

INVESTOR'S BUSINESS DAILY®

Union Victory On 4-To-4 Vote Shows High Court Stakes

March 30, 2016

Supreme Court: A split decision defeated a California public school teacher challenging being forced to finance her union's political activities. The shift caused by Justice Scalia's death could be made permanent by this year's election.

In *Friedrichs vs. the California Teachers Association*, the far-left 9th Circuit Court of Appeals' decision was left standing on Tuesday by the tied vote of an ideologically-split, eight-member U.S. Supreme Court — minus Antonin Scalia, who was found dead last month. It was a strong blow to First Amendment freedom of speech.

The law currently says plaintiff Rebecca Friedrichs benefits from wage increases and should pay the union's negotiating expenses. But as Trevor Burrus of the Cato Institute's Center for Constitutional Studies asks: Why does the federal government give unions "the extraordinary privilege of extracting dues from non-members?" Parents, trade associations and non-profits don't enjoy that, he notes. "In fact, unions are the only special interest group in American society that gets this privilege."

And as Burrus points out, public-sector unions like that of the California public school teachers are really a "political special interest that seeks favors from the government, and what they can't get at the ballot box, they'll get at the bargaining table."

The media, even in the wake of Scalia's death, refer to the Supreme Court as "conservative" in makeup. The refusal of George W. Bush appointee Chief Justice John Roberts to strike down ObamaCare in 2012 should have rendered any such assertion dubious, as should Reagan appointee Justice Anthony Kennedy's nearly three decades of left-to-right-to-left acrobatics.

Considering the seven vacancies filled by GOP presidents since 1980, it should be a decisively conservative court today. But Reagan made at least two, and arguably three, missteps.

He chose the mixed bag of Sandra Day O'Connor, picked the unreliable Kennedy in the aftermath of the Robert Bork defeat, and should have chosen Bork as chief justice to replace

Warren Burger in 1986, when Republicans controlled the Senate. Instead, he nominated sitting Supreme Court Justice William Rehnquist, and tapped Scalia to take Rehnquist's old seat.

Had Reagan saved Scalia, the first Italian-American justice, for 1987 to replace the retiring Lewis Powell, when Democrats ran the Senate, it would have avoided the Bork fight that resulted in Kennedy's appointment. Scalia won 98-to-0 in 1986.

George H.W. Bush appointed conservative Clarence Thomas, confirmed in spite of the Democrats' character assassination, but also David Souter, who ended up being one of the most liberal justices. George W. Bush appointed conservative Samuel Alito, but Roberts has been unsteady, to put it charitably. And if the current chief justice believes saving ObamaCare was playing ball with his liberal colleagues, looking to future compromises, the Friedrichs decision shows it has yet to bear any fruit.

We know the kind of big-government-favoring justices Hillary Clinton would appoint. We also know Ted Cruz would appoint justices in the mold of Scalia and Thomas. As with so much else, however, we do not know what a President Trump would do.

Thanks to past GOP timidity, the future for constitutional liberty looks bleak.