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Conservatives to Play Defense in 'Center-Left' SCOTUS

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Liberals may learn to play offense at the U.S. Supreme Court, court watchers told Bloomberg BNA following the end of the high court's 2015 term.

Recently the intellectual energy in American law has been spent on an attempt from the right to overturn 25 years of liberal jurisprudence, Tom Goldstein, of Goldstein & Russell, P.C., Bethesda, Md., told Bloomberg BNA June 30.

As a result, liberals have been on defense in so-called test cases challenging race-conscious programs, regulatory authority and other areas in the conservative crosshairs, Ilya Shapiro, editor-in-chief of the libertarian Cato Institute's "Supreme Court Review," Washington, told Bloomberg BNA June 30.

But those major conservative projects ran out of time with the Feb. 13 death of Justice Antonin Scalia, Goldstein, who regularly argues at the Supreme Court, said.

While he said that the future of the Supreme Court depends a great deal on who wins November's presidential election, what seems likely to emerge as of now is a "center-left" court.

Moreover, that center-left court is likely to itself center on a "coalition" of centrist justices, rather than just one, Goldstein said.

Dramatic Liberal Victories

This term is a reflection of that slight pivot to the left.

To be sure, liberals saw some pretty dramatic victories, constitutional law professor Adam Winkler, of UCLA School of Law, Los Angeles, told Bloomberg BNA July 1.

On the abortion front, the court sent a strong signal that it won't tolerate an end run around the right to an abortion, Elizabeth Wydra, of the progressive Constitutional Accountability Center, Washington, told Bloomberg BNA June 30.

The court June 27 struck down a pair of Texas abortion regulations that the state said were intended to improve the safety of abortions, in *Whole Woman's Health v. Hellerstedt*, 84 U.S.L.W. 4534, 2016 BL 205262 (U.S. June 27, 2016) (84 U.S.L.W. 1931, 6/30/16).

The 5–3 court clarified that in determining whether a state abortion regulation passed the “undue burden” test set forth in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), courts must weigh the “asserted benefits against the burdens” imposed on abortion access.

Finding that neither regulation conferred “medical benefits sufficient to justify the burdens upon access that each imposes,” the court struck them down.

Winkler anticipates that courts will more aggressively strike down state abortion laws in the wake of *Whole Woman's Health*.

Affirmative Action Blueprint

The court also handed liberals a victory on affirmative action, Wydra—who was “on the side of the most amicus victories this Term” according to a [July 3 blog post](#)—said.

The court ruled 4-3 in favor of University of Texas at Austin's admissions program in *Fisher v. Univ. of Tex. at Austin*, 84 U.S.L.W. 4472, 2016 BL 201460 (U.S. June 23, 2016) (84 U.S.L.W. 1932, 6/30/16).

The fate of affirmative action programs in higher education seemed in doubt after the court first considered a challenge to UT's program in 2013, Shapiro said.

But Justice Anthony Kennedy's shift on affirmative action in the case's second trip to the high court not only saved UT's race-conscious program, but it also provided a blueprint for public schools wanting to consider race in admissions, Wydra said.

Obama Initiatives Blocked

The liberals tended to prevail on the most ideologically divisive issues this term, but there were still some significant losses, constitutional law professor [Ilya Somin](#), of the Antonin Scalia Law School at George Mason University, Arlington, Va., told Bloomberg BNA June 30.

Two of President Barack Obama's major initiatives were blocked by the high court even though the court never actually issued a ruling on the merits of those programs, Goldstein said.

He was referring to Obama's [Deferred Action for Parents of Americans and Lawful Permanent Residents](#) immigration program—or “DAPA”—and a climate change initiative, the [Clean Power Plan](#).

With regard to DAPA, the Supreme Court split 4–4 in *United States v. Texas*, 84 U.S.L.W. 4471, 2016 BL 201458 (U.S. 2016) (84 U.S.L.W. 1935, 6/30/16).

That left in place a nationwide preliminary injunction that halted the program intended to help more than four million immigrants who entered the country illegally, Somin explained.

The case now heads back to the district court for consideration of the merits, he said.

Similar Fate

A similar fate befell the administration's Clean Power Plan, which was intended to reduce carbon emissions at existing power plants.

Just four days before Scalia's passing, the Supreme Court split 5–4 to stay the Clean Power Plan while it was being challenged in a lower court.

The en banc U.S. Court of Appeals for the District of Columbia is now waiting to consider the merits of that dispute in *West Virginia v. EPA*, D.C. Cir., No. 15-1363, to be argued 9/27/16 (84 U.S.L.W. 1762, 5/26/16).

Avoiding Dramatic Change

Apart from those clear wins and losses, perhaps the biggest news of the term is what the court didn't do, Goldstein said.

For example, the high court was asked to require states to use “voting population” instead of “total population” when drawing new voting maps, in *Evenwel v. Abbott*, 84 U.S.L.W. 4175, 2016 BL 105367 (U.S. April 4, 2016) (84 U.S.L.W. 1453, 4/7/16), Somin explained.

That would have dramatically changed the way states undergo redistricting, he said.

But the Supreme Court unanimously rejected that proposition, Somin said.

Big Non-Decisions

Another big “non-decision” was *Friedrichs v. Cal. Teachers Ass'n*, 84 U.S.L.W. 4159, 2016 BL 96297 (U.S. March 29, 2016) (84 U.S.L.W. 1475, 4/7/16) (84 U.S.L.W. 1417, 3/31/16).

The Supreme Court had signaled for several terms that its caselaw allowing public unions to charge non-members certain union dues was in jeopardy, *Allyson Ho*, of Morgan, Lewis & Bockius LLP, Dallas, told Bloomberg BNA July 5.

While Scalia seemed likely to vote in favor of overturning the caselaw, the court eventually split 4-4, she said.

As a result, that caselaw lived to see another day, Ho said.

New Center

Cases like *Evenwel* and *Friedrichs* show that the court didn't swing dramatically to the left this term, Goldstein said. But it also didn't swing to the right like many anticipated that it would at the start of the term, he said.

What emerged was a “new center” that focused on a “centrist coalition” of justices, not just one justice, Goldstein said.

In the past decade, the high-profile cases have traditionally come down to Kennedy.

This term, those cases turned on Justices Stephen Breyer and Elena Kagan too—justices that are often considered more liberal than Kennedy, Goldstein said. In fact, Kennedy, Breyer and Kagan were the only justices in the majority more than 90 percent of the time this term.

That dynamic will certainly shift again when a ninth justice is eventually confirmed, Shapiro said.

Every new justice changes the court, he said.

Overruling Conservative Victories?

How dramatic that shift will be, and how that affects the cases brought before the justices, remains to be seen.

But Goldstein said that another Warren Court—known for its historic liberal outcomes—is unlikely.

The resulting Supreme Court will more likely be center-left, he said.

Winkler seemed to agree, noting the court's per curiam decision in *Caetano v. Massachusetts*, 84 U.S.L.W. 4133, 2016 BL 85221 (U.S. March 21, 2016) (84 U.S.L.W. 1387, 3/24/16).

There, the court said that the Second Amendment might apply to stun guns, Winkler explained.

Caetano shows that even a liberal court isn't eager to overrule some major conservative victories, he said, referring to the court's landmark Second Amendment decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008).

Still, liberals—both the justices and litigants—will likely target some conservative issues.

Especially if a Democrat is elected president, in which case conservatives will have to learn to run a good defense in the high court, Shapiro said.

SUPREME COURT SCORECARD

Top Cases Selected By Supreme Court Analysts

CASES	Tom Goldstein	Allyson Ho	Ilya Shapiro	Ilya Somin	Adam Winkler	Elizabeth Wydra
Caetano v. Massachusetts					●	
Evenwel v. Abbott				●		●
Fisher v. Univ. of Tex. at Austin	●		●	●	●	●
Friedrichs v. Cal. Teachers Ass'n	●	●	●		●	
Luis v. United States			●			
McDonnell v. United States			●			
United States v. Texas	●			●		●
United Student Aid Funds, Inc. v. Bible (review denied)		●				
West Virginia v. EPA (stay granted)	●					
Whole Woman's Health v. Hellerstedt	●		●	●	●	●
Zubik v. Burwell			●		●	

• **Tom Goldstein**, Goldstein & Russell, P.C., Bethesda, Md. • **Allyson Ho**, Morgan, Lewis & Bockius LLP, Dallas
 • **Ilya Shapiro**, Cato Institute, Washington • **Ilya Somin**, Antonin Scalia Law School at George Mason University, Arlington, Va. • **Adam Winkler**, UCLA Law School, Los Angeles • **Elizabeth Wydra**, Constitutional Accountability Center, Washington

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