The Anthony Kennedy Court

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Supreme Court commentator Dahlia Lithwick said it best, "This is Anthony Kennedy's world and we are all just living in it." Justice Kennedy voted in the majority in an astounding 98 percent of all the decisions in the recently completed term.

When Kennedy voted with the three conservative justices - John Roberts, Clarence Thomas, and Samuel Alito - the result was a 4-4 tie. This meant that the lower court decision was affirmed, without opinion from the Supreme Court, by an evenly divided court. This occurred five times during October Term 2015.

One of the most notable cases was United States v. Texas, which was a challenge to President Barack Obama's immigration action, Deferred Action of Parents of Americans. This grants "deferred deportation status" to those not lawfully in the United States if they have been present since at least 2010, do not have a criminal conviction, and have a child who is an American citizen or a lawful resident alien. The court's tie means that a nationwide preliminary injunction issued by a federal district court in Texas against the Obama immigration action remains in effect.

In Friedrichs v. California Teachers Association, the court considered whether to overrule a precedent (Abood v. Detroit Board of Education (1977)), which held that non-union members can be required to pay the share of the union dues that support collective bargaining activities, though not the political activities of the union. The court's deadlock means there is no change in the law and non-union members can continue to be required, as they are in California, to pay their "fair share" of union dues.

But when Kennedy voted with Justices Ruth Bade Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan, there was a majority for a liberal result. This is exactly what occurred in the two most high profile cases of the term which involved affirmative action and abortion. What was most striking was how each reflected the evolution of Anthony Kennedy's views on these controversial constitutional issues.
Since coming on the Supreme Court in February 1988 until June 23, 2016, not once had Kennedy ever voted to uphold an affirmative action program - not in education, not in contracting, not in employment. In fact, in his first opinion as a justice about affirmative action, in *Metro Broadcasting v. Federal Communications Commission* in 1990, Kennedy strongly condemned the very idea of affirmative action. He wrote: "The history of governmental reliance on race demonstrates that racial policies defended as benign often are not seen that way by the individuals affected by them. ... [A] plan of the type sustained here may impose 'stigma on its supposed beneficiaries,' and 'foster intolerance and antagonism against the entire membership of the favored classes.' Special preferences also can foster the view that members of the favored groups are inherently less able to compete on their own." He concluded his dissent by saying, "I regret that after a century of judicial opinions we interpret the Constitution to do no more than move us from 'separate but equal' to 'unequal but benign.'"
As recently as three years ago, when *Fisher v. University of Texas, Austin* was last before the court, Kennedy wrote an opinion urging aggressive judicial review of affirmative action programs and rejecting any deference to colleges or universities. He wrote: "The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference."

But on June 23, when *Fisher* was back before the court, Kennedy wrote the opinion for a 4-3 court (Kagan was recused because of her involvement with the case when she was solicitor general) that upheld the University of Texas affirmative action plan. The tone of Kennedy’s opinion was strikingly different than a few years before. He concluded his opinion by expressly declaring the need for deference: "Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. ... In striking this sensitive balance, public universities, like the States themselves, can serve as 'laboratories for experimentation.'"

Not surprisingly, Alito, in dissent, declared: "Something strange has happened since our prior decision in this case." The difference is that Kennedy has changed in his views on affirmative action. The court’s decision in *Fisher* is enormously important in allowing colleges and universities to engage in affirmative action.

Kennedy’s vote in the abortion case is similarly stunning. From February 1988 until June 27, 2016, only once had Kennedy voted to strike down any abortion regulation. In fact, in his first case as a justice on abortion rights, *Webster v. Reproductive Health Services*, in 1989, Kennedy joined with the two dissenters in *Roe v. Wade*, William Rehnquist and Byron White, in calling for an overruling of that decision.

But in *Whole Woman's Health v. Hellerstedt*, the court, 5-3 with Kennedy in the majority, declared unconstitutional a Texas law that would have closed 75 to 80 percent of all the facilities where abortions are provided in that state. The Texas law required that any doctor performing an abortion have admitting privileges at a hospital within 30 miles and that all places where abortions are performed have surgical quality facilities even if no surgical abortions are performed there.

The federal district court issued a preliminary injunction, finding that the law likely was unconstitutional as creating an impermissible undue burden on a woman’s right to abortion. The district court found that there was no evidence that the law protected women’s health. If a woman experiences complications at an abortion facility, she is taken to the local emergency room and doctors there provide medical treatment. Also, there is no need for surgical level facilities. The district court found that the Texas law was adopted with the purpose and would have the effect of keeping women from having access to abortions.
The 5th U.S. Circuit Court of Appeals reversed and upheld the law. The 5th Circuit said that it is for the legislature, not the judiciary, to assess whether the law protects women’s health. The 5th Circuit said that deference to the legislature required upholding the law.

With Breyer writing for the five justice majority, the Supreme Court stressed that in deciding whether a law imposes an undue burden on abortion it is for the judiciary to balance the justifications for the restrictions against its effect on the ability of women to have access to abortions. The court concluded that the Texas law would greatly limit the ability of women in Texas to have access to abortions, without any evidence that the restrictions were necessary to protect women’s health.

In one sense, the court’s decision is narrow and is just an analysis of this particular law, including a detailed analysis of the facts surrounding it. But the case sends a much broader message. The court was clear that the judiciary must carefully scrutinize laws restricting abortion that were adopted with the purported justification of protecting women’s health. The majority rejected judicial deference to the legislature. Many states have recently adopted laws to restrict abortion. The court’s ruling in Whole Woman’s Health makes it very likely that these targeted restrictions of abortion provider laws will be struck down.

These cases make it clear that because of Anthony Kennedy joining the four liberal justices there is now a majority on the Supreme Court to strike down abortions restrictions and to uphold affirmative action programs. Both results reflect a significant shift in views by Kennedy. To be sure, he has not become a liberal justice and he often votes with the conservatives, such as in United States v. Texas and Friedrichs v. California Teachers Association. But all of it shows, that now, more than ever, it is the Anthony Kennedy Court.

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