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Trump, the Court, and Constitutional Law

ERWIN CHEMERINSKY*

On the morning of November 8, 2016, I awoke with hope that there soon would be a majority of Justices on the Supreme Court appointed by Democratic presidents for the first time since 1971 and that it likely would continue for years and perhaps decades to come. The election of Hillary Clinton would mean the confirmation of Chief Judge Merrick Garland or perhaps even someone more liberal to replace Justice Antonin Scalia. Other vacancies in the next four years seem likely and they, too, would be filled by a Democratic president.

By the time I went to sleep on November 9, it was clear that Donald Trump would be chosen by the Electoral College as the next President of the United States. Vacancies on the Court, including the Scalia seat, would be filled by a conservative Republican. For the rest of my life, there likely will be a conservative majority on the Supreme Court and it likely will become even more conservative over the next few years. Since 1960, seventy-eight years old is the average age at which a Supreme Court Justice has left the bench. At the time of Trump's election, there were three Justices who were seventy-eight or older. Even optimistically assuming that Trump is a one-term president, he has the chance to reshape the federal judiciary in a way that is likely to last for decades.

In this Essay, I want to offer initial thoughts on what the Trump presidency is likely to mean for constitutional law. First, I want to focus on the lost opportunity: what might have happened had Hillary Clinton replaced Scalia and filled other vacancies on the Court. Second, I want to focus on the reality of what we are likely to see as a result of Neil Gorsuch replacing Antonin Scalia and of other possible vacancies being filled by President Trump. Finally, I want to discuss how progressives should react to this and to the foreseeable future of constitutional law.

These, of course, are all illustrations of the costs of keeping the ideological balance that existed before February 13. But what also must not be forgotten is the opportunity that was lost on November 8. What might it have meant to have a majority of Justices on the Court who were appointed by Democratic presidents?

LOST OPPORTUNITIES

We must never forget that what the Republicans did to block the confirmation of Chief Judge Merrick Garland is unprecedented in American history. Prior to 2016, twenty-four times there had been a vacancy in the last year of a President's term. In twenty-one of these instances, the Senate confirmed; three times, the Senate did not. But never before had the Senate said that it would not hold hearings or a vote. This is truly the seat on the Court that Republicans stole and it will have consequences for decades to come.

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WHAT MIGHT HAVE BEEN IF HILLARY CLINTON HAD REPLACED JUSTICE SCALIA
AND FILLED OTHER VACANCIES IN THE NEXT FOUR YEARS

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 forty 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.¹ 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 forty years, the Supreme Court has held that people have a First Amendment right to spend unlimited amounts of money in election campaigns.² *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.³ 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 also 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 2016 documented that the United States is in the company of nations like Iran, China, Libya, Somalia, Sudan, and North Korea.⁴ 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 twenty-two to twenty-four hours a day, as is done in federal prisons and prisons in forty-four states.⁵

1. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976) (proving a racial classification requires demonstrating discriminatory intent).

2. *Buckley v. Valeo*, 424 U.S. 1 (1976) (concluding expenditure limits in campaign spending laws violate the First Amendment).

3. 558 U.S. 310 (2010) (concluding corporations have the First Amendment right to unlimited expenditures from their treasuries in election campaigns).

4. *The Death Penalty in 2016: Facts and Figures*, AMNESTY INT'L (Apr. 11, 2017), <https://www.amnesty.org/en/latest/news/2017/04/death-penalty-2016-facts-and-figures> [<https://perma.cc/Z5V9-4MVP>].

5. See *Davis v. Ayala*, 135 S. Ct. 2184, 2208–09 (2015) (Kennedy, J., concurring) (“It is estimated that 25,000 inmates in the United States are currently serving their sentence in

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.⁶ The Court ruled that education is not a fundamental right and that discriminating against the poor does not violate the Constitution.⁷

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.⁸ In recent years, the Court has said that arbitration clauses in form contracts keep injured workers or consumers from getting to go to court.⁹ The Court has made it very difficult to sue the 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.¹⁰ The Court has made it often impossible to sue state and local governments even for egregious violations of rights.

All of this is lost not just for the next few years, but likely for many years to come. Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito are all in their sixties and easily could remain another two decades. Neil Gorsuch is forty-nine years old. If he remains on the Court until he is ninety years old, the age at which Justice Scalia died, Gorsuch will be a Justice until the year 2058.

THE EFFECT OF REPLACING JUSTICE SCALIA

In his first few months on the Court, Neil Gorsuch was everything that conservatives could have hoped for and liberals could have feared. He voted 100% of the time with Justice Clarence Thomas. He repeatedly staked out positions at the far right of the Court.¹¹ This was to be expected given Gorsuch's record as a judge on the United States Court of Appeals for the Tenth Circuit.¹²

whole or substantial part in solitary confinement, many regardless of their conduct in prison. The human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators. . . . Yet despite scholarly discussion and some commentary from other sources, the condition in which prisoners are kept simply has not been a matter of sufficient public inquiry or interest." (citations omitted)).

6. 411 U.S. 1 (1973).

7. *Id.* at 17–29.

8. I develop this point in detail in ERWIN CHERMERINSKY, *CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE* (2017).

9. *See, e.g.*, *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

10. *See* *Briscoe v. LaHue*, 460 U.S. 325 (1983) (holding absolute immunity for police officers who commit perjury); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (holding there was absolute immunity for prosecutor who knowingly used perjured testimony).

11. *See, e.g.*, *Pavan v. Smith*, 137 S. Ct. 2075, 2079–80 (2017) (Gorsuch, J., dissenting) (objecting to the Court declaring unconstitutional an Arkansas statute that kept both members of a same-sex couple from having their names listed on a child's birth certificate).

12. *See* NAACP LEGAL DEFENSE FUND, *THE CIVIL RIGHTS RECORD OF JUDGE NEIL*

But the long-term cost of replacing Justice Scalia with a staunch conservative cannot be overstated. 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 February 13, 2016 when Justice Scalia died, there always have been at least five and sometimes as many as eight Justices appointed by Republican Presidents. But after Scalia's death, there were four Justices appointed by Republican Presidents and four Justices appointed by Democratic Presidents. Donald Trump replacing Justice Scalia with a conservative, Justice Gorsuch, restored the Court to the ideological balance that it had before Scalia's death.

Keeping this ideological balance has real costs. Consider some examples:

Unions. It now seems inevitable that the Supreme Court will deal a severe blow to unions by holding that non-union members cannot be required to pay the share of the union dues that support the collective bargaining activities of the union. In 1977, in *Abood v. Detroit Board of Education*, the Supreme Court reaffirmed that no one can be forced to join a public employees' union, but the Court held that non-union members can be required to pay the share of the union dues that go to support the collective bargaining activities of the union.¹³ The Court explained that non-union members benefit from collective bargaining in their wages, their hours, and their working conditions. They should not be able to be free riders. The Court said, though, that non-union members cannot be required to pay the share of the union dues that go to support the political activities of the unions; that would be impermissible compelled speech in violation of the First Amendment.¹⁴

In two recent cases, in 2011 and 2014, the five conservative Justices then on the Court—Roberts, Scalia, Kennedy, Thomas, and Alito—strongly indicated a desire to overrule *Abood* and prevent public employees from being required to pay their “fair share” of the union dues that go to support collective bargaining.¹⁵ A case, *Friedrichs v. California Teachers Association*, was filed to provide that vehicle and after the oral argument on Monday, January 11, 2016, there seemed little doubt that the Court was poised to overrule *Abood*.¹⁶ Not one of the five conservative Justices asked a single question or made a single comment that left doubt that he was going to vote to do so. This would be devastating in California and twenty-

GORSUCH 5 (2017).

13. 431 U.S. 209 (1977).

14. *Id.* at 234–35.

15. *Harris v. Quinn*, 134 S. Ct. 2618, 2626 (2014); *see also* *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298 (2012).

16. *See* 136 S. Ct. 1083 (2016) (affirming lower court's decision by an evenly divided Court).

one other states that do not have right-to-work laws; there would be a substantial decrease in union revenues, union membership, and union political influence.

Justice Scalia died before the Court issued its decision and so the Justices announced that they were deadlocked 4-4, which means that *Abood* remains the law. But with Justice Scalia being replaced by a conservative, the overruling of *Abood* is just delayed and now seems a certainty.

Guns. 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.¹⁷ But in *District of Columbia v. Heller*, the Court, 5-4, struck down a thirty-two year-old District of Columbia ordinance that prohibited private ownership or possession of handguns.¹⁸ 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.¹⁹ These are the only cases in all of American history to invalidate laws as violating the Second Amendment.

Without Scalia, the Court was split 4-4 on the meaning of the Second Amendment. Merrick Garland or a Clinton nominee would have meant a Court that was unlikely to extend gun rights and very well might have overruled *Heller* and *McDonald*. Replacing Scalia with a conservative Justice means a Court 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*.²⁰ The town of Greece is about 100,000 people and is outside of Rochester, New York. For an eleven 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.

Replacing Justice Scalia with Justice Garland or a Clinton nominee, would have meant five Justices in favor of enforcing the separation of church and state. But with Gorsuch replacing Scalia, there again is a majority to allow much more in the way of prayer in public schools and other government events, religious symbols

17. See, e.g., *United State v. Miller*, 307 U.S. 74 (1939).

18. 554 U.S. 570 (2008).

19. 561 U.S. 742 (2010).

20. 134 S. Ct. 1811 (2014).

on government property, and government aid to parochial schools for religious instruction.²¹

Access to the courts. In a series of ideologically divided 5-4 decisions, with Justice Scalia in the majority, the Supreme Court in recent years has greatly protected businesses at the expense of injured consumers and employees. As mentioned above, the Court, for example, has ruled that clauses requiring arbitration in form contracts must be enforced and can be used to keep those with valid claims from suing in court.²² Similarly, the Court has significantly restricted the ability of those hurt to sue in class action suits.²³ Especially when a large number of people each suffer a small injury, it often is a class action or nothing as a remedy.

Replacing Scalia with a Democratic appointee would have shifted this balance. The Roberts Court has been the most pro-business Court since the mid-1930s, virtually always in 5-4 rulings with the majority comprised of Roberts, Scalia, Kennedy, Thomas, and Alito. Trump's ability to replace Scalia means that this will continue and that new limits on access to the courts, especially to sue businesses, will be imposed.

These are the costs of Justice Scalia being replaced by a conservative, Neil Gorsuch, rather than by Merrick Garland or by a Hillary Clinton nominee. But what is even more frightening is what happens if Ruth Bader Ginsburg or Anthony Kennedy or Stephen Breyer leaves the bench during a Trump presidency. When the Court began its October 2017 term, Ginsburg was eighty-four, Kennedy was eighty-one, and Breyer was seventy-nine. How realistic is it that all three of these Justices still will be on the bench on January 20, 2021, assuming that Trump is a one-term President?

The reality is that 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. What would this mean?

Abortion. I have no doubt that, given the opportunity, Justices John Roberts, Clarence Thomas, and Samuel Alito would vote to overrule *Roe v. Wade* and allow states to prohibit abortions.²⁴ Each has voted to uphold every restriction on abortion that has come before him on the Court. There is not a word that any of these Justices ever has written or publicly spoken that would suggest the slightest hesitation about doing so. If Trump gets to replace both Scalia and one other Justice, there will be a majority to end a woman's constitutional right to reproductive autonomy.

This means that the issue of abortion will be left to each state. Many states already have laws on the books prohibiting all or almost all abortions that would go into effect immediately if *Roe* is overruled. Of course in other states, like California and New York, abortion will remain legal. Women with resources will

21. In fact, in his first decision concerning the religion clauses, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2026 (2017) (Gorsuch, J., concurring in part), Justice Gorsuch, along with Justice Thomas, took the most conservative position in urging the Court to reconsider precedent and require more government assistance to religious institutions.

22. See, e.g., *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

23. See, e.g., *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011).

24. 410 U.S. 113 (1973).

be able to travel to these states for safe abortions. But it is poor women and teenagers who again will be left to the cruel choice between an unsafe back alley abortion and an unwanted child. But there also is the prospect of a Republican-controlled Congress passing a law, using its commerce power, to prohibit all (or virtually all) abortions.

Affirmative Action. In 2007, Chief Justice John Roberts wrote a stunning opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, in which he said that the Constitution requires that government always act in a color-blind fashion and thus that all forms of affirmative action are unconstitutional.²⁵ The Court declared unconstitutional the ability of local school districts to consider race as one factor in assigning students to schools so as to achieve racial diversity. Roberts's opinion was joined by Scalia, Thomas, and Alito.

Most recently, on June 23, 2016, the Supreme Court, in *Fisher v. University of Texas*, upheld the ability of colleges and universities to engage in affirmative action to benefit minorities and enhance diversity.²⁶ Roberts, Thomas, and Alito vehemently dissented. Replacing Scalia with a conservative Trump appointee, Gorsuch, provides just a fourth vote for their position. But if Trump gets to replace one more Justice later for Ginsburg, Breyer, or Kennedy, that will mean the end of affirmative action in the United States.

Diversity in the classroom is essential. I have been a professor for thirty years now and have taught constitutional law in classes that are almost all white and those that are racially diverse. It is different to talk about racial profiling by the police when there are African-American and Latino men in the room who can talk powerfully about their experience of being stopped for driving while black or driving while brown. Preparing students for the racially diverse world they will experience requires that they learn in racially diverse classrooms.

There are not realistic alternatives for achieving diversity without affirmative action. Because of historic and continuing inequalities in education, color blindness in admissions would mean dramatic decreases in the number of African-American and Latino students in colleges and universities across the country. Giving preferences based on social class fails to achieve racial diversity because there are many more poor whites than poor African-Americans and Latinos, even if the percentage in poverty in the latter groups is larger.

Marriage equality. On June 26, 2015, in *Obergefell v. Hodges*, the Court ruled, 5-4, that laws prohibiting same-sex marriage infringe the right to marry and deny equal protection to gays and lesbians.²⁷ As a result, there is marriage equality for gays and lesbians in all fifty states and all territories of the United States.

Donald Trump has said that the right to same-sex marriage is "settled law." Of course, it is not clear why he believes a decision from a year ago is settled law, while a ruling from almost forty-four years ago, *Roe v. Wade*, is not and should be overruled. It is tempting to think that our society has moved past the debate over marriage equality and has come to accept that gays and lesbians are entitled to equal treatment and equal dignity in this regard.

25. 551 U.S. 701, 733 (2007).

26. 136 S. Ct. 2198 (2016).

27. 135 S. Ct. 2584 (2015).

But one need only read the passionate dissents of John Roberts,²⁸ Clarence Thomas,²⁹ and Samuel Alito³⁰ in *Obergefell* to see that they likely would vote to overrule this decision in an instant. Roberts, in some ways the least reliable conservative of the three, for the first time in his years on the Court read a dissent from the bench, and it was angry in its tone and content. In his first opinion on the subject, Justice Gorsuch left little doubt that he would vote to overrule *Obergefell*.³¹

The result of overruling *Obergefell* would be that marriage equality will be left to the states. Many will continue to allow gays and lesbians to marry, but some states surely will prohibit this.

Is all of this unduly bleak? It is obviously possible that Ginsburg, Breyer, and Kennedy all will remain healthy and be on the Court at the end of the Trump presidency. Is it also possible that Trump nominees will not be so bad? After all, sometimes Justices do not turn out as expected, like David Souter, who was appointed by President George H. W. Bush, and occasionally Justices even change their views once on the bench.

Unfortunately, this is wishful thinking. Souter had been a justice on the New Hampshire Supreme Court, and his opinions had given no indication of his ideology. Every President since—Democrat and Republican—has taken great care to appoint a Justice with a clear and predictable ideology to ensure no more Souters.

Nor do many Justices have major ideological transformations once on the Supreme Court. Scalia was just as conservative when he died on February 13 as when he went on the Court in 1986. Thurgood Marshall was as liberal when he resigned as when he went on the bench. There are occasional exceptions. Harry Blackmun was quite conservative when appointed by President Richard Nixon, but left the Court as one of its most liberal members. Felix Frankfurter was perceived as a liberal when President Franklin Roosevelt put him on the bench and became a very conservative Justice. But these are the notable exceptions. The reality is that relatively few people have major ideological transformations in their fifties, sixties, and seventies.

All of this has focused just on the Supreme Court. But the Trump presidency also will have a huge effect on the lower federal courts, and there is no filibuster to stop confirmation of far right federal district court and court of appeals judges. The Supreme Court last term decided only fifty-nine cases after briefing and oral argument; the year before, it decided sixty-three cases. Lower courts obviously get the last word in the overwhelming majority of cases.

As of November 2016, there were 116 vacancies on the lower federal courts, which represents eleven percent of all federal court of appeals and judgeships. Trump will be able to fill all of these vacancies upon taking office.³² Other vacancies, of

28. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611–26 (2015) (Roberts, J., dissenting).

29. *Id.* at 2531–40 (Thomas, J., dissenting).

30. *Id.* at 2640–43 (Alito, J., dissenting).

31. *See Pavan v. Smith*, 137 S. Ct. 2075, 2079–80 (2017) (Gorsuch, J., dissenting) (objecting to the Court declaring unconstitutional an Arkansas statute that kept both members of a same-sex couple from having their names listed on a child's birth certificate).

32. *See* Tessa Berenson, President Trump Appointed Four Times as Many Federal Judges as Obama in His First Year, *TIME* (Dec. 15, 2017), <http://time.com/5066679/donald-trump-federal-judges-record> [https://perma.cc/EZY8-HL9H].

course, will open over the next four years. It is easy to imagine, by January 2021, twenty to twenty-five percent of all federal judges being Trump appointees.

WHAT NOW?

All this paints a bleak picture. I see no silver lining to the election of Donald Trump and what it will mean for the Supreme Court and constitutional law. But what then must progressives do?

As I said to my students after the election, this result means that we need to fight harder and better than ever before. The conclusion to draw from all of this is how crucial it will be to fight against the worst Trump nominees for the courts, even if blocking them may not be possible, and to use every available means to mobilize people to oppose the worst policies, even if stopping them often will be impossible. The hope must be that for the worst of these, a successful coalition might be built with the relatively few moderate Republicans in Congress. At the very least, this can provide a foundation for effective campaigns in 2018 and 2020.

For progressive academics, we must be the vocal opposition. We must write briefs, op-eds, and law review articles articulating a progressive vision. We must criticize the Court's conservative rulings and provide an intellectual foundation for a future, more-liberal Court, whenever that may come. Vacancies on the Supreme Court are impossible to foresee. Perhaps there will be a Democratic President again soon and vacancies that allow for a majority of the justices appointed by Democratic presidents. But even if that is a long way into the future, a progressive vision of the Constitution must continue to be articulated and championed for it ever to become the law.

It is only accidents of history that have created the Republican majorities on the Court. If Hubert Humphrey had been elected in 1968 and filled four vacancies in his first two years as President, there would have been a Democrat-appointed majority on the Court for the last forty-five years. If Al Gore or John Kerry had been President instead of George W. Bush, either would have replaced William Rehnquist and Sandra Day O'Connor, and the Court would be vastly different now. The most important, and obvious, lesson is that elections have enormous consequences for the Court and the Constitution.

The course of American history has seen enormous progress with regard to liberty and equality. I deeply believe that overall it will continue over the long term. The Constitution has been the vehicle for so much of the progressive changes and will continue to be in the future. But for that to happen, progressive law professors and lawyers must espouse a vision of the Constitution based on greater equality, an expansion of rights, and the advancement of the dignity of every individual.

The Trump presidency is going to be a disaster for the things that I and other progressives believe. But it will be even worse if we abandon our progressive vision for the Supreme Court and the Constitution.

