

## October Term 2015

# *Events Upend Predicted Tilt of High Court*

ADAM LIPTAK, *The New York Times* National Edition, June 29, 2016, A1, A13.



Waiting for Supreme Court decisions to be delivered on Monday, near the end of the term. Credit: Gabriella Demczuk for The New York Times

WASHINGTON — Conservatives thought this [Supreme Court](#) term would be different.

Still reeling from losses last year in major cases on health care and [same-sex marriage](#), they welcomed [a new docket](#) in October studded with cases that seemed poised to move the law to the right.

But then came two unexpected turns of events. Justice Antonin Scalia, the longest-serving member of the court's five-justice conservative wing, died. And Justice [Anthony M. Kennedy](#) veered left in two of the term's biggest cases, joining the court's liberals in significant decisions favoring affirmative action and abortion rights.

For the second term in a row, the court led by Chief Justice [John G. Roberts Jr.](#) delivered liberal decisions at a rate not seen since the famously liberal court led by [Chief Justice Earl Warren](#) in the 1950s and 1960s.

Yet the court, which ended its term on Monday, remains in a period of great transition. With one vacant seat and the possibility of more to come, it is almost certainly entering a new era, the shape of which will depend on the outcome of the presidential election.

For now, [Justice Scalia](#)'s absence has handed Chief Justice Roberts the difficult task of steering his colleagues toward consensus in big cases. Over the past term, when he succeeded the resulting decisions were sometimes so narrow that they barely qualified as rulings. When he failed, the court either deadlocked or left him in dissent.

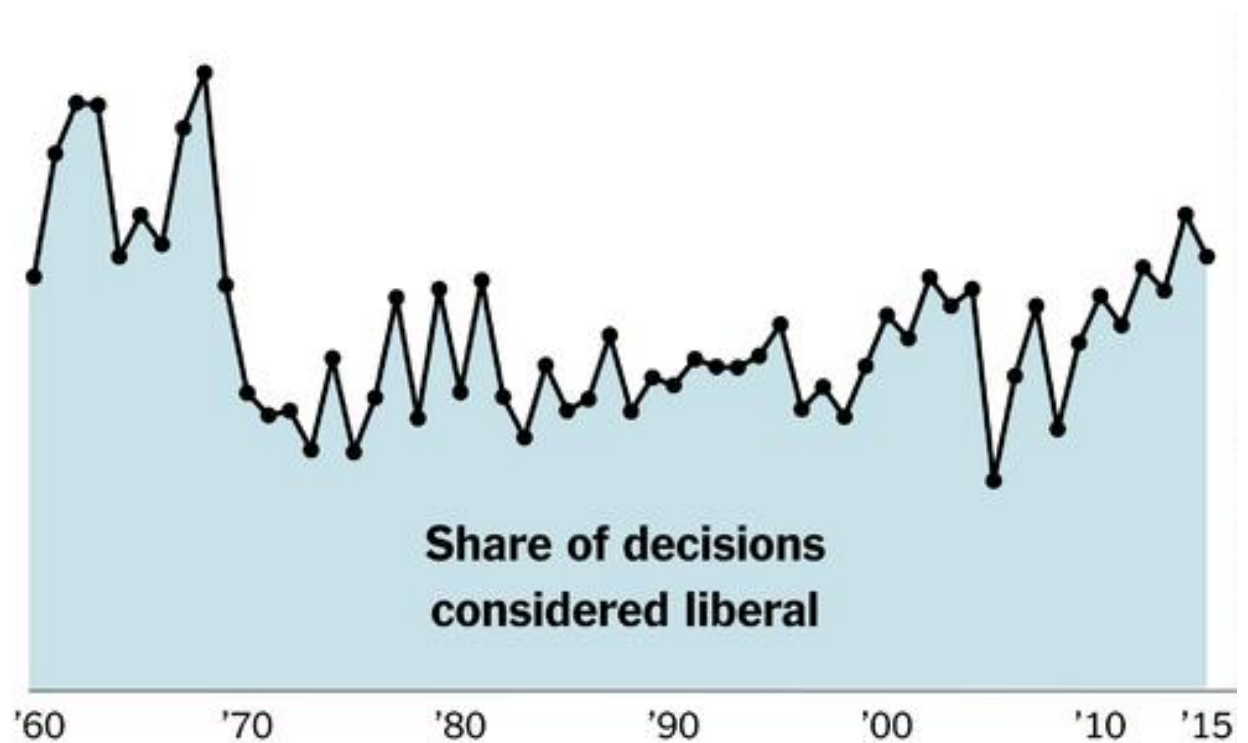
Before Justice Scalia died, the court had agreed to hear cases that conservative advocacy groups hoped would help business interests and Republican politicians, while dealing setbacks to public unions, colleges with racial admissions preferences and abortion providers. Just four days before his death, the court seemed to send an assertive signal, [blocking](#) the Obama administration's effort to combat [global warming](#) by regulating emissions from coal-fired power plants. The vote was 5 to 4, with the court's conservatives in the majority.

Things soon changed. Justice Scalia's death left the court's eight remaining members evenly divided along ideological lines, and a case that had threatened to cripple public unions, *Friedrichs v. California Teachers Association*, No. 14-915, illustrates the impact of his absence.

## GRAPHIC

### When the Eight-Member Supreme Court Avoids Deadlocks, It Leans Left

Decisions in the 2015-16 term were deeply affected by the death of Justice Antonin Scalia and the refusal of Senate Republicans to approve President Obama's nomination of Judge Merrick B. Garland to fill the empty seat.



**OPEN GRAPHIC**

[When it was argued in January](#), a month before Justice Scalia died, the court's conservatives seemed ready to say that forcing public workers to support unions they have declined to join violates the First Amendment. Soon after the argument, the publicly available evidence indicates, Chief Justice Roberts assigned the majority opinion to Justice Samuel A. Alito Jr., who in two earlier opinions had made clear that he was ready to overturn [a 1977 decision](#) allowing such unions to require the payments.

But in March, the month after Justice Scalia died, the court announced that [it had deadlocked in the case](#). As is the custom, the brief order gave no reasons and did not say how the justices had voted. The decision left the 1977 precedent in place.

A second deadlock, in [United States v. Texas](#), No. 15-674, effectively destroyed President Obama's plan to shield as many as five million immigrants from deportation. But it could have been worse for the president. While the tie vote left in place an appeals court decision blocking the effort, Justice Scalia, if he had been alive, would almost certainly have provided the fifth vote for a comprehensive rebuke to what Republicans say is a pattern of unconstitutional overreach by Mr. Obama.

The alternative to a deadlock was sometimes a muddle. In May, the court [unanimously returned](#) a major case on access to contraception, *Zubik v. Burwell*, No. 14-1418, to the lower courts for further consideration in the hope that the two sides could somehow settle their differences. "The court expresses no view on the merits" of the case, the unsigned opinion said.

If an eight-member court was deadlocked or toothless, it turned out that a seven-member court was prepared to take a major step. In [Fisher v. University of Texas](#), No. 14-981, a long-running challenge to a race-conscious admission program at the University of Texas, Austin, the court was missing both Justice Scalia and Justice Elena Kagan, who had recused herself because she worked on the case as solicitor general.

The case had generally been viewed as a threat to affirmative action, particularly after the court [agreed to take a second look at it](#) last June. Instead, Justice Kennedy, abandoning his earlier hostility to race-conscious programs, joined the court's remaining liberals to endorse the Texas program by a 4-to-3 vote. If Justice Scalia had been alive, the case would almost certainly have ended in a deadlock.

Justice Scalia was a dominant presence on the court, and his influence could exceed the power of his single vote. But it is also possible that Justice Scalia played a role in pushing Justice Kennedy to the left. When [the Fisher case was argued in December](#), Justice Scalia's comments from the bench brought aspects of it into vivid relief. He said that some minority students may be better off at "a less advanced school, a slower-track school where they do well."

"I don't think it stands to reason," Justice Scalia said, "that it's a good thing for the University of Texas to admit as many blacks as possible."

Vikram Amar, dean of the University of Illinois College of Law, said there had been a change in tone at the court since Justice Scalia died. "In *Fisher*," Dean Amar said, "even though the dissent Justice Alito read from the bench was frank, it was not as barbed and incendiary as Justice Scalia's likely would have been."

Justice Kennedy also joined the court's liberals in [a 5-to-3 decision on Monday](#) striking down parts of a restrictive Texas abortion law and strengthening the "undue burden" standard that the court announced in 1992.

The silencing of Justice Scalia's voice seemed to help other justices find theirs. Two weeks after Justice Scalia died, Justice Clarence Thomas [broke a decade-long silence](#) by asking questions from the bench.

## GRAPHIC

### How a Vacancy on the Supreme Court Affected Cases in the 2015-16 Term

The empty seat left by Justice Antonin Scalia's death leaves the court with two basic options for cases left on the docket this term if the justices are deadlocked at 4 to 4.



## OPEN GRAPHIC

Justice Sonia Sotomayor, already a major presence at arguments, took on an even larger role. This month, she wrote [a lashing dissent](#), rooted in the concerns of the Black Lives Matter movement, in a case on police stops.

Justice Thomas remained the most conservative member of the court based on voting patterns this term, while Justice Sotomayor overtook Justice Ruth Bader Ginsburg as the most liberal one, according to an analysis by Lee Epstein, a law professor and political scientist at Washington University in St. Louis, and Kevin Quinn, a political scientist at the University of California, Berkeley.

Justice Sotomayor's votes in criminal cases also make her one of the most liberal justices since 1937, while Justice Alito is among the most conservative, to the right of even Justice Thomas.

In all, though, the justices are doing what they can to find common ground, Professor Epstein said.

“Without Scalia, it’s still the Kennedy court, but Kagan and Breyer had a very good term,” she said. “Both were in the majority in divided cases over 80 percent of the time, and the Democratic side of the court yet again won victories in some of the term’s biggest cases.”

There have been five versions of the Roberts court since the chief justice took charge in 2005. Justice Sandra Day O’Connor left not long after, followed by Justices David H. Souter and John Paul Stevens. But the court was nonetheless ideologically stable for a decade, from the arrival of Justice Alito in 2006 to the death of Justice Scalia this year.

The court’s new volatility is likely to continue for some time. Even after Justice Scalia is replaced, other openings could be on the horizon: By the time the next president is inaugurated, Justice Stephen G. Breyer will be 78, Justice Kennedy will be 80, and Justice Ginsburg will be 83.

Republican senators have vowed to block Mr. Obama’s Supreme Court nominee, Judge Merrick B. Garland, meaning that the court will remain short-handed for some time. Even if Hillary Clinton wins the presidency and Democrats make gains in the Senate, it may be spring before a new justice is confirmed.

“The odds are more likely than not that there will be an entire next term with eight justices,” said one leading Supreme Court advocate, Andrew J. Pincus of Mayer Brown.

The term that ended on Monday included a half-dozen potential blockbusters, but all of them had been put on the docket before Justice Scalia died. Since then, the court has been accepting cases in uncontroversial areas, notably intellectual property.

“I don’t think it wants to take on more cases in which it’s going to be closely divided and that could end up 4-4,” Mr. Pincus said, “unless there is some very compelling reason to do that.”

**A version of this article appears online on June 28, 2016, with the headline: The Right-Wing Supreme Court That Wasn’t.**

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## October Term 2015

GRAPHIC:

# How a Vacancy on the Supreme Court Affected Cases in the 2015-16 Term

By ADAM LIPTAK, LARRY BUCHANAN and ALICIA PARLAPIANO **UPDATED** JUN. 27, 2016

The empty seat left by Justice Antonin Scalia's death, which Senate Republicans have vowed not to fill until after the election, directly affected the result in a handful of key decisions.

## Abortion

DECIDED JUNE 27, 2016

# 5-3



Sotomayor



Kagan



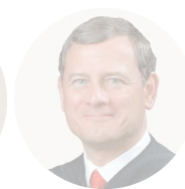
Ginsburg



Breyer



Kennedy



Roberts



Alito



Thomas

In [Whole Woman's Health v. Cole](#), the court struck down portions of a Texas law that would have left the state with about 10 abortion clinics, down from what was once more than 40. The court had not heard a major abortion case since 2007.

**Had Justice Scalia have joined the dissenters, the ruling would have remained the same.**

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## Public Corruption

DECIDED JUNE 27, 2016

# 8-0



Sotomayor



Kagan



Ginsburg



Breyer



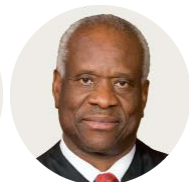
Kennedy



Roberts



Alito



Thomas

[In \*McDonnell v. United States\*](#), the court vacated the convictions of Bob McDonnell, a former Republican governor of Virginia, saying that the government used too broad of a definition for an “official act” of governmental power in the corruption case it brought against him.

Mr. McDonnell was convicted of using his office to help a businessman, Jonnie R. Williams Sr., who had showered the governor and his wife with luxury products, loans and vacations. The gifts themselves were legal, and the question in the case was whether they were part of a corrupt bargain in which Mr. McDonnell reciprocated by using the power of his office to help Mr. Williams.

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## Immigration

DECIDED JUNE 23, 2016

*Justice splits are not disclosed in cases affirmed by a 4-to-4 vote. The most likely lineup, based on questioning during the oral arguments:*

# 4-4

LIKELY SIDED WITH ADMINISTRATION



Sotomayor



Kagan



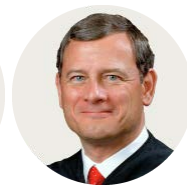
Ginsburg



Breyer



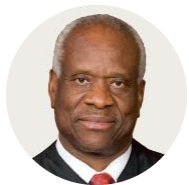
Kennedy



Roberts



Alito



Thomas

In [United States v. Texas](#), the court considered whether the Obama administration was entitled to shield as many as five million unauthorized immigrants from deportation and to allow them to work.

**Without a ninth justice**, a 4-to-4 tie resulted in a major loss for the administration, affirming the lower court decision and upholding a nationwide injunction blocking the program. Had Judge Merrick B. Garland, President Obama's nominee to fill Justice Scalia's seat, have been approved by the Senate in time to weigh in on the case, he might have sided with the administration, resulting in a 5-4 decision.

## Affirmative Action

DECIDED JUNE 23, 2016

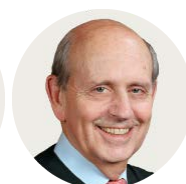
4-3



Sotomayor



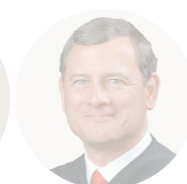
Ginsburg



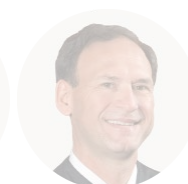
Breyer



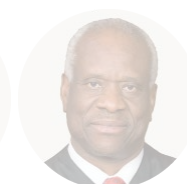
Kennedy



Roberts



Alito



Thomas

In [Fisher v. University of Texas](#), the court decided that the race-conscious program used to admit students to the University of Texas at Austin does not violate the Constitution's equal protection principles.

The case was decided by **seven members of the court** because Justice Elena Kagan had recused herself. Had Justice Scalia have joined the dissenters, a tie



would have most likely resulted in an affirmance of the lower court decision upholding the program, but no precedent would have been set.

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## Jury Selection

DECIDED MAY 23, 2015

# 7-1



Sotomayor



Kagan



Ginsburg



Breyer



Kennedy



Roberts



Alito



Thomas

The court decided in [Foster v. Chatman](#) that prosecutors in Georgia violated the Constitution by systematically excluding blacks from the jury in a capital case, leaving an all-white panel to decide the fate of a black defendant accused of killing a white woman.

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## Contraception

ANNOUNCED MAY 16, 2016

*The justices issued an unsigned, unanimous opinion.*

# 8-0



Sotomayor



Kagan



Ginsburg



Breyer



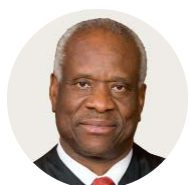
Kennedy



Roberts



Alito



Thomas

The court announced that it would not rule in [Zubik v. Burwell](#), instructing the lower courts to try to find a compromise. The case relates to how a contraception-coverage requirement under the Affordable Care Act applies to religiously affiliated institutions like schools and hospitals, many of which object to providing insurance coverage for contraception to their female employees.

**Without a ninth justice**, the court appeared to be exploring every avenue to avoid 4-to-4 deadlocks, even if the resulting action does not decide the question the justices agreed to address.

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## Voting Rights

DECIDED APRIL 4, 2016

# 8-0



Sotomayor



Kagan



Ginsburg



Breyer



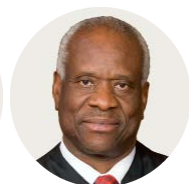
Kennedy



Roberts



Alito



Thomas

In [Evenwel v. Abbott](#), the court decided that states may draw voting districts based on total population under the “one person, one vote” principle. The court had long said that state voting districts must have roughly equal populations, but it had never specified whether they should have the same number of people or the same number of eligible voters.

The court did not address the question of whether states may draw districts based on voter-eligible population, a method that could diminish the political power of districts that include disproportionate numbers of unauthorized immigrants, which would generally benefit Republicans.

## Public Unions

DECIDED MARCH 29, 2016

*Justice splits are not disclosed in cases affirmed by a 4-to-4 vote. The likely lineup, based on questioning during the oral arguments:*

# 4-4

LIKELY SIDED WITH UNIONS



Sotomayor



Kagan



Ginsburg



Breyer



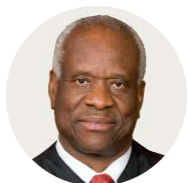
Kennedy



Roberts



Alito



Thomas

In a win for organized labor, a tie in [Friedrichs v. California Teachers Association](#) effectively decided that public employees who choose not to join unions may be required to pay fees for the union's collective bargaining activities.

**Without a ninth justice**, a tie affirmed the appeals court's decision favoring the unions but set no precedent. Had Justice Scalia have joined the conservative bloc, the court would have ruled against the unions.

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## Class Actions

DECIDED MARCH 22, 2016

# 6-2



Sotomayor



Kagan



Ginsburg



Breyer



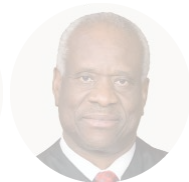
Kennedy



Roberts



Alito



Thomas

This class action, [Tyson Foods v. Bouaphakeo](#), was brought by workers at a pork processing plant who said they did not get enough overtime pay for the time they spent putting on and taking off protective gear and the like. The court decided that the workers may rely on statistical formulas to establish what they are owed and do not have to establish damages individually.

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## Capital Sentencing

DECIDED JAN. 12, 2016

# 8-1



Sotomayor



Kagan



Ginsburg



Breyer



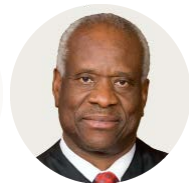
Kennedy



Roberts



Alito



Thomas



Scalia

In [Hurst v. Florida](#), the court struck down an aspect of Florida's capital punishment system, in which the state allowed nonunanimous juries to recommend death sentences and left the final sentencing to a judge, saying it did not give jurors a sufficient role in deciding whether defendants should be put to death.

# Juvenile Justice

DECIDED JAN. 25, 2016

## 6-3



Sotomayor



Kagan



Ginsburg



Breyer



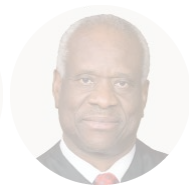
Kennedy



Roberts



Alito



Thomas



Scalia

The court ruled in [Montgomery v. Louisiana](#) that its 2012 decision banning mandatory life-without-parole sentences for juvenile killers must be applied retroactively, allowing the possibility of the eventual release for hundreds of inmates now serving life sentences without the possibility of parole for murders they committed in their youth.



# *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*

Adam Liptak, *The New York Times* Online Edition, JULY 10, 2016.



Justice Ruth Bader Ginsburg of the Supreme Court in May. In an interview in her chambers on Friday, she chastised the Senate for refusing to act on President Obama's Supreme Court nominee. Credit Mike Groll/Associated Press

WASHINGTON — Unless they have a book to sell, Supreme Court justices rarely give interviews. Even then, they diligently avoid political topics. Justice Ruth Bader Ginsburg takes a different approach.

These days, she is making no secret of what she thinks of a certain presidential candidate.

“I can’t imagine what this place would be — I can’t imagine what the country would be — with Donald Trump as our president,” she said. “For the country, it could be four years. For the court, it could be — I don’t even want to contemplate that.”

It reminded her of something her husband, [Martin D. Ginsburg](#), a prominent tax lawyer who died in 2010, would have said.

“Now it’s time for us to move to New Zealand,” Justice Ginsburg said, smiling ruefully.

In an interview in her chambers on Friday, Justice Ginsburg took stock of a tumultuous term and chastised the Senate for refusing to act on President Obama’s Supreme Court nominee.

Her colleagues have said nothing in public about the presidential campaign or about Mr. Obama’s stalled nomination of Judge Merrick B. Garland to the Supreme Court. But Justice Ginsburg was characteristically forthright, offering an unequivocal endorsement of Judge Garland.

“I think he is about as well qualified as any nominee to this court,” she said. “Super bright and very nice, very easy to deal with. And super prepared. He would be a great colleague.”

Asked if the Senate had an obligation to assess Judge Garland’s qualifications, her answer was immediate.

“That’s their job,” she said. “There’s nothing in the Constitution that says the president stops being president in his last year.”

The court has been short-handed since [Justice Antonin Scalia died](#) in February, and Justice Ginsburg said it will probably remain that way through most or all of its next term, which starts in October. Even in “the best case,” in which Judge Garland was confirmed in the lame-duck session of Congress after the presidential election on Nov. 8, she said, he will have missed most of the term’s arguments and so could not vote in those cases.

Justice Ginsburg, 83, said she would not leave her job “as long as I can do it full steam.” But she assessed what is at stake in the presidential election with the precision of an actuary, saying that Justices Anthony M. Kennedy and Stephen G. Breyer are no longer young.

“Kennedy is about to turn 80,” she said. “Breyer is going to turn 78.”

For the time being and under the circumstances, she said, the Supreme Court is doing what it can. She praised Chief Justice John G. Roberts Jr.

“He had a hard job,” Justice Ginsburg said. “I think he did it quite well.”

It was a credit to the eight-member court that it deadlocked only four times, she said, given the ideological divide between its liberal and conservative wings, both with four members.

One of the 4-4 ties, [Friedrichs v. California Teachers Association](#), averted what would have been a severe blow to public unions had Justice Scalia participated. “This court couldn’t have done better than it did,” Justice Ginsburg said of the deadlock. [When the case was argued in January](#), the majority seemed prepared to overrule [a 1977 precedent](#) that allowed public unions to charge nonmembers fees to pay for collective bargaining.

A second deadlock, in [United States v. Texas](#), left in place a nationwide injunction blocking Mr. Obama’s plan to spare more than four million unauthorized immigrants

from deportation and allow them to work. That was unfortunate, Justice Ginsburg said, but it could have been worse.

“Think what would have happened had Justice Scalia remained with us,” she said. Instead of a single sentence announcing the tie, she suggested, a five-justice majority would have issued a precedent-setting decision dealing a lasting setback to Mr. Obama and the immigrants he had tried to protect.

Justice Ginsburg noted that the case was in an early stage and could return to the Supreme Court. “By the time it gets back here, there will be nine justices,” she said.

She also assessed whether the court might have considered a narrow ruling rejecting the suit, brought by Texas and 25 other states, on the ground that they had not suffered the sort of direct and concrete injury that gave them standing to sue. Some of the [chief justice’s writings](#) suggested that he might have found the argument attractive.

“That would have been hard for me,” Justice Ginsburg said, “because I’ve been less rigid than some of my colleagues on questions of standing. There was a good argument to be made, but I would not have bought that argument because of the damage it could do” in other cases.

The big cases the court did decide, on abortion and affirmative action, were triumphs, Justice Ginsburg said. Both turned on Justice Kennedy’s vote. “I think he comes out as the great hero of this term,” Justice Ginsburg said.

The [affirmative action case](#), [Fisher v. University of Texas](#), was decided by just seven justices, 4 to 3. Justice Elena Kagan had recused herself because she had worked on the case as United States solicitor general.

But Justice Ginsburg said the decision was built to last. “If Justice Kagan had been there, it would have been 5 to 3,” she said. “That’s about as solid as you can get.”

“I don’t expect that we’re going to see another affirmative action case,” Justice Ginsburg added, “at least in education.”

The [abortion decision](#), [Whole Woman’s Health v. Hellerstedt](#), in a 5-to-3 vote, struck down two parts of a restrictive Texas law, ones requiring doctors who perform abortions to have admitting privileges at nearby hospitals and abortion clinics to meet the demanding standards of ambulatory surgical centers.

Justice Kennedy had only once before voted to find an abortion restriction unconstitutional, in [Planned Parenthood v. Casey](#) in 1992, when he joined Justices Sandra Day O’Connor and David H. Souter to save the core of [Roe v. Wade](#), the 1973 decision that established a constitutional right to abortion.

Asked if she had been pleased and surprised by Justice Kennedy’s vote in the Texas case, Justice Ginsburg responded: “Of course I was pleased, but not entirely surprised. I know abortion cases are very hard for him, but he was part of the troika in Casey.”

Justice Breyer wrote the methodical majority opinion in the Texas case, and Justice Ginsburg added only a brief, sharp concurrence.

“I wanted to highlight the point that it was perverse to portray this as protecting women’s health,” she said of the challenged requirements. “Desperate women then would be driven to unsafe abortions.”

The decision itself, she said, had a message that transcended the particular restrictions before the court.

“It says: ‘No laws that are meant to deny a woman her right to choose,’” she said.

Asked if there were cases she would like to see the court overturn before she leaves it, she named one.

“It won’t happen,” she said. “It would be an impossible dream. But I’d love to see [Citizens United](#) overruled.”

She mulled whether the court could revisit its 2013 decision in [Shelby County v. Holder](#), which effectively struck down a key part of the Voting Rights Act. She said she did not see how that could be done.

The court’s 2008 decision in [District of Columbia v. Heller](#), establishing an individual right to own guns, may be another matter, she said.

“I thought Heller was “a very bad decision,” she said, adding that a chance to reconsider it could arise whenever the court considers a challenge to a gun control law.

Should Judge Garland or another Democratic appointee join the court, Justice Ginsburg will find herself in a new position, and the thought seemed to please her.

“It means that I’ll be among five more often than among four,” she said.

A version of this article appears in print on July 11, 2016, on page A1 of the national edition with the headline: Ginsburg Has A Lot to Say About Trump.