Op-ed: Is Brett Kavanaugh Angling to Be the Next Anthony Kennedy?

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(Excerpts from this op-ed written by David Flugman were originally published in LGBTQ Nation)

The balance between religion and LGBTQ rights, and the fate of the Affordable Care Act, are front and center in a pair of important cases argued at the Supreme Court this month.

Watching Kavanaugh, it certainly seems like he is trying to occupy the position of "swing justice" held by Kennedy, his old boss.

As a result of Kennedy's 2018 retirement and the recent confirmation of Amy Coney Barrett, the Court now has a solid 6-3 conservative majority. There is no doubt that the Court has moved decidedly to the right, and along with it the "center" that any justice in the middle would occupy.

It would be a mistake, however, to view the block of six conservatives as a monolith; there are real differences among them in judicial philosophy and respect for precedent.

Justice Kavanaugh styles himself as neither a rigid doctrinaire nor a zealous institutionalist. He is not openly hostile to the LGBTQ community. Quite to the contrary, it seems these days like Justice Kavanaugh is going out of his way to be overly solicitous towards LGBTQ people.

Take last term's Bostock case, in which Justice Neil Gorsuch, joined by Chief Justice Roberts and the then-four left-leaning justices, held that Title VII of the Civil Rights Act of 1964 prohibited discrimination in employment on the basis of sexual orientation and gender identity as a form of sex discrimination.

Kavanaugh wrote separately from the other two conservatives (Thomas and Alito) to emphasize—even while voting against us—that LGBTQ people should "take pride" in the Court's decision, one that resulted from our community's "extraordinary vision, tenacity, and grit."

Is this the soaring rhetoric of Justice Kennedy's final paragraphs of Obergefell? Certainly not. But one can certainly make the case that the words on the page signal that the Justice at least understands that LGBTQ people have fought hard for their rights and are entitled to respect and dignity.

Fast-forward to this month's Fulton v. City of Philadelphia and we see a Justice Kavanaugh who appeared to struggle to find an answer somewhat more restrained than the Thelma & Louise-style drive-off-the-cliff result urged by right-wing litigants.

Fulton involves a policy prohibiting entities that contract with Philadelphia from discriminating on the basis of sexual orientation. Catholic Charities is one of many organizations that contracted with the city to screen and certify potential foster parents. But unlike those other organizations, Catholic Charities refuses to consider same-sex married couples, claiming that doing so would violate its religious opposition to same-sex marriage.

The case generally presents two questions.

The first asks whether Philadelphia's policy, as applied to Catholic Charities, is constitutional under the thirty-year-old rule in Employment Division v. Smith. That rule holds that so long as a law is generally applicable and is neutral towards religion (meaning that it does not – on its face or in practice – target religion) it can withstand a free exercise challenge.

The second question asks whether the Court should throw the Smith rule out entirely and substitute a "strict scrutiny" test for any law that imposes upon a particular religious belief or practice. The

consequences to the LGBTQ community (among others) of imposing such a test—the toughest known to constitutional law—are hard to overstate.

In a world where every law is subject to override by anyone's sincerely-held religious belief, an LGBTQ person's right to eat in a restaurant, stay at a bed and breakfast, visit a spouse in a hospital, or obtain medical treatment could suddenly be in jeopardy, notwithstanding state and federal nondiscrimination laws.

Justice Kavanaugh's questions during the Fulton argument provided little comfort for those of us who want to see the Court rule in favor of the city. But they do suggest that he is not looking to go so far as to upend Smith.

True, at one point he characterized the city's position as "extreme" (as if insisting that entities that receive government contracts and funding must treat all people equally is somehow radical). But he also zeroed in on the specific facts of the case in a way that indicated a desire to strike a "balance" between forcing Catholic Charities to consider same-sex couples, on the one hand, and blanket adopting the strict scrutiny test for all religious challenges, on the other.

He asked whether there was a "win/win" result here, observing that there were several dozen other agencies that contracted with Philadelphia to certify foster parents considered LGBTQ couples without issue. And in so doing, he made clear that he recognized that the equal treatment of LGBTQ people was an important interest that the Court must consider.

Where the balance eventually is struck between that interest and the religious liberties of these and future plaintiffs is unclear. But at least Kavanaugh seems willing to concede that there is a spectrum, and that religious liberty does not and should not override civil rights protections as a matter of course. At the moment, that might be the best we can hope for.

Kavanaugh similarly signaled his unwillingness to go to an extreme during arguments this past week in the most recent challenge to the Affordable Care Act. Invoking the doctrine of severability, in which a court striking down individual parts of a law will still permit the rest of the law to stand, Kavanaugh made clear his view that even if the Court were to find parts of the landmark 2010 law unconstitutional, the rest of the law should survive.

Again, not the result that the right-wing—which has spent the last decade trying to overturn the ACA in Congress and the courts—is hoping for.

So, in a world in which Justice Kavanaugh is the ideological center, how do we as advocates for LGBTQ equality move him closer to results that affirm our rights?

Like any good lawyer will tell you, listen to the judge's concerns and craft your arguments accordingly. Emphasize the ways in which our dignity and worth are being denigrated by discriminatory practices.

File amicus briefs explaining the real-world consequences of the issues the Court is considering and why, practically speaking, religious liberties will not be impaired by a decision in our favor.

Support our arguments with data—statistics compiled by respected think tanks like UCLA's Williams Institute—that make it harder to deny the importance of these issues to LGBT people.

And continue to fight tooth and nail for our rights, because while there is no denying that we have come very far, legal decisions matter in people's lives—none more so than those of the Supreme Court.

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