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Kennedy’s Retirement: Despair Not, Go Out and Organize

Bruce Ledewitz
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JURIST Guest Columnist Professor Bruce Ledewitz of Duquesne University School of Law, discusses the impact of US Supreme Court Justice Kennedy’s retirement and the potential for a revival of democratic values . . .

The retirement of Justice Anthony Kennedy this week represents the end of an era and the beginning of the entrenchment of a more conservative Supreme Court, probably for years to
come. That much seems clear. But there are actually many more sides to Justice Kennedy’s retirement than that simple statement implies.

Justice Kennedy was nominated to the Court in 1987 by President Ronald Reagan. Everything about his nomination bespoke an earlier, less politically polarized moment in American history. Kennedy replaced another centrist figure on the Court, Justice Lewis Powell. Kennedy was not identified with a conservative ideology or methodology of interpretation, in contrast to the failed nomination of Judge Robert Bork, whose place Kennedy took on the Court. *Kennedy was confirmed* by a vote of 97-0, with three Democrats absent from the Senate. A similarly unanimous confirmation vote for any Supreme Court nominee is inconceivable today.

For much of his time on the Court, Justice Kennedy has functioned as a deciding vote. This has especially been the case since the *retirement* of Justice Sandra Day O’Connor in 2006. In recent years, there have generally been two opposed four-Justice blocs on the Court, one liberal and one conservative, with Justice Kennedy often in the middle.

This has led to a certain misconception about Justice Kennedy. He is best known for a series of liberal positions in the areas of *abortion*, *gay rights*, the *death penalty* and *affirmative action*. But most of his votes during his tenure on the Court have actually been cast in a conservative direction. That reality was especially evident during this *past term*, when he sided with the conservative bloc in a series of important cases.

Certainly, Justice Kennedy’s main legacy will be a series of liberal positions. Since joining Justices O’Connor and David Souter in the 1992 plurality reaffirming *Roe v. Wade*—albeit a somewhat diminished version—in *Planned Parenthood v. Casey*, Justice Kennedy has stood firm against any effort to overrule *Roe*. Justice Kennedy has permitted restrictions on abortion—he authored the 2007 opinion upholding a ban on partial birth abortions in *Gonzales v. Carhart*—but *Roe* was safe while he remained on the Court. President Donald Trump has *promised* to appoint Justices who will overturn *Roe* and now he will have the opportunity to finally fulfill this promise.

Similarly, Justice Kennedy authored a series of important decisions concerning gay rights, most significantly *Lawrence v. Texas* in 2003, outlawing the criminalization of adult, consensual gay sex, and *Obergefell v. Hodges* in 2015, constitutionalizing the right to same-sex marriage. *Obergefell* is now also potentially on the judicial chopping block. In contrast to those threats, Justice Kennedy’s juvenile sentencing cases *limiting* death penalty and life without parole sentences for offenders under 18 at the time of the crime, seem pretty secure, even with a more conservative Court. Likewise, his important suggestion in 2007, in a concurrence in *Parents Involved v. Seattle School District*, that “race-conscious” actions by school authorities taken to prevent segregated schools, might not
constitute racially discriminatory action for constitutional purposes, might yet prove a workable distinction in that field.

In the area of religion, Justice Kennedy's legacy is pretty evenly balanced. He authored both the important precedent **Lee v. Weisman** in 1992, outlawing government sponsored prayer at public school graduations, and, just this term, the **Masterpiece Cakeshop** opinion, protecting the right of a baker to refuse to bake a cake for a same-sex wedding, for reasons of religious conscience. In the **Hobby Lobby** case in 2014, Justice Kennedy wrote a noteworthy concurrence attempting to bridge the gap between the majority's protection of religious liberty and the dissent's argument in favor of the rights of female workers by suggesting alternative means for the government to provide contraception coverage.

But most of Justice Kennedy's decisions are firmly conservative. Certainly that is so with regard to free speech. Justice Kennedy was the author of **Citizen's United v. FEC** in 2010, the case that recognized the right of corporations to engage in political speech and political funding, and, just this term, he joined decisions outlawing the agency fee for public sector unions—**Janus v. AFSCME**—and protecting the free speech rights of pro-life clinics in **NIFLA v. Becerra**.

Also during this term, Justice Kennedy joined the conservative bloc in allowing Ohio to purge voter rolls in **Husted v. A. Philip Randolph Institute**, restricting the right of workers to file class-action lawsuits against their employers in **Epic Systems v. Lewis**, and upholding President Trump's travel ban in **Trump v. Hawaii**. To that extent, Justice Kennedy's retirement will just reinforce an already conservative-leaning Court.

The other sides of Justice Kennedy's retirement are political and jurisprudential. Politically, this retirement and its implications vindicate the might-makes-right philosophy of Senate Majority Leader Mitch McConnell, whose disgraceful refusal to allow a vote on the Supreme Court nomination of Judge Merrick Garland set the stage for Justice Neil Gorsuch's Supreme Court confirmation, which in turn will cement a conservative majority when Justice Kennedy's replacement joins the Court.

On the other hand, this new conservative majority may turn out to be a case of be-careful-what-you-wish-for, for Republicans. For years, Republicans have rallied pro-life voters without delivering much of anything for them. Those voters will now expect **Roe** to be overruled. A failure to accomplish that result would severely weaken the Republican Party coalition.

But this previous Republican Party electoral strategy has been almost costless because pro-choice voters could not be similarly marshalled while **Roe** remained safely the law. As divided as Americans are about abortion, simply overruling **Roe** without any concurrent protections for women—a not unlikely judicial outcome with a more conservative majority—will be very unpopular with the American people. Even before that occurs, the confirmation vote on
Justice Kennedy's replacement will take place in the midst of next fall's midterm election campaign and the prospect of Roe's demise will energize Democratic voters.

Jurisprudentially, Justice Kennedy's replacement is likely to further consolidate the conservative interpretive methodology of originalism. Justice Gorsuch was perhaps the first expressly originalist Supreme Court judicial nominee since the disastrous confirmation fight over Robert Bork. But he will not be the last. Justice Kennedy's replacement will probably also publicly embrace originalism.

There is reason to be skeptical about Justice Gorsuch's commitment to originalism—in his first important case, he voted to require States to allow churches to participate in public funding programs under a non-originalist interpretation of the Free Exercise Clause—but there is no question that the philosophy of legal positivism is now ascendant. The conservative claim that judges should enforce the law without regard to norms, values or justice, is established. As Justice Gorsuch put it in his Epic Systems majority opinion, “The policy may be debatable but the law is clear.”

As monumental as all this sounds, there is reason to question how important a more conservative Supreme Court will turn out to be. The most obvious positions of the post-Kennedy Court are likely to be negative. The Court will be less protective, or not protective at all, of the right to choose, the right to same-sex marriage, the rights of criminal defendants and the right to vote. But the Supreme Court will not actually threaten these rights. The Justices simply may not defend them.

There are exceptions to this judicial passivity, of course. The new Court will be even more anti-union. It will protect big campaign contributors from regulation. It will protect religious believers in the exercise of conscience. And the Court may even attempt to limit the power of Congress to legislate.

But even in its more affirmative positions, these actions by the Court would still be marginal in terms of American public life as a whole. Such actions may make it a little more difficult to overturn the current status quo, but that is all the Justices really can do.

That leaves matters to the rest of us—the voters. For the retirement of Justice Kennedy may have the unexpected result of leading to a genuine rebirth of American democracy. Yes, efforts are made, often successfully, to interfere with the will of the voters. Gerrymandering is openly practiced. Voter ID laws are adopted for partisan purposes. The anti-democratic structures of the Constitution—the Electoral College and the makeup of the Senate—also restrict majority rule. And big money wants to have its way.

Yet, with all that, the American people are not helpless. Basically, as the stalled effort to repeal Obamacare demonstrated, the will of the people still decides policy in America. We can have
the country and the future that we insist upon. The question is really one of commitment. Anyone unhappy or fearful because of the retirement of Justice Kennedy has a clear path to follow—as the labor movement used to say, “go out and organize.”

Bruce Ledewitz is a professor of law at Duquesne University School of Law and the co-director of the Duquesne’s Pennsylvania Constitution website. He teaches in the areas of state and federal constitutional law and jurisprudence, specializing in law and religion and law and the secular.


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