

**THE COURT,
LIKE THE COUNTRY,
NEEDS BALANCE –**
*It would be wise for the
president to change his
mind on a nomination
to replace Justice Scalia.*

By Peggy Noonan – Feb. 18, 2016
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The president has every right to nominate a successor to Justice Antonin Scalia. He shouldn't, but he has the right by law and precedent.

The reasons he shouldn't spring from facts particular to the moment and having to do with what Justice Scalia symbolized.

In a 50/50 country, one that suffers deep ideological divisions and is constantly at its own throat, Justice Scalia stood, for that half of the country that is more or less conservative, for wisdom, permanence, enduring structures and understandings. That he was brilliant, witty and penetrating in his thought goes without saying. He was also brave, with that exhausting kind of courage that has to do with swimming each day against the tide. Here is Justice Scalia as prophet, dissenting in 1992's sweeping abortion decision, *Planned Parenthood v Casey*: "Its length, and what might be called its epic tone, suggest that its authors believe they are bringing to an end a troublesome era in the history of our Nation and of our Court. ... [But] by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish."

It did; it has.

Here is the end of his dissent in *Obergefell v. Hodges*, the 2015 decision on same-sex marriage: "Hubris is sometimes defined as o'erweening pride; and pride, we know, goeth before a fall.... With

each decision of ours that takes from the People a question properly left to them — with each decision that is unabashedly based not on law, but on the ‘reasoned judgment’ of a bare majority of this Court — we move one step closer to being reminded of our impotence.”

By “we” he meant the people, not the court.

Conservatives — again, half the country, maybe more — took succor from his bracing 30-year presence on the bench. The country, and the court too, benefited: With his fierce dissents Scalia helped people accept decisions with which they disagreed. At least our view was spoken. *At least it’s respected by someone!*

Our divided country has been stumbling along for decades with a split court. We have grown used to the phrase, “In a 5-4 decision.” Half the country probably thinks high-court decisions are by definition 5-4.

The court in our time has both expanded its role and loosened its intellectual standards. It pronounces now on every facet of life in America — on our religious life, on abortion and marriage, on guns and immigration. At the same time members of the court have grown used to approaching issues based on their personal vision of what is desirable public policy. Scalia famously didn’t think his preferences were the issue; what the law says is the issue.

Justice is supposed to be blind, impartial. It is not supposed to be about politics and brute power. But we all know that is what it is now about. As Hugh Hewitt wrote this week in the Washington Examiner, the court “has assumed power never intended it by the Framers, but it is what it is and there is no going back.”

Which is why the issue of Scalia’s replacement is so consequential.

When the court is roughly balanced, 5-4, the public is allowed to assume some rough approximation of justice will occur — that something that looks like justice will be handed down. There will be chafing and disappointments. ObamaCare will be upheld. *Yay! Boo!* Gay marriage will be instituted across the land. *Yay! Boo!*

The closeness of the vote suggests both sides got heard. The closeness contributes to an air of credibility. That credibility helps people accept the court’s rulings.

When the balance of the court tips too much one way, it invites people to see injustice and bully politics. It invites unease and protest.

That in turn will produce another crack in the system — and in public respect for the system. This divided nation does not need more cracks and strains.

What to do? The closest you can come to public peace in resolving the question of Scalia’s replacement is to take a step wholly unusual, even unprecedented, and let the American people make the decision themselves, this year, with their 2016 presidential vote.

Maybe that election will produce a progressive Democratic president. That president will choose as progressive a nominee as the Senate will accept.

Maybe that election will produce a conservative Republican president. That president will choose as conservative a nominee as the Senate will accept.

Either way half the country will be half happy, half unhappy, but *the country will have chosen*. That they made the decision will allow people to accept the outcome more easily — either a real change in the ideological makeup of the court, or a court whose rough and not always predictable balance has been preserved.

We take a swerve or stay where we are. But it will be the people who swerved or stayed.

For President Obama to leave the Scalia replacement to the next president would be an act of prudence and democratic courtesy. He of course says he will put a nominee forward. What a thing it would be if he changed his mind.

The Republican Senate has every right by law and precedent to block his nominee. They moved quickly after Scalia's death, and with startling unanimity, to announce they would do so. This had the virtue of clarity and the defect of aggression. Still, their ultimate stand is right.

It should be noted there's no reason to believe leaving it to the people will guarantee conservative outcomes.

I close with a thought about an aspect of modern leftism that is part of the context here.

There is something increasingly unappeasable in the left. This is something conservatives and others have come to fear, that progressives now accept no limits. We can't just have court-ordered legalized abortion across the land, we have to have it up to the point of birth, and taxpayers have to pay for it. It's not enough to win same-sex marriage, you've got to personally approve of it and if you publicly resist you'll be ruined. It's not enough that we have publicly funded contraceptives, the nuns have to provide them.

This unappeasable spirit always turns to the courts to have its way.

If progressives were wise they would step back, accept their victories, take a breath and turn to the idea of solidifying gains, of heroic patience, of being peaceable.

Don't make them bake the cake. Don't make them accept the progressive replacement for Scalia. Leave the nuns alone.

Progressives have no idea how fragile it all is. That's why they feel free to be unappeasable. They don't know what they're grinding down.

They think America has endless give. But America is composed of humans, and they do not have endless give.

Isn't that what we're seeing this year in the political realm? That they don't have endless give? And we'll be seeing more of it.