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Insights From 2017-2018 High Court Term And What's Ahead

By **Chad Eggspuehler** (December 4, 2018, 5:07 PM EST)


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For the second year in a row, the U.S. Supreme Court embarks on a new term with a new justice. The addition of Justice Brett Kavanaugh following one of the most contentious confirmation processes of recent memory, and the retirement of perceived centrist Justice Anthony Kennedy, has left many court watchers with a greater sense of uncertainty than previous personnel changes at the court. So have a pair of recent decisions overturning long-standing precedent on union shop fees and limits on the collection of taxes on out-of-state sales.

Many expect the new conservative majority to track rightward, while others wonder if Chief Justice John Roberts — or other justices — will assert a moderating influence as the new "swing justice." As these developments unfold, the court's recent decisions and upcoming docket provide the best insights into the court's trajectory.

The Changing Court: Kavanaugh Replaces Mentor Kennedy After Contentious Confirmation Process

Days after the conclusion of the 2017-2018 term, Justice Kennedy announced his retirement after 30 years on the court, and President Donald Trump nominated D.C. Circuit Judge Brett Kavanaugh, a former Kennedy clerk, to fill his seat. While few expected the addition of Justice Neil Gorsuch last year to shift the ideological balance of the court (because he replaced the late conservative Justice Antonin Scalia), many believe Kavanaugh's appointment portends a rightward shift by the court since he replaces Kennedy's pivotal "swing" vote.

During his 30 years on the Supreme Court, Justice Kennedy cast the deciding vote and/or authored key decisions preserving abortion rights (Planned Parenthood v. Casey (1992), Whole Woman's Health v. Hellerstedt (2016)) and affirmative action in university admissions policies (Fisher v. University of Texas II (2016)). And arguably no other justice played a larger role in leading the court's modern due process and equal protection jurisprudence on LGBT rights. Justice Kennedy authored a series of closely divided opinions striking down laws forbidding legal protections for LGBT citizens (Romer v. Evans (1996)), same-sex intimacy (Lawrence v. Texas (2003)), federal spousal tax benefits for married same-sex couples (United States v. Windsor (2013)), and same-sex marriage (Obergefell v. Hodges (2015)).

The stakes of Kennedy's retirement, combined with a split Senate still scarred by Senate Republicans' decision to freeze out President Barack Obama's final Supreme Court nominee Judge Merrick Garland, promised a contentious confirmation process. Even after the appointment of Sen. Jon Kyl, R-Ariz., to the

late Sen. John McCain's seat, Republicans' advantage in the Senate was 51-49. Disputes over the Senate's ability to review documents from Kavanaugh's tenure as White House staff secretary to President George W. Bush added to the partisan rancor.

But then allegations of attempted sexual assault and harassment as a teenager threatened to derail the Kavanaugh nomination. While journalists, pundits and, ultimately, the FBI examined the allegations — which Kavanaugh denied — the Senate Judiciary Committee continued the confirmation hearing to allow testimony from one of the accusers. In the end, Kavanaugh was confirmed 50-48.

Clues from Kavanaugh's opinions as a D.C. Circuit Judge, combined with Trump's frequent promises to appoint conservative justices and the president's suggestion that abortion rights under Roe v. Wade (1973) are in jeopardy, lead many to anticipate that Justice Kavanaugh will move the court to the right. While his impact on the Supreme Court remains to be seen, the bitterness of his confirmation, on the heels of the fraught Gorsuch and Garland processes, reflects the increasingly partisan nature of Supreme Court nominations in recent years — a trend that appears likely to continue.

First Amendment: Court Continues to Favor Religious Liberty, Free Speech Rights

Continuing the trend from recent terms, the Supreme Court issued key First Amendment decisions that will reshape religious liberty and free speech rights.

In the much-anticipated Masterpiece Cakeshop v. Colorado Civil Rights Commission decision, which involved a baker's religious objections to preparing a wedding cake for a same-sex couple, the court sided with religious liberty. Many expected a close decision, as the case presented competing constitutional principles of utmost importance to Justice Kennedy: freedom of speech and religion against public accommodations laws protecting the dignity of the LGBT community. Yet, a solid majority of the court ruled on narrow free exercise grounds, 7-2, finding unconstitutional religious bias in Colorado's administrative proceedings against the baker — specifically, the comment of one commissioner who compared the baker's religious objections to the Holocaust and dismissing his beliefs as nothing but a "despicable piece[] of rhetoric."

Though the Masterpiece court saved for another day the broad free speech arguments — i.e., that sale of wedding-related goods (such as cakes, flowers, etc.) constitutes protected symbolic speech — the majority also spoke favorably of antidiscrimination public accommodations laws, reaffirming the principle from Newman v. Piggie Park (1968) that religious objections do not automatically override generally applicable public accommodations laws. This reasoning should give hope to LGBT rights advocates as more business owners challenge LGBT antidiscrimination laws in court, but it remains to be seen how the delicate balance struck in Masterpiece will fare with Justice Kennedy no longer on the court.

The court did, however, vindicate free speech claims in other contexts, ranging from abortion to election law. In National Institute of Family and Life Advocates v. Becerra, a split court ruled 5-4 that California's FACT Act violated the First Amendment. The act required that crisis pregnancy centers post notices (1) regarding the availability of subsidized abortion services in California, and (2) stating that the center is not licensed to provide medical services. Justice Clarence Thomas, writing for the majority, deemed the notice requirements content-based speech regulations that changed the message of the centers and concluded that the law failed under strict scrutiny.

Then, in Minnesota Voters Alliance v. Mansky, the court invalidated a state law prohibiting voters from wearing political apparel to the polling location. Applying the reasonableness standard applicable to

nonpublic forums, the court recognized that Minnesota had a permissible purpose in maintaining polling place decorum — that, "in light of the special purpose of the polling place itself, Minnesota may choose to prohibit certain apparel there because of the message it conveys, so that voters may focus on the important decisions immediately at hand." The court nevertheless invalidated the law for ambiguity, 7-2, with Chief Justice Roberts explaining that the law's absence of clear standards gave election officials unfettered discretion to decide what constituted appropriate political apparel.

But perhaps the most impactful free speech decision arose from a case involving public unions' shop fees — i.e., the mandatory fee charged to all employees in a unionized field regardless of membership for the union's collective bargaining on their behalf. The court had previously sustained union shop fees against a First Amendment objection in Abood v. Detroit Board of Education (1977), with the caveat that the union must ensure that the shop fees paid for only collective bargaining benefits and not political activities. But a series of opinions in recent years signaled that the court's conservatives intended to revisit Abood. The court's first attempt, Friedrichs v. California Teachers Association, failed in a 4-4 split decision after Justice Scalia's untimely death in February 2016. Indicative of the mantra that "elections have consequences," Justice Gorsuch filled Justice Scalia's seat and cast the deciding vote to overrule Abood in Janus v. American Federation of State, County, and Municipal Employees, Council 31.

Justice Samuel Alito, writing for the 5-4 majority that split along ideological lines, rejected the premise that union speech could be separated into political and nonpolitical speech. In his view, compulsory union shop fees violated core First Amendment protections by requiring nonmembers to support ideas with which they disagreed, and this imposition on their free speech rights could not be justified out of concern for the free-rider problem. Janus augurs dramatic changes in public sector unions' finances and likely foreshadows a decline in their influence on public policy.

On Taxes and Gambling: Court Modernizes Tax Principles for E-Commerce, Tosses Out Federal Law Prohibiting States From Allowing Sports Betting

Janus was not the only long-standing precedent to fall last term. In South Dakota v. Wayfair Inc., the court overruled the "physical-presence" requirement of Quill Corp. v. North Dakota (1992) and National Bellas Hess v. Department of Revenue of Illinois(1967), which provided that states could not require out-of-state businesses to collect sales tax on in-state sales unless the business had a physical presence in the state.

Wayfair produced an unusual vote alignment, with Justice Ruth Bader Ginsburg joining the court conservatives in Justice Kennedy's 5-4 majority opinion and Chief Justice Roberts joining the other court liberals in dissent. The majority reasoned that the physical-presence requirement was obsolete in light of the dramatic growth of e-commerce, which enables companies to entice out-of-state customers with a "virtual showroom" with "more inventory, in far more detail, and with greater opportunities for consumer and seller interaction than might be possible for local stores." By removing the physical-presence requirement, Wayfair paves the way for states to collect taxes on more than $450 billion in e-commerce sales.

Meanwhile, Murphy v. NCAA opened the door for states to legalize sports betting. A federal law prohibited states from sponsoring, promoting or licensing sports betting, with the exception of a handful of states that had grandfathered programs. Justice Alito, writing for the court, concluded that the federal law violated the anti-commandeering principle of the Tenth Amendment — i.e., that Congress cannot issue orders directing state legislatures in how to exercise their legislative authority.

Court Rejects Challenge to President's Travel Ban

Last term also brought the long-awaited decision on the president's so-called travel ban, at that point in its third iteration. Chief Justice Roberts wrote for the ideologically split 5-4 majority in Trump v. Hawaii, deferring to the president's exercise of suspension authority under § 1182(f) of the Immigration and Nationality Act and the proclamation's stated reason that the targeted countries failed to meet information-sharing standards.

There was no need for a "searching inquiry" of the indefinite travel ban, the court explained, because § 1182(f) does not require detailed findings that a group of people be detrimental to U.S. interests. After comparing the proclamation to the suspension orders of past presidents, the court addressed the claim of religious bias against Muslims. The court sustained the proclamation under rational basis review, concluding that there was a legitimate national security basis for excluding persons traveling from the targeted countries: their countries' failure to meet information-sharing protocols. And the court distinguished between the president's Twitter messages about the travel ban and the stated basis for the facially neutral proclamation.

In one of the more scathing dissents of recent memory, Justice Sonia Sotomayor compared the court's decision to the infamous Korematsu v. United States (1944) decision that upheld the internment of Japanese-Americans during World War II under dubious claims of national security. She also critiqued the majority's willingness to ignore the president's hostile tweets about Muslims, in light of the court's strong emphasis on similar statements in another religious liberty case this term, Masterpiece Cakeshop.

Cases to Watch, the 2018 Term

While the court has yet to add the sort of hot-button abortion, LGBT rights or affirmative action case for which Justice Kennedy so often played the part of "swing justice," the following cases should make headlines.

In Timbs v. Indiana, the court must decide whether the Eighth Amendment's prohibition on excessive fines applies to the states under the 14th Amendment. At stake are states' policing-for-profit civil forfeiture regimes, which permit private attorneys to bring civil forfeiture suits on behalf of the state and share in the "profit." Such incentives can lead to abuses, such as the forfeiture of Tyson Timbs' Land Rover SUV (valued at approximately $40,000) for a drug crime with a maximum penalty of $10,000.

In Gamble v. United States, the court must decide whether it will overrule the "separate sovereigns" exception to the Fifth Amendment's double jeopardy clause, which permits duplicate convictions for the same predicate crime so long as the convictions are obtained by separate sovereigns (here, Alabama and the United States).

Finally, in The American Legion v. American Humanist Association, the court will grapple with an establishment clause challenge to a cross-shaped World War I memorial. In the process, the court may reassess the continuing viability of its establishment clause standard from Lemon v. Kurtzman (1971).

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