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# KENNEDY'S LAST TERM

*Marc O. DeGirolami and Kevin C. Walsh*  
report on the 2017–2018 Supreme Court.

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wenty-eight brought the end of Justice Anthony Kennedy's tenure on the Supreme Court. We are now entering a period of uncertainty about American constitutional law. Will we remain on the trajectory of the last half-century? Or will the Court move in a different direction?

The character of the Supreme Court in closely divided cases is often a function of the median justice. The new median justice will be Chief Justice John Roberts if Kennedy's replacement is a conservative likely to vote most often with Justices Clarence Thomas, Neil Gorsuch, and Samuel Alito. This will mark a new phase of the Roberts Court.

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Yet the composition of the Court is not the only important variable. The Court has been influenced—heavily influenced, in some areas—by elite cultural opinion as well. Where such influence has degraded the foundations of constitutional law, a new justice, no matter what his views, can only make a limited difference.

Before offering some conjectures about the post-Kennedy Court, though, we look back at some of the signature cases of this past term.

**T**he term was significant for the First Amendment. It was important for what the Court said and what it did not say. It highlighted disagreement between the conservative and progressive wings of the Court about the nature, scope, and value of freedom of speech, a disagreement likely to intensify in future years.

Two First Amendment cases in particular illustrated a broader asymmetry in much culture war litigation. Social progressives use the courts to secure and extend cultural gains, while social conservatives repair to the courts to obtain reprieves from further cultural losses. Perhaps unsurprisingly, the two cases involved same-sex marriage and abortion, respectively. Social conservatives won in both cases, but their victories are tenuous, and they were forced to litigate in the first place only because they had lost unequivocally in the legislative and administrative realms.

Both cases involved legal penalties imposed on Christians for what state legislators or officials openly condemned as retrograde and benighted views. *Masterpiece Cakeshop v. Colorado Civil Rights Commission* concerned a challenge to a state civil rights commission's ruling that Jack Phillips, a Christian baker, violated Colorado's antidiscrimination laws when he declined to create a custom cake in celebration of a same-sex marriage. In a 7–2 decision authored by Justice Kennedy, the Court held that the commission violated the free exercise clause because one commissioner openly denigrated Phillips's Christian view of marriage, calling it “despicable” and comparing it to defenses of slavery and the Holocaust. A second commissioner indicated that religious beliefs like Phillips's cannot be “carried into the public sphere or commercial domain.” But the seven-justice majority's zone of agreement was narrow, depending especially on the first commissioner's imprudent on-the-record vituperation. The crucial decision about how to resolve the tensions in a case not involving explicit hostility toward traditional Christian views was thus postponed.

The dueling concurrences of Justice Elena Kagan (joined by Justice Stephen Breyer) and Justice Gorsuch (joined by Justice Alito) demonstrate the deeper conflict within the Court about the future of the First Amendment in these cases. The core of their disagreement concerned evidence that customers who approached other bakers to make cakes with messages expressing disapproval of same-sex marriage were refused by those bakers. Yet when those customers sued the bakers for religious discrimination, the bakers prevailed before the Colorado Civil Rights Commission. Meanwhile, Phillips, who would not make a cake approving of same-sex marriage, lost before the commission.

Justice Kagan argued that this discrepancy was immaterial. These pro-same-sex-marriage bakers, unlike Phillips, were not engaged in the relevant kind of discrimination against “individuals based on . . . sexual orientation and creed,” because they would not have made the requested cake for *any* customer. They were neutral with respect to customers. When it comes to sexual orientation, the Court has treated conduct as inextricably connected with identity and thus deserving of protection. But for religion, Kagan felt that a different rule should apply: “A vendor can choose the products he sells, but not the customers he serves—no matter the reason.” A refusal to sell a wedding cake to couples of the same sex, she flatly declared, “has nothing to do with Phillips' religious beliefs.”

Justice Gorsuch disagreed: “It was the kind of cake, not the kind of customer, that mattered.” Phillips would not have made a cake celebrating a same-sex marriage for any customer, gay or straight, just as the other bakers would not have made a cake disapproving a same-sex marriage under any circumstances. And yet, argued Gorsuch, the civil rights commission applied one standard for Phillips and another for the other bakers. Thus do we get an inkling of where the battle will be waged in future cases involving similar conflicts between First Amendment freedoms and state antidiscrimination laws.

**I**n *National Institute of Family and Life Advocates v. Becerra*, the Court reviewed a challenge to California regulations imposed on pro-life pregnancy resource centers. One required state-licensed centers to advertise the availability of state-subsidized abortions, while a second required unlicensed centers to notify women prominently and in several languages that they were not licensed. (In Los Angeles, thirteen different translations were necessary.) The law manifested an intent to target “largely Christian belief-based” centers, which

California state legislators believed were not sufficiently “forward thinking” about abortion, as recorded in the statute’s legislative history.

In a 5–4 opinion, Justice Clarence Thomas held that the statute violated the freedom of speech. Its provisions compelled the centers to express content-specific messages, including about obtaining the very service to which the centers objected: abortion. The Court emphatically rejected the claim that “professional speech” is a distinctive category that may be regulated more extensively than others. And it also relied on the difference between speech and conduct in distinguishing cases like *Planned Parenthood v. Casey*, which held that abortion providers could be required by the state, over their free speech objections, to obtain informed consent before performing an abortion. Those cases, Thomas argued, did not apply because the pro-life centers in *NIFLA* were not performing abortions. He noted that California had selectively exempted general practice medical facilities from the same requirements that it imposed on the pro-life centers, suggesting that the state of California had an illegitimate interest in compelling precisely these facilities to advertise state-sponsored abortion. Justice Kennedy’s concurrence, joined by Justice Gorsuch, argued that the regulations were intended to squelch the pro-life views of the centers: “It is not forward thinking to force individuals to ‘be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable.’”

Justice Stephen Breyer dissented, joined by Justices Kagan, Ruth Bader Ginsburg, and Sonia Sotomayor. If a state may require an abortion provider to tell a woman seeking an abortion about adoption services (as the Court had held in *Casey*), Breyer argued, it should also be able to require pro-life centers to tell a woman about the availability of state-subsidized abortion. The dissent went further, charging that the majority had empowered pro-life centers “to use the Constitution as a weapon” to defeat “reasonable” “economic and social laws.” It would not be the last time this term that these justices would employ the metaphor of constitutional weaponization as to the freedom of speech.

Perhaps the most controversial First Amendment case of the term was *Janus v. American Federation of State, County, and Municipal Employees*, in which the Court struck down an Illinois law that compelled nonmembers to pay public-sector union fees. The Court reversed *Abood v. Detroit Board of Education*, the late 1970s decision that held compulsory public-sector agency fees were constitutional, so long as the

money was used only for activities “germane” to collective bargaining rather than for what the Court then described as separate “political and ideological projects.” In an opinion for the Court authored by Justice Alito on behalf of the same five-justice majority as in *NIFLA*, the Court held that these compulsory union fees violated the freedom of speech. Such fees forced support (in the form of financial subsidies) for messages with which the litigants disagreed, and *Abood*’s distinction between permissible and impermissible expenditures had proved easier to articulate than apply. “It is impossible to argue,” the majority opinion contended, “that the level of . . . state spending for employee benefits . . . is not a matter of great public concern.”

As in Justice Breyer’s *NIFLA* dissent, Justice Kagan’s acid *Janus* dissent accused the majority of “weaponizing” the freedom of speech. Kagan denounced the justices in the majority as “black-robed rulers overruling citizen choices” and censured them for “turning the First Amendment into a sword” with which to smite democracy. “The First Amendment,” she lectured, “was meant for better things. It was meant not to undermine but to protect democratic governance.”

One might have thought that the function of constitutional rights was precisely to protect against certain democratic choices, even those not involving the sexual mores and secular proclivities of the elite classes. *Janus*, at least, involved a freedom with a firm textual anchor in the Constitution, rather than one invented by the Court in response to the felt imperatives of the forward cultural march. But the weaponization metaphor was minted about five years ago to attack religious freedom, when the *Hobby Lobby* case evoked so much outrage. It is sobering to see four justices now deploying it against the freedom of speech.

Notwithstanding the rhetorical warfare of the *NIFLA* and *Janus* dissenters, both of these decisions do showcase the Court’s increasing embrace of a robustly libertarian conception of the First Amendment—one which has been ascendant for at least a half century. Yet if the libertarian freedom of speech is now serving conservative ends, one should remember that for decades it promoted socially progressive ends in the Court’s cases involving defamation, obscenity, sexually explicit speech, and many other twentieth-century expansions of free speech. Libertarian freedom of speech can support very different ideological projects.

Indeed, First Amendment doctrine from the late 1960s through the early 1980s was largely functionalist, involving unabashed policy judgments and the

crude balancing of competing political and economic considerations. Over the past few decades, by contrast, the Court's preferred approach has become more formalist, turning on categories and rule-based doctrinal formulations. The Roberts Court's overruling of *Abouad in Janus* can thus be understood as what Villanova law professor Michael Moreland has aptly called the end of the free speech disco era.

Much of the disagreement between Justice Alito's majority opinion and Justice Kagan's dissent in *Janus* concerned the force of *stare decisis*—the principle that precedent should be followed even if erroneous, absent overriding justification. This conflict recurred in other cases, and it will again as the personnel of the Court continues to change. As more conservative judges join the Court, one should expect louder appeals by the Court's left wing for adherence to *stare decisis* in an attempt to preserve and entrench past gains. The more conservative judges, unhappy with the trajectory of recent decades, will continue to press for distinguishing, narrowing, or overruling what they regard as the Court's many wrong doctrinal turns.

Not all of the 1970s is destined to go up in flames, however. In another closely watched case, the more conservative justices relied heavily on a decision from the 1970s to douse a First Amendment conflagration. *Trump v. Hawaii* concerned President Donald Trump's executive order stopping immigration from eight countries (later reduced to five, and with some exceptions from the listed countries). The third version of the so-called "Muslim travel ban" earned the sobriquet because of controversial statements made by President Trump, including some from before he was elected.

The constitutional objection to President Trump's order was that it discriminated against Muslims in violation of the First Amendment's establishment clause. Writing for a bare majority, Chief Justice Roberts argued that *Kleindienst v. Mandel* (1972) easily disposed of the case because it limits judicial oversight of visa denials to any "facially legitimate and bona fide" reason the president might offer. That meant no in-depth examination of all of President Trump's utterances on the topic. Roberts actually scrutinized a little more than *Kleindienst* had envisioned, looking underneath the face of the order for a "rational basis" for it. But rational basis review is very circumscribed, and Roberts emphasized the limits of the Court's power as respects a function allocated to the executive branch within broad boundaries set by Congress.

The four dissenting justices split. Justice Breyer, joined by Justice Kagan, wrote a narrow, technical, cold opinion that reads like an unsuccessful attempt to peel off a justice from the majority. Justice Sotomayor authored the other dissent, joined by Justice Ginsburg. This more full-blooded dissent distinguished *Kleindienst* as inapplicable and invoked *Korematsu v. United States*, the notorious World War II-era case upholding the detention of American citizens of Japanese descent in internment camps. "By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animus, all in the name of a superficial claim of national security," Sotomayor charged, "the Court redeploys the same dangerous logic underlying *Korematsu*." Responding for the majority, Roberts contended that *Korematsu* was "wholly inapt." "The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race," Roberts wrote, "is objectively unlawful and outside the scope of presidential authority." *Korematsu* was entirely unlike the "facially neutral policy denying certain foreign nationals the privilege of admission."

Alongside these significant First Amendment developments ran a second, less noticed theme: the influence of social, technological, and moral change on Supreme Court doctrine.

In *South Dakota v. Wayfair, Inc.*, for example, the growth of Internet commerce prompted an unusual five-justice coalition finally to abandon a 1967 decision, *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, that prevented states from taxing sales made by out-of-state merchants to in-state residents. Doctrinal change in related areas and the growth of mail-order businesses between 1967 and 1992 had prompted one state supreme court to opine that "tremendous social, economic, commercial, and legal innovations" of the intervening quarter century had rendered *National Bellas Hess* obsolete. But in 1992, eight justices—including Justice Kennedy and Justice Thomas—disagreed and reaffirmed it. This year, Kennedy and Thomas changed their minds, and Justices Ginsburg, Alito, and Gorsuch joined them in reversing course. Not only was the 1992 refusal to overrule *National Bellas Hess* "wrong on its own terms," wrote Kennedy in an opinion for the Court, but "since then the Internet revolution has made its earlier error all the more egregious and harmful." Chief Justice Roberts dissented, joined by Justices Breyer, Sotomayor, and Kagan. These justices agreed that the precedents were wrong but believed that *stare*

*decisis* called for leaving them in place. Congress, they argued, not the Court, should address the problem.

Another variation on the theme of social change influencing doctrinal change appeared in a very significant Fourth Amendment decision, *Carpenter v. United States*. But this time Chief Justice Roberts was in the majority, while Justices Kennedy, Thomas, Alito, and Gorsuch dissented. The case concerned the “third-party doctrine,” which provides that an individual has no reasonable expectation of privacy giving rise to Fourth Amendment protection in information handed over to third parties. The Court has previously held, for instance, that individuals have no Fourth Amendment privacy expectation in their bank records because those are maintained by the bank, a third party; same for the telephone numbers one calls because those are transmitted to the phone company.

The question in *Carpenter* was whether the third-party doctrine permitted the government to obtain data about a person’s location from wireless company cell towers without first securing a warrant. Law enforcement officials had tracked a robbery suspect, Timothy Carpenter, after getting this kind of information from a wireless carrier using a special kind of order that did not require the same showing of suspicion needed for a warrant. The information thus procured was “12,898 location points cataloging Carpenter’s movements over 127 days—an average of 101 data points per day.” Motivated perhaps by a concern about how deeply intertwined our personal lives have become with digital devices, Chief Justice Roberts held that the third-party doctrine did not authorize the government to obtain this information without a search warrant. He was joined by Justices Breyer, Ginsburg, Sotomayor, and Kagan. The majority insisted that it was not rejecting the third-party doctrine more broadly. But lower courts will have to figure out whether and how *Carpenter*’s reasoning applies to other kinds of information we regularly produce in the digital world.

While *Carpenter* illustrates that technological change may narrow precedent, *Murphy v. NCAA* shows that social and moral change may entrench and extend it. Congress enacted the Professional and Amateur Sports Protection Act (PASPA) in the early 1990s to prevent the spread of sports gambling beyond Nevada and a handful of other states. When passed, the act gave New Jersey—home to Atlantic City’s many casinos—one year to decide whether to allow sports gambling. The state did not authorize sports gambling by the deadline. A couple decades later, however, New Jersey voters changed their mind, but the NCAA and professional sports leagues

went to court to stop New Jersey and enforce PASPA’s prohibition. Here things get a little tricky. PASPA does not make sports gambling a federal crime. But it does prohibit New Jersey from repealing its own prohibition of sports gambling. By a 7-2 vote, the Supreme Court held that the federal government could not handcuff the states in this manner.

*Murphy* extends and solidifies the Court’s “anti-commandeering” doctrine. In an earlier case, the Supreme Court held that Congress could not directly order states to pass particular laws. This kind of national takeover of state legislative processes, the Court said, is undemocratic because it enables both Congress and the states to evade popular accountability. Each can blame the other for the resulting state of the law. Writing for the Court in *Murphy*, Justice Alito reasoned that there was no real difference between ordering states to enact laws and prohibiting them from repealing laws. Although earlier anti-commandeering cases had been viewed as vulnerable “states’ rights” cases because of the narrow and ideologically inflected majorities by which they had been decided, the fact that Justices Breyer and Kagan joined Alito’s opinion for the Court shows that anti-commandeering doctrine is here to stay.

The social, economic, and moral impact of *Murphy* is likely to be substantial. Since the decision was handed down, a number of states have moved to legalize sports gambling. Social conservatives may regret this outcome; indeed, the decision will probably be most damaging to those least capable of coping with the vice of gambling. But from another point of view, a strong anti-commandeering doctrine obstructs social engineers from fobbing off responsibility for objectionable policies.

**T**wo cases involving the constitutionality of partisan gerrymandering brought the relationship among cultural change, personnel change, and doctrinal change together with another leitmotif of the term: the limits of judicial power.

Current constitutional doctrine for drawing voting district lines requires that districts must contain roughly equal numbers of people and that racial considerations may not predominate. The question posed by partisan gerrymandering claims is whether there is a third rule that partisan political considerations may not play an excessive role in district drawing. Since first holding in 1986 that intentional disadvantaging of the voters of one party presents a justiciable partisan gerrymandering claim, the Supreme Court has failed for more than thirty years to articulate

administrable standards for evaluating these claims. In 2004, four justices argued that such claims were nonjusticiable because there was no plausible standard for deciding how much politics was too much. The lower courts, wrote Justice Antonin Scalia, had been “wandering in the wilderness for eighteen years.” But the other five justices, including Justice Kennedy, wanted to keep trying.

And so the lower courts have continued to wander, while the academic constitutional clerisy has developed a profusion of theories that address the evil of excessive partisan gerrymandering. Many believed the Supreme Court would finally settle on a standard this term. But that was not to be. In *Gill v. Whitford*, the Court reversed a decision that threw out the entire Wisconsin districting plan as an unconstitutional partisan gerrymander. But the justices disposed of the case on standing grounds: The Court held that no plaintiff had a right to challenge all of the districts, only those that affected one's rights personally, as a voter in that district. *Benisek v. Lamone* was a second partisan gerrymandering case disposed of unanimously on non-merits grounds. Unlike *Gill*, this was a single district challenge. But because of legal uncertainty about political gerrymandering claims generally and the poor timing of the plaintiffs' complaint, the Court held that the lower court had not abused its discretion in denying relief.

Taken together, *Gill* and *Benisek* are best understood as decisions not to decide too much. At one level, these cases can be understood simply as instances of a principle Chief Justice Roberts articulated early in his tenure: “If it is not necessary to decide more to a case, then in my view it is necessary not to decide more to a case.” But there may be deeper significance to these cases as well. They may signal that the Court is coming to realize, albeit gradually and reluctantly, that it should never have led the lower courts on this merry chase to micromanage what are political decisions. After all, neither the Constitution nor the Supreme Court can deliver us from every political evil.

What, then, should we expect from the post-Kennedy Court? Perhaps more of the same. There was not a single 5–4 decision this term in which Justice Kennedy joined with the more liberal wing of the Court. That has never before happened on the Roberts Court. And there were fourteen 5–4 cases in which Kennedy joined with the four more conservative justices to form a majority, including First Amendment cases such as *Janus* and *NIFLA*, separation of powers cases like

*Trump v. Hawaii*, political process cases involving political and racial gerrymandering, and a range of statutory interpretation and business cases. This record suggests that, should Judge Brett Kavanaugh be confirmed, we ought to expect a fair amount of continuity rather than radical change.

But in other major areas—areas that happen not to have been addressed this term—the change may be more substantial. Consider, for example, the constitutional law of abortion. Here, Kennedy's replacement might make a difference, particularly if there is a possibility that a Justice Kavanaugh might join with four colleagues in ending the regime of constitutional abortion law initiated by *Roe v. Wade*.

Social conservatives have been disappointed before. The Court's first major abortion case after Justice Kennedy joined the Court was the 1989 decision *Webster v. Reproductive Health Services*, where it seemed there might be five votes to overrule *Roe*. Chief Justice William Rehnquist wrote an opinion for four justices that purported to “modify and narrow” *Roe*, but Reagan-nominated Justice Sandra Day O'Connor went her own way, introducing the “undue burden” standard that has remained the law until today. Scalia, meanwhile, lamented that this missed opportunity to reverse *Roe* meant that “the mansion of constitutional abortion law, constructed overnight in *Roe*, must be disassembled doorjamb by doorjamb, and never entirely brought down, no matter how wrong it may be.” Scalia was farseeing. Four years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Kennedy joined with O'Connor and Justice David Souter to preserve what they called “the central holding” of *Roe*.

We are guardedly optimistic that Kavanaugh's confirmation will eventually result in the rejection of *Roe v. Wade*. But nobody should expect a quick or complete demolition of constitutional abortion rights. Caution is in order because of both internal Court dynamics and external pressure on the institution.

The shift on the new Court should be measured not by the distance between Kennedy and Kavanaugh, but between Kennedy and Roberts. On a multi-member Court, the views of the median justice matter most in the close cases implicating the culture wars. And Roberts cares deeply about public perceptions of the Court's legitimacy. The same concerns that motivate Roberts to embrace minimalism more broadly, as in the cases this term about partisan gerrymandering and sales taxes, will likely mean even greater caution in these hotter and angrier areas of constitutional law.

Neither should we forget that the result of overruling the *Roe/Casey* regime is no panacea. It would

simply lift restrictions on state legislation. But that is hardly always desirable. We can surely expect some, perhaps many, states to follow the lead of Massachusetts, where legislators passed a NASTY (Negating Archaic Stereotypes Targeting Young) Women Act that repealed abortion restrictions that might in theory have come back into force if *Roe/Casey* were overturned. New York's governor has made extensive abortion rights a rallying cry of his campaign for reelection.

Just as the damage done by *Roe/Casey* is not exclusively legal, neither will it be undone by legal means alone. The Court and dominant cultural opinion shape each other, and the arrow of influence runs in both directions. However much "the mansion of constitutional abortion law" may be dismantled, the constitutional rot at its foundation is the result of powerful cultural forces. Let us not put our trust in judges any more than princes, not only because they are fallible, but also because judges are meant to judge, not to save us from ourselves.

**B**eginning in the mid-twentieth century, the Court inserted itself into all manner of cultural and social conflicts—about the nature of the human person, sexual mores, church-state relations, and many other subjects. It purported to resolve cultural disagreement by judicial fiat, and it earned a certain kind of prestige for its decisions, channeling the consensus of an elite constituency. Over the last two generations, America's cultural, intellectual, and legal leaders have become partisans in an increasingly bitter war

not against foreign enemies, but against large constituencies of Americans, the "deplorables" whose religious and moral views have suffered decades of sustained assault. What began as a legal war against recalcitrant Southern segregationists in the 1950s has mutated into something entirely different: a multi-front campaign to destroy "haters," who turn out to be a significant plurality, and perhaps even a majority, of Americans.

The Supreme Court in recent years has provided religious conservatives some respite. This protective function is real and important. But by the time these culture war cases end up in courts, conservatives are usually fighting rearguard actions. As we write, Jack Phillips and Masterpiece Cakeshop are back in court, trying to stave off yet another attempt by the Colorado Civil Rights Commission to use state anti-discrimination law to show him, and the nation, who is really in charge.

Even if the courts continue to provide all the defensive protection that dissenters seek, and even if the courts end the aggressive judicial creation of new rights, the war will go on outside the courts. Even if the Supreme Court reaffirms that there is no constitutional right to physician-assisted suicide, for example, states such as California will persist in their commitment to suicide as a fundamental component of a perverse view of human dignity and autonomy.

Our cultural conflicts are over the political good, the moral good, and most fundamentally, what it means to be human. The Supreme Court cannot resolve them. True, legal power can provide protection on certain fraught battlefields. But the war will go on. ■