



U.S. Supreme Court

Chemerinsky: What will the presidential election mean for SCOTUS?

Posted Sep 06, 2016 08:45 am CDT

By [Erwin Chemerinsky](#)



Whether one identifies as Democrat or Republican, liberal or conservative, there is no issue more important in the coming election than who will fill the vacancies that are sure to exist on the Supreme Court in the next several years. That's especially true if the next president serves two terms, because he or she is likely to have several appointments to the Supreme Court.

Since 1960, the average age at which a justice has left the bench is 78 years old. Justice Antonin Scalia was 79 when he died last February. When the next president is inaugurated, there will be three justices 78 or older: Ruth Bader Ginsburg (who turned 83 on March 16), Anthony Kennedy (who turned 80 on July 23), and Stephen Breyer (who turned 78 on August 15). Also, of course, there is Justice Scalia's seat, which still may be left for the next president to fill.

Since 1971, when Richard Nixon's third and fourth nominees for the Supreme Court were confirmed, there have been five, and sometimes as many as seven, justices on the court who were appointed by Republican presidents. For 45 years, when the court has been ideologically divided, more often than not it has decided in a conservative direction. But now, there are four justices appointed by Democratic presidents and four appointed by Republicans.

Literally every issue concerning our constitutional rights will turn on who replaces these justices. Consider five issues that almost surely will depend on who wins the presidency.

Abortion rights

On June 27, in *Whole Women's Health Center v. Hellerstedt*, the court in a 5-3 decision struck down a Texas law restricting abortions. The majority opinion was written by Justice Breyer and joined by Justices Kennedy, Ginsburg, Sonia Sotomayor, and Elena Kagan. The dissents were written by Justice Samuel A. Alito, joined by Chief Justice John G. Roberts Jr., and Justice Clarence Thomas.

If Justice Scalia is replaced by someone who favors abortion rights, *Roe v. Wade* will be more secure than it has been in decades. If Justices Ginsburg, Breyer, and Kennedy are replaced by Hillary Clinton, abortion rights will be protected for decades to come and the court likely will revisit some of its rulings that allowed restrictions on abortions. But conversely, if even two of these four seats are replaced by Donald Trump, it seems certain that there would be five votes to greatly limit abortion rights and I believe to overrule *Roe v. Wade*. Chief Justice Roberts and Justices Alito and Thomas would have the votes to be the majority, not the dissent, when it comes to laws restricting access to abortions.

Affirmative action

On June 23, in *Fisher v. University of Texas, Austin*, the Court in a 4-3 decision upheld the University of Texas' affirmative action program. Justice Kennedy wrote the majority opinion, joined by Justices Ginsburg, Breyer, and Sotomayor. Again, there were dissenting opinions by Justice Alito, joined by Chief Justice Roberts, and Justice Thomas. Justice Kagan was recused from participating because of her involvement in the case as Solicitor General. But all believe that she would have joined the majority and voted to uphold the affirmative action program. The surprise, which obviously was determinative, was Justice Kennedy's vote. Prior to this decision, since coming on the court in February 1988, Justice Kennedy never had voted to uphold any affirmative action program in any context.

The lineup and the future are thus the same as with abortion. Replacing Justice Scalia with a Democratic appointee ensures a secure majority to allow affirmative action programs. Replacing some or all among Justices Ginsburg, Breyer, and Kennedy with Democratic appointees will put the issue of the constitutionality of affirmative action to rest. But if even two vacancies are filled by Donald Trump, there are five sure votes to eliminate all affirmative action as Chief Justice Roberts and Justices Alito and Thomas have made clear that this is their position.

Campaign finance

Recent decisions striking down federal and state campaign finance laws—such as *Citizens United v. Federal Election Commission* (2010), *Arizona's Free Enterprise Club's PAC v. Bennett* (2011), and *McCutcheon v. Federal Election Commission* (2014)—were 5-4 rulings. In each case, the majority was comprised of Chief Justice Roberts and Justices Scalia, Kennedy,

Thomas, and Alito. In other words, the court now is split 4-4 when it comes to campaign finance laws.

A Hillary Clinton victory likely will mean, as she suggested in her acceptance speech at the Democratic Convention, the overruling of *Citizens United v. Federal Election Commission* and a court far more willing to allow government regulation of campaign spending. A Donald Trump victory would ensure a majority on the Court to affirm and extend these limits on campaign finance.

Gun control

Few issues so closely correspond to ideology and political party affiliation as the meaning of the Second Amendment. Until 2008, the Supreme Court never had invalidated any law as violating the Second Amendment. The court always had ruled that the Second Amendment was about a right to have guns for the purpose of militia service. But in *District of Columbia v. Heller* (2008), the court, 5-4, struck down a 32 year-old District of Columbia ordinance that prohibited private ownership or possession of handguns. Justice Scalia wrote for the court, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. Two years later, in *McDonald v. City of Chicago*, the same five justices were the majority in a 5-4 decision holding that the Second Amendment is a fundamental right that applies to state and local governments.

Again, the current court is likely split 4-4 on the meaning of the Second Amendment. A Hillary Clinton victory would mean a court that is unlikely to extend gun rights and very well might overrule *Heller* and *McDonald*. A Donald Trump presidency would create a court committed to these decisions and would be likely to strike down many other laws regulating firearms.

Separation of church and state

Views on the Establishment Clause, too, very much track political party ideology. Conservatives interpret this provision narrowly as only prohibiting the government from establishing a church or coercing religious participation. Liberals see the Establishment Clause as, in the words of Thomas Jefferson, creating a wall separating church and state.

This is reflected in the court's most recent decision on the Establishment Clause, *Town of Greece v. Galloway* (2014). The town of Greece, population about 100,000, is outside of Rochester, New York. For an 11-year period, every month almost without exception, the town board invited a Christian clergy member to deliver a prayer before its meetings and these usually were explicitly Christian in their content. The court, in a 5-4 decision, split exactly along ideological lines, rejected an Establishment Clause challenge. Justice Kennedy wrote the court's opinion, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Justice Kagan wrote the dissent, joined by Justices Ginsburg, Breyer, and Sotomayor.

What, then, would it mean for the Establishment Clause if Donald Trump replaces Justices Scalia, Kennedy, Ginsburg, and Breyer? Along with Chief Justice Roberts and Justices Thomas and Alito, there would be seven justices who take the accommodationist approach under which little ever would violate the Establishment Clause. Conversely, if it is Hillary Clinton who

replaces these justices, there likely will be six justices to enforce a separation of church and state. This will determine issues such as the constitutionality of prayer in public schools and other government events, of religious symbols on government property, and of the ability of the government to give aid to parochial schools for religious instruction.

The November presidential election is likely to determine the ideological composition of the court for many years to come. A Donald Trump victory will ensure that the Supreme Court will continue to have a majority of justices appointed by Republican presidents, as it has since 1971. A Hillary Clinton triumph will create a majority on the court appointed by Democratic presidents for the first time in 45 years.

Put in this way, the next election will affect all of us, often in the most intimate and important aspects of our lives. Who fills the vacancies on the court should be among the most important issue in the November presidential election.

Erwin Chemerinsky is Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law at the University of California, Irvine School of Law. He is an expert in constitutional law, federal practice, civil rights and civil liberties, and appellate litigation. He's the author of seven books, including The Case Against the Supreme Court (Viking, 2014).