

5-4: How Brett Kavanaugh's Supreme Court Appointment Might Affect UNC Charlotte

DIVISION OF INSTITUTIONAL INTEGRITY
LEGAL SYMPOSIUM
OCTOBER 16, 2018



SCOTUS Eras

Dean Chemerinsky believes we've entered into a new "era" of the Supreme Court:



- 1890s to mid-1930s (very conservative Supreme Court)
- 1937 to 1969 (progressively more liberal court particularly in 1960s under Earl Warren)
- 1971 to today (beginning with Nixon's appointees, always at least five ideologically conservative, Republican-appointed justices, but with a "swing justice" to effect a liberal result in high-profile cases)



Kennedy's Appointment

- Reagan appointee (1988) following two unsuccessful nominations (Bork, Ginsburg) and extremely thorough background check
- Approved unanimously by Senate (97-0)



Kennedy: The Early Years

Until her retirement in 2005, Sandra Day O'Connor was viewed as the swing vote on the Court:

- *Planned Parenthood v. Casey* (1992): broke with Chief Justice Rehnquist and in affirming *Roe v. Wade* (Kennedy co-authored opinion)
- *Lee v. Weisman* (1992): finding that government-sponsored prayer is not permitted at high school graduations (Kennedy authored opinion)
- *Stenberg v. Carhart* (2000): overturned a Nebraska ban on "partial-birth" abortions (Kennedy dissenting)
- *Grutter/Gratz v. Bollinger* cases (2003): affirmed, but limited, the right of state colleges and universities to use affirmative action in admissions policies (Kennedy in majority for *Gratz*, dissented from *Grutter*)



Kennedy: The Conservative

Justice Kennedy has been solidly with conservative justices with respect to several issues:

- Campaign finance
- Church and state (accommodationist view)
- Business (free speech, environmental issues, favoring arbitration over adjudication)
- Executive authority



Kennedy: The Liberal

On other issues, however, Kennedy has sided with the SCOTUS's liberal bloc:

- Affirmative action
- Gay rights
- Abortion rights




Kavanaugh v. Kennedy: Affirmative Action

- *Metro Broadcasting* (1990)/*Adarand Constructors* (1995): 5-4 cases in which Kennedy vehemently argued against lower standard of judicial review for race-based affirmative action
- *Grutter v. Bollinger* (2013): 5-4 case, Kennedy in minority
- *Gratz v. Bollinger* (2013): 5-4 case, Kennedy in majority
- *Fisher v. Texas I* (2013): Kennedy wrote 7-1 majority opinion
- *Fisher v. Texas II* (2014): Kennedy wrote 4-3 majority opinion, joined liberal justices

- Current issues:
 - Is promoting diversity (and avoiding racial isolation) a compelling state interest?
 - *Parents Involved in Community Schools v. Seattle School District No. 1* (2007): 4-1-4 decision, with Kennedy as the "1" reiterating that compelling interests exist in avoiding racial isolation and promoting diversity
 - Roberts quote: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."

- PREDICTION:
 - Nothing on docket for next term, but eventually colleges and universities will be colorblind with respect to admission




Kavanaugh v. Kennedy: Gay Rights

- *Obergefell v. Hodges* (2015): 5-4, four scathing dissents, only dissent ever read from the bench by John Roberts
- *United States v. Windsor* (2013): 5-4 federal Defense of Marriage Act case (for purpose of federal benefits, marriage is between a man and a woman)
- *Pavan v. Smith* (2017): *per curiam* decision with Gorsuch, Alito, and Thomas dissenting ("note" no Roberts), Arkansas law re: birth certificates

- Current issues:
 - Circuit splits as to whether Title VII protects against discrimination for sexual orientation
 - Unclear whether Title IX addresses discrimination against transgender students
 - *Masterpiece Cakeshop* (2018): 6-3, Kennedy-authored opinion, intersection of Free Speech/Free Exercise and sexual orientation

- PREDICTION:
 - Title VII/Title IX: *not* literally
 - "Compelled expression" *not* unconstitutional
 - Gay marriage: *not* unconstitutional




Kavanaugh v. Kennedy: Abortion Rights

- *Hodgson v. Minnesota* (1988): O'Connor as swing vote striking down two-parent notification requirement for minors prior to abortion, but upholding parental notification generally with judicial bypass (Kennedy in conservative bloc)
- *Planned Parenthood v. Casey* (1992): Created "undue burden" standard, upheld "essential holding" in *Roe v. Wade* (1973), upheld parental consent, informed consent, and waiting period restrictions in Pennsylvania, but struck down spousal consent. Kennedy helped author 5-4 plurality opinion (dissenters argued for overturning *Roe* entirely).
- *Stenberg v. Carhart* (2000)/*Gonzales v. Carhart* (2007): "Partial-birth" abortion cases, Kennedy in 5-4 minority in *Stenberg* and 5-4 majority in *Gonzales*


- Current issues:
 - Will *Roe v. Wade* (1973) be overturned, returning regulation of abortion to the states?

- PREDICTION:
 - No (with trepidation, and for reasons described later), BUT more stringent state restrictions will be permitted




Other Issues: Gun Rights

- Very few 2nd Amendment cases, unresolved issues:
 - Right to bear arms *outside* the home
 - Constitutionality of “assault weapon” bans
 - Appropriate level of scrutiny for gun control laws
- Texas enacted “campus carry” law, faculty challenged that in 5th Circuit Court of Appeals and lost
- Kavanaugh has written 2nd Circuit opinions strongly in favor of gun rights



Other Issues: Disparate Impact Analysis


- Several federal civil rights laws—such as in the areas of employment discrimination, voting rights and fair housing—allow liability upon proof of **racially disparate impact**.
 - *Texas Department of Housing and Community Affairs v. Inclusive Communities Project Inc.* (2015): Kennedy-authored 5-4 decision holding that there is disparate impact liability under the Fair Housing Act of 1964
 - Conservative justices have argued that disparate impact liability raises constitutional issues
 - Forces legislators/policymakers to take race into account in their decisions in order to avoid liability
 - *Ricci v. DeStefano* (2009): 5-4 Kennedy-authored decision; can't fail to promote one race because of fear of disparate impact claims (Alito, Thomas, Scalia concurring that disparate impact liability is unconstitutional) (*note* no Roberts)



Wildcards

- Chief Justice Roberts
 - Institutional
 - Watch *Madison v. Alabama* (2018)
- Potential Kavanaugh recusals on:
 - Presidential investigations/policies
 - Campus sexual assault issues
 - Partisan political matters
- Kavanaugh himself

How Kavanaugh compares
The ideologies of the current justices on the Supreme Court — and that of President Trump's nominee



• MORE LIBERAL | MORE CONSERVATIVE •
Judicial Common Space score

Supreme Court justice scores are from the 2018 term. Kavanaugh's score is based on his nomination process and not his votes.
From The Atlantic

