

NewsRoom

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Section: Opinion

Commentary: It should be called Kennedy Court

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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 of the decisions.

Where 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.

Most notably, this occurred in *United States v. Texas*, which was a challenge to President Obama's immigration action, and *Friedrichs v. California Teachers Association*, which was about whether non-union members can be required to pay the share of the union dues that support collective bargaining activities. In the former, it meant a nationwide preliminary injunction against the Obama immigration action remains in effect. In the latter, it means non-union members must continue to pay their "fair share" of union dues.

But when Kennedy voted with Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan, there was a majority for a liberal result. This is 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 percent 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.

With Breyer writing for the majority, the court stressed that in deciding if a law imposes an undue burden on abortion, the judiciary must balance the justifications for restrictions against their effect on the ability of women to have access to abortions. The court concluded that the Texas law would greatly limit that ability, without any evidence that the restrictions were necessary to protect women's health.

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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 that the judiciary must carefully scrutinize laws restricting abortion that were adopted with the purported justification of protecting women's health. The court's ruling makes it very likely these targeted restrictions of abortion provider laws in many states will be struck down.

In the affirmative action case, Kennedy wrote for the court, in a 4-3 decision (Kagan was recused because she had been involved in the case as solicitor general). The court upheld the University of Texas plan that used race as one of many factors in undergraduate admissions decisions.

Perhaps most surprising was the tone of Justice Kennedy's majority opinion. 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.

Most important, the court expressed the need for deference to educational institutions and their value as "laboratories for experimentation."

Never before had Anthony Kennedy voted to uphold an affirmative action plan. Only once before since coming on the Court in February 1988 had he voted to strike down any abortion restriction.

These cases make it clear that because of 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. Obviously, whether this continues and for how long is one of the many things to be determined by the presidential election.

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