



Assessing Justice Kennedy's Legacy

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Supreme Court Justice Anthony Kennedy retired earlier today, a move that has major implications for the future of the Court. But Kennedy also had a massive impact on the Court's jurisprudence over his thirty year tenure, particularly during the last twelve years, when he was the key swing voter on many issues. Politico recently published [a symposium](#) on Kennedy's legacy, with commentary by numerous legal scholars and commentators. Here's an excerpt from my contribution:

Justice Anthony Kennedy leaves behind a mixed legacy. It includes elements that appeal to both sides of the political spectrum. Kennedy's most famous and influential opinions are probably his rulings in four landmark gay rights cases: *Romer v. Evans*, *Lawrence v. Texas*, *United States v. Windsor*, and—most of all—*Obergefell v. Hodges*, which struck down laws banning same-sex marriage. He was a key figure in the rapid progress gays and lesbians have made towards legal equality over the last 25 years. But Kennedy also wrote opinions or provided key votes for numerous "conservative" outcomes, particularly in free speech, affirmative action and federalism cases....

Kennedy's methodology was just as eclectic as the political valence of his opinions. In some cases, he relied on vague and fuzzy standards that made it difficult to figure out exactly what rule his decision establishes or why. *Obergefell* (despite my agreement with the result) was a notable example. But there are many other Kennedy opinions that are much more rigorous and formal, as in his free speech jurisprudence.

Kennedy's greatest strengths were his staunch political independence, and his genuine commitment to liberty and equality for people of widely differing backgrounds and views....

It was interesting to see the wide range of perspectives in the symposium, particularly among the liberal participants. Some of them take a very positive perspective on Kennedy's legacy, while others are much more negative.

At this point, we may not have enough historical distance from Kennedy to properly assess his impact. We may have a very different view twenty or thirty years from now than we do today. Nonetheless, my tentative assessment is that Kennedy's judicial philosophy was not especially impressive, but he nonetheless did a great deal of good when it comes to specific legal doctrines. From a libertarian perspective, it may even be that no other modern Supreme Court justice has done as much good as he did.

When it comes to methodology, Kennedy was - as I suggested in the symposium, highly inconsistent. The problem is not just that he used different methods in different cases, but that he never gave much indication why he relied on formalist and textualist arguments in some situations, but a very different approach in others. Some of his fuzzier opinions have drawn criticism even from many who agreed with the results. For example, I was happy to see the result in *Obergefell*, but was not impressed with its somewhat muddled reasoning.

But when it comes to specific cases and doctrines, Kennedy often moved the Court in beneficial directions. Many participants in the symposium correctly note his crucial role in the gay and lesbian rights decisions. Without his work, this long-oppressed minority might have remained second-class citizens for considerably longer. That certainly would have been the case had President Reagan appointed a more conventional conservative in 1988, and especially if the Senate had confirmed Robert Bork (whose 1987 defeat led to Kennedy's nomination). I believe he should have reached the results he did in those cases by clearer and more logically coherent routes. But reach the right results he did.

As Ilya Shapiro of the Cato Institute points out in the Politico symposium, Kennedy was probably the most speech-protective justice in the history of the Supreme Court. He consistently voted to strike down both those speech restrictions favored by the left (such as campaign finance regulations) and those promoted by the right (such as restrictions on flag-burning and sexually explicit speech). Kennedy was a major figure in strengthening protection for freedom speech across the board, and his opinions in this field are, on the whole, far more coherent and well-thought out than the ones on gay and lesbian rights. Here too, Kennedy was far better than Bork (who had a very narrow conception of freedom of speech) probably would have been.

With one notable exception discussed below, Kennedy also consistently voted to strengthen judicial enforcement of structural constraints on federal power. That was an important and valuable doctrinal trend that accelerated during the Roberts Court, in large part thanks to Kennedy's support. His opinions in this field, like speech, were usually well-thought out and carefully reasoned. That includes some lesser-known cases, such as *Bond v. United States I*, which I analyzed here. In that case, Kennedy managed to secure unanimous support for the crucial proposition that federalism constraints on national power are meant to protect individual citizens, not just state governments. Liberals decried many of his federalism decisions at the time. But they may have reason to thank him now, when some of these rulings are crucial to their efforts to protect sanctuary cities and otherwise combat the Trump administration, a circumstance that has led some on the left to rethink their attitudes to these issues.

Against these major positives, Kennedy also gave us three massive clunkers, where he cast key votes in favor of terrible results: Kelo v. City of New London, Gonzales v. Raich, and - most recently - the travel ban case. The works linked in the previous sentence summarize my objections to these rulings, all of which I regard as grave errors. I also agree with many of the negative assessments of Kennedy's travel ban concurrence offered by some of the symposium participants, and by Cass Sunstein here. Kennedy's last opinion undermines his otherwise strong record of combating unconstitutional religious discrimination by government.

In the *Raich* case, he voted for the holding that Congress' power to regulate interstate commerce was broad enough to justify a ban on the possession of medical marijuana that had never crossed state lines, or been sold in any market even within a single state. This conclusion is both badly flawed in itself, and at odds with his record in other federalism cases. I am also no fan of Kennedy's recent majority opinion in Murr v. Wisconsin, an important takings case, where he undercut protection for constitutional property rights and created a muddle for lower courts to sort out.

But these serious errors are not enough, in my view, to outweigh the significant good Kennedy achieved in a lot of other cases across multiple important issue areas. Kennedy was perhaps the only Supreme Court justice who struck important blows for the constitutional rights of both same-sex couples and social conservatives with religious objections to same-sex marriage. When it came to protecting liberty for a wide range of people with differing backgrounds and views, Kennedy had fewer blind spots than almost any of his colleagues.

Because he did not produce much in the way of an overarching judicial philosophy, assessments of Kennedy's record necessarily depend greatly on one's views of particular cases and doctrines where he influenced the outcome. For that reason, I can readily understand how conservative pro-lifers and liberals who believe that campaign finance regulation is essential to democracy, might take a far dimmer view of Kennedy's record than I do. As cases like *Kelo* and *Raich* demonstrate, Kennedy was by no means a consistent libertarian, just as he was not a consistent liberal or conservative, originalist or living constitutionalist. But we libertarians nonetheless have much reason to be grateful to him.

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