

ORANGE COUNTY REGISTER

The Kennedy court

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2016-07-06 21:05:14

The Supreme Court term that ended June 27 showed more than ever that it is truly the Anthony Kennedy Court. Justice Kennedy voted in the majority in 98 percent of all decisions.

Where Kennedy voted with the three conservative justices – Roberts, Thomas and 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 most notably in *United States v. Texas*, which was a challenge to President Obama’s immigration action, Deferred Action of Parents of Americans, and in *Friedrichs v. California Teachers Association*, which was about whether non-union members can continue to be required to pay agency fees that support collective bargaining activities. In the former, it meant that a nationwide preliminary injunction against the Obama immigration action remains in effect. In the latter, it means that there is no change in the law, and non-union members must continue to pay their “fair share” of fees.

But when Kennedy voted with Justices Ginsburg, Breyer, Sotomayor and 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 abortion and affirmative action.

In *Whole Women’s Health Center v. Hellerstedt*, the court, 5-3, 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. 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 United States Court of Appeals for the Fifth Circuit reversed and upheld the law. The Fifth Circuit said that it is for the legislature, not the judiciary, to assess whether the law protects

women's health. The Fifth Circuit said that deference to the legislature required upholding the law.

With Justice Breyer writing for the majority, the 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 their 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. 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.

In the affirmative action case, *Fisher v. University of Texas*, Justice Kennedy wrote for the court in a 4-3 decision (Justice Kagan was recused because she had been involved in the case as Solicitor General). The court upheld the University of Texas affirmative action plan which used race as one of many factors in undergraduate admissions decisions. To be sure, the court reaffirmed that the burden is on the educational institution to prove that there is no race-neutral way to achieve diversity. But the court found that the University of Texas had met this burden.

These cases make it clear that because of Anthony Kennedy joining the four liberal justices, there is now a majority on the court to strike down abortion restrictions and to uphold affirmative action programs. Whether this continues, and for how long, is one of the many things to be determined by the November 2016 presidential election.

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