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PERSPECTIVE

## Kennedy, Kavanaugh and the OT 2017 term

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The 2017 term of the U.S. Supreme Court concluded last month with a series of close decisions on some of the most divisive issues of the day. On the final day of the term, Justice Anthony Kennedy announced that he will retire from the court at the end of July. And not even two weeks later, President Donald Trump nominated D.C. Circuit Judge Brett Kavanaugh to replace Justice Kennedy.

Much has been and will be written on the impact that a Justice Kavanaugh would have on the Supreme Court's jurisprudence. Most commentators expect that replacing the court's "swing justice" (a term Justice Kennedy hated) with a committed conservative like Judge Kavanaugh would move the court significantly to the right. But a look back at the 2017 term suggests that while Judge Kavanaugh will likely be to the right of Justice Kennedy on some high profile issues, the effect of this appointment might not be as dramatic as many expect.

The 2017 term resulted in *nineteen* 5-4 decisions, up from only seven in 2016 and four in 2015. The 5-4 decisions this term were largely decided along ideological lines, with a few exceptions. And, significantly, Justice Kennedy did not join the more liberal justices in a single 5-4 decision — the first time in the Roberts court that has occurred.

For example, an ideologically split court held in *Epic Systems Corp. v. Lewis* (2018 DJDAR 4705) that courts must enforce



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Brett Kavanaugh, President Donald Trump's Supreme Court nominee, in between meetings on Capitol Hill in Washington, July 11, 2018.

individualized arbitration agreements in employment contracts. Justice Neil Gorsuch wrote the majority opinion, concluding that "the policy may be debatable, but the law is clear: Congress has instructed that arbitration agree-

(*Abood v. Detroit Bd. of Ed.*) upholding union agency fees. In an opinion by Justice Samuel Alito, the court held that government employees who are represented by a union cannot be required to pay a fee to cover the union's cost

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ments like those before us must be enforced as written." This continued the Supreme Court's trend of broadly interpreting the Federal Arbitration Act, such that litigants can challenge an arbitration agreement only on grounds that would apply to any contract, not on grounds specific to arbitration.

Justice Kennedy also sided with the conservative justices in a number of politically charged cases.

First was *Janus v. AFSCME* (2018 DJDAR 6308), the long-expected reversal of the Supreme Court's prior decision

a medical license. The majority held that such requirements were under-inclusive because they did not apply to many other clinics in the state and were unnecessary because the state had many other means of notifying women about the availability of state-subsidized abortion without requiring these clinics to do it. Justice Kennedy issued a concurring opinion, expressing his disdain for this "paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression."

Similarly, in *Trump v. Hawaii* (2018 DJDAR 6193), the same ideologically split court rejected a challenge to President Trump's September 2017 executive order, also known as the third revised "travel ban." Chief Justice John Roberts, writing for the majority, held that the order did not exceed the president's authority under federal immigration law because those laws exude deference to the executive. The majority also rejected the argument that it violated the establishment clause, noting that the revised ban was neutral on its face, had a legitimate purpose of ensuring national security, and was not a blanket exclusion of all immigration from Muslim-majority countries. Justice Kennedy wrote his last words as a sitting justice in a concurring opinion, urging government officials to "adhere to the Constitution and to its meaning and its promise" because "an anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect."

to negotiate a contract that applies to them. The court viewed such 'agency' fees as speech in favor of a political position regarding how public employees should be paid. Thus, mandatory agency fees represented compelled political speech in violation of the First Amendment.

In *NIFLA v. Becerra* (2018 DJDAR 6224), the five conservative justices sided with crisis pregnancy centers in their challenge to California's law that required them to post notices of the availability of low-cost abortions and disclaimers about their lack of

In two other decisions, Justice Kennedy sided with a 5-4 conservative majority, but punted on core constitutional questions. In *Gill v. Whitford* (2018 DJDAR 5768), the court had the opportunity to address the constitutional limits on partisan gerrymandering, but did not reach the merits, instead unanimously holding that the Democratic voters in Wisconsin failed to demonstrate Article III standing. And in *Mastertpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018 DJDAR 5291), the court dodged the constitutionality of anti-discrimination laws compelling commercial conduct in conflict with religious beliefs, instead holding that the Colorado Civil Rights Commission violated the free exercise clause because it adjudicated the baker's particular case with hostility towards his religious beliefs. Justice Kennedy explained in his opinion for the court that the free exercise of religion does not "allow business owners ... to deny protected persons equal access to goods and services under a neutral and generally applicable law." However, the court emphasized that the "delicate question of when the free exercise of his religion

should yield" to state power must be answered through "neutral and respectful consideration."

Justice Kennedy also authored the 5-4 decision in *Wayfair v. South Dakota* (2018 DJDAR 5927, with Justice Ruth Bader Ginsburg and without the chief justice), overturning a prior holding (*Quill Corp. v. North Dakota*), and ruling that states are now free to impose taxes on businesses that lack a physical presence in their state. While the commerce clause requires that the taxed business still have substantial connections to the state, the court rejected the old rule as "a judicially created tax shelter for businesses that decide to limit their physical presence and still sell their goods and services to a state's consumers."

In several other important and contested decisions, a "conservative" Justice Kavanaugh vote would similarly have had no impact. For example, the court held in *Lucia v. SEC* (2018 DJDAR 5940) that administrative law judges of the Securities and Exchange Commission are officers of the United States for the purposes of the appointments clause of the U.S. Constitution. And the court enforced federalism-based

limits on congressional authority in *Murphy v. NCAA* (2018 DJDAR 4453), ruling that the Professional and Amateur Sports Protection Act unconstitutional because it "unequivocally dictates what a state legislature may and may not do." But in both cases, Justice Elena Kagan joined the more conservative justices for a 6-3 majority.

Justice Kennedy's final term as a sitting Supreme Court justice reminded us that he was a reliable conservative vote on all but a few high-profile issues. Justice Kavanaugh may end up voting to the right of Justice Kennedy in cases involving reproductive rights, marriage equality, and affirmative action. But in all likelihood, Justice Kavanaugh's presence on the court may not affect the outcome in very many cases.

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