

FORTUNE

How the Supreme Court Will Continue to Change the Workplace

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THE CONSERVATIVE GRIP on the Supreme Court is set to be cemented for a generation if President Trump's nominee, federal appeals-court judge Brett Kavanaugh, navigates his Senate confirmation hearing. The arrival of Kavanaugh, who is ideologically further to the right than outgoing Justice Anthony Kennedy, would influence many aspects of U.S. society—not least the rules governing American workplaces.

As the court wrapped up its most recent term, it delivered a pair of decisions that effectively expanded employers' leverage over their employees. In *Janus v. AFSCME*, Justice Samuel Alito wrote for a 5–4 majority that speech protections in the First Amendment mean that government workers cannot be compelled to pay union dues, since that could force them to financially support political stances they didn't agree with. *Janus* will hurt the coffers of public unions, which fight for worker benefits and protections and support candidates who do the same.

In a blistering dissent, Justice Elena Kagan accused the majority of “weaponizing the free speech clause for political ends. Indeed, *Janus* is one of many recent rulings that define freedom of expression in ways favorable to corporations. Others include the 2014 Hobby Lobby decision, which gave a religious exemption to employers who objected to covering birth control in their health care plans. As for Kavanaugh's record, it strongly suggests that he supports this view of the First Amendment (see sidebar).

In Kavanaugh's Past Rulings, Clues To His Views On Big Business

Seaworld of Florida v. Perez

Decided April 2014

Kavanaugh was the lone dissent in a case involving a SeaWorld trainer killed during a killer-whale show. The court upheld a ruling that SeaWorld violated workplace safety standards. But Kavanaugh, in a scathing dissent, likened the whale show to a dangerous sport such as football or boxing, where the participants know the risks.

Venetian Casino v. NLRB

Decided July 2015

Writing the opinion of the court, Kavanaugh asserted that the Venetian Casino in Las Vegas did not violate labor laws by requesting that police issue citations to union workers demonstrating on

its private property. Kavanaugh wrote that the casino had a First Amendment right to petition the government in that matter.

Agri Processor v. NLRB

Decided Jan. 2008

Agri Processor, a meatpacking company in New York, refused to recognize the formation of a workers union because undocumented migrants it employed had voted for unionization. (The company fired the workers soon after.) Kavanaugh agreed that NLRB protections do not apply to the undocumented.

While these rulings have generated considerable Sturm und Drang, another recent Supreme Court case, on class action lawsuits brought by employees, packs a broader punch. In a 5–4 ruling, in May, the court held that companies are free to include clauses in employment contracts that force workers to use arbitration rather than courts to enforce their rights—a decision with implications in areas ranging from pay disputes to workplace sexual harassment.

“This is great news for those of us who believe in freedom of contract, and who think the remedy for an unsatisfactory job is to quit and get another,” says Walter Olson, a legal scholar with the libertarian Cato Institute. Labor advocates oppose the arbitration clauses, in part because they result in sealed settlements that can keep shady practices under wraps. Craig Becker, general counsel for the AFLCIO, argues that while employees can pursue cases with state and federal agencies, these agencies are understaffed and don’t present the same deterrent as a potentially costly lawsuit. Congress could change the arbitration law, but that would likely require both a Democratic Congress and a Democrat in the White House.

The paper trail suggests that Kavanaugh supports employers’ rights to enforce contracts like these—effectively making him the sixth vote in a powerfully pro-business bloc. Knowing that the high court will be a bulwark against frivolous lawsuits will free up companies to be more nimble in hiring the people they need and removing nonperformers.

Still, even as employers enjoy the most power they’ve had in half a century, they may be hesitant to exert it too forcefully. That’s because they also have to answer to an even more powerful body: the court of public opinion. And at a time of sluggish wage growth and simmering economic insecurity, there’s no telling how that court may rule if business overplays its hand.