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# Justice Kennedy's exit and higher ed

Aldemaro Romero

The recent announcement of the July 1 retirement of Associate Justice to the U.S. Supreme Court Anthony M. Kennedy has already created a political storm about many issues ranging from reproductive rights to LGBTQ issues. What effects can we expect on higher education from his departure and the potential appointment of a new justice by President Trump? Plenty. Let's begin by examining those decisions in which Kennedy participated that directly affected colleges and universities.

Affirmative Action has always been a bone of contention between conservative and liberal justices on the court. For one thing, liberals see the concept – first established by an executive order from President John F. Kennedy in 1962 – as a way to bridge societal inequalities, including access to education. In fact, not long ago many colleges and universities discriminated against non-whites, non-Christians, and women in their admission processes. Conservatives have argued that affirmative action policies represent “reverse discrimination” against whites, and, therefore, should not be used, particularly when it came to establishing quotas.

In this matter, Kennedy's opinions seem to have evolved. For example, in the 2003 court's ruling in *Grutter v. Bollinger* that upheld race-conscious admissions at the University of Michigan Law School, he dissented. However, in the 2016 decision in *Fisher v. University of Texas at Austin* (a decision he wrote) he sided with the liberal faction that supported not only the idea of using race as a factor in admissions, but also gave deference to the autonomy of institutions to make those admissions policies.

Although there is a tradition of not reversing well-established precedents, political observers believe that a new conservative majority will be tempted to do so. That will certainly be the case if Kennedy's replacement happens to be an activist, conservative justice. In the last few weeks the Justice Department has launched an investigation into alleged racial discrimination against Asian-American applicants by Harvard University, which signals yet another attempt to dismantle the very concept of affirmative action.

Another hot issue on college campuses lately has been that of free speech. Conservatives have been arguing that hostile policies

and practices against right-wing speakers on campuses is a violation of their freedom of speech rights. In the 2010 ruling on *Hastings Christian Society Fellowship v. Martinez*, Kennedy joined the court's four liberal justices in finding that the University of California's Hastings College of Law had not violated the First Amendment in denying official recognition to a Christian student group that effectively excluded gay students from membership. The law school requires that all official student groups be open to all.

Kennedy also wrote the majority opinion in the 2006 case *Garcetti v. Ceballos*, in which the court ruled that public employees could be disciplined for speech made while carrying out their official duties. This case was brought to court by the plaintiff Richard Ceballos, who had been a deputy district attorney in Los Angeles County since 1989 and who argued that he had been passed up for a promotion for criticizing the legitimacy of a warrant. Kennedy sided with the conservatives in this 5-4 decision.

Although this ruling seems on the surface to be irrelevant to higher education, it is not. Think about faculty members at public institutions who express opinions that can be considered as “offensive” or “unorthodox,” or

that express controversial ideas? If faculty members were to be disciplined for doing so, part of the disciplinary actions against them could be dismissal (even if they have tenure), which is a direct violation of one of the most important principles in higher education: academic freedom.

Although no specific case dealing with academic freedom has yet to be brought to the U.S. Supreme Court, the *Garcetti v. Ceballos* case could be used by a more conservative court as a basis to allow punishment of controversial faculty members because of their opinions expressed either in the classroom or in a more public forum.

In the two latest decisions by the court – upholding Trump's travel ban (*Trump v. Hawaii*) and striking down mandatory membership fees for public sectors unions (*Janus v. American Federation of State, County, and Municipal Employees Council*) – Kennedy sided with the conservatives in these 5-4 decisions.

The first decision will impact further the enrollment of international students (whose numbers have been declining since Trump was elected president), which in turn affects colleges and universities that need that tuition money to survive. These institutions, mostly because of diminishing demographics, need

international students to make up for fewer U.S. students enrolling in an environment in which public institutions are receiving less and less support from the government.

The second decision means that faculty at public institutions will see weakened unions to represent them in negotiations with university administration.

Based on all of the above it is clear that Kennedy's departure and his likely replacement by a more conservative justice poses a more dire future to higher education in this country. Although it is too early to tell, this may be a pivotal moment in the history of American higher education because it can affect in dramatic ways and for decades to come three essential pillars of colleges and universities as institutions: access to higher education, freedom of speech on campuses, and the most solid tradition of all in academia, freedom of inquiry, a tradition whose history dates back to the medieval ages when faculty members were protected from backlash for their intellectual works.

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