Looking back on the 2017-18 Supreme Court term

By **JULIE UNDERWOOD**

The end of the latest Supreme Court term brought some important rulings for education and launches a time of transition for the Court.

Janus is the Roman god of beginnings, endings, and transitions, usually shown with two faces to allow him to look both backward and forward. What a perfect name for the tumultuous end of the 2017–18 U.S. Supreme Court term.

At the end of the term, the Court handed down a few cases of importance to public education, including one entitled Janus. Then, of course, we received the news that Justice Anthony Kennedy was resigning from the bench after 30 years. Justice Kennedy has been an important figure on the bench as author of many landmark opinions, including two outlined below. Generally conservative, but with a libertarian streak, he often has been a swing vote between the traditional liberal and conservative factions.

On July 9, President Donald Trump announced Brett Kavanaugh from the U.S. Court of Appeals, a conservative with a long track record in Republican politics and on the bench, as his nominee to replace Justice Kennedy.

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The replacement of a justice has incredible importance to the Court and to the law. In the current political environment, the nomination and confirmation process is bound to be dynamic. I discuss Kennedy's legacy and Kavanaugh's confirmation in more detail on the *Kappan* website (www.kappanonline.org).

Three decisions from the most recent term are of particular relevance to education.

Janus v. American Federation of State, County, and Municipal Employees Council 31 (2018)

In a 5-4 decision, the Court held that mandatory fair share fees violated the plaintiff's First Amendment rights to free speech, since the funds could be seen as requiring individuals to financially support political positions with which they may not agree.

As I wrote in this column last spring ("What *Janus* means for teachers' unions," May 2018), public employee unions in Illinois and 22 other states were allowed to collect a "fair share" payment from nonunion member employees. This fee was intended to defray the cost of representing the employees during workplace contract negotiations but workplace contract but does not include the union's cost in engaging in outreach or political activity. Mark Janus, a public healthcare worker, argued that the fees force him to support the union's political speech with which he does not agree, violating his First Amendment rights to free speech.

The U.S. Supreme Court held that "The State's extraction of agency fees from nonconsenting public sector employees violated the First Amendment," thus adopting Janus' argument that the collective bargaining process in a public setting is itself inherently political because it involves policy issues of spending, wages, pensions, and so on. Compelling public employees to pay union fees (or dues) forces the employee to support the union's speech on matters of public concern. The decision, which overruled *Abood v. Detroit Board of Education* (1977), was not unexpected since *Frederichs v. California Teachers Association* (2016) brought forward basically the same issue and resulted in a 4-4 stalemate after Justice Antonin Scalia's death.

Justice Elena Kagan's sharply worded dissent noted the reversal with the previous line of cases and the likely financial impact on unions. Since individuals will be able to reap the benefits of negotiations without having to contribute to the cost, there is likely to be a loss in union membership, and unions may be put in a position of not being able to fulfill their primary role in negotiations and representation.

Reaction from parts of the education community has been strong. The American Federation of Teachers press release was acerbic, stating, "The *Janus* case was about defunding unions." The release from the Network for Public Education stated that the "decision is intended to cripple our

public sector unions." On the other side, the Center for Education Reform applauded the decision, observing that it ended "the decades long assault on worker freedom."

In light of this ruling, districts that currently collect fair share fees should make certain that their policies are updated to reflect this decision. (Note that 27 states and the federal government do not require public employees to pay union fair share fees.) In districts where the collective bargaining agreement requires payment of fair share fees, that agreement most likely will need to be renegotiated. If districts collect union dues from members, it should be clear that the employee has authorized that payment before it is taken.

Where unions are the exclusive bargaining agent for employees, they will still be required to represent nonmember employees, even though they will not be collecting any funds from them. The *Janus* opinion clearly states that a union's duty of fair representation is a necessary part of its authority as an exclusive bargaining representative.

South Dakota v. Wayfair, Inc. (2018)

This case is about whether a state has the authority to collect sales tax from online retailers when they have no physical presence in the state. Noting its inability to garner sales tax revenue in the face of increasing online sales, South Dakota passed a law requiring collection of sales tax from all retailers over a certain size. This was in defiance of previous U.S. Supreme Court cases that required a "physical presence" in a state before they could collect these taxes.

The 5-4 decision features an unusual alliance of justices. Justice Ruth Bader Ginsburg joined conservative justices Clarence Thomas, Samuel Alito, and Neil Gorsuch. Also in the majority was Justice Kennedy, who wrote the opinion. On the dissenting side, Chief Justice John Roberts joined the more liberal justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan.

The decision in favor of South Dakota overruled *National Bellas Hess, Inc. v. Illinois Dep't of Revenue* (1967) and *Quill Corporation v. North Dakota* (1992), cases that had been decided during the days of mail-order commerce. Modern brick-and-mortar retailers have argued that not taxing online retailers imposes a significant disadvantage to them, even though they are creating jobs in the states where they have a physical presence. Stating that "modern e-commerce does not align with a test which relies on . . . physical presence," the Court determined that there was sufficient nexus to allow South Dakota to collect these sales taxes.

What does this mean for education? If states choose to, they will be able to collect funds from the volume of internet commerce currently taking place. The decision is seen positively for states' tax coffers and for public schools in those states where education is funded through sales tax revenues.

Lozman v. City of Riviera Beach (2018)

Also in June, the Court released an opinion about public speech at a public meeting. Fane Lozman was a persistent public critic of the Riviera City, Fla., Council. Specifically, he had filed a lawsuit challenging the procedures the city used during a meeting in which the council decided to use eminent domain to redevelop the Riviera Beach Marina. At a subsequent regular public meeting, Lozman was speaking during the public comment portion of the agenda, which he did regularly. When his comments moved into the issue of local government corruption, he was told to stop speaking. He ignored that instruction, and the council had Lozman removed from the meeting and arrested for violating the council's rules by discussing issues unrelated to the city and refusing to leave the podium.

Lozman did not challenge the city's policy on limiting the subject matter during the public comment period. He only challenged the lawfulness of his arrest, arguing that it was retaliation against his persistent comments at public meetings, his public criticism of public officials, and his lawsuits against the city.

Showing that it is not deeply divided about every issue, the Court ruled against the city in an 8-1 decision written by Justice Kennedy. The focus was on Lozman's right to address public officials at a public meeting:

> [I]t must be underscored that this Court has recognized the right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights. Lozman alleges the City deprived him of this liberty by retaliating against him for his lawsuit against the City and his criticisms of public officials. Thus, Lozman's speech is high in the hierarchy of First Amendment values.

The Court applied the standard set out in *Mt. Healthy City Board of Educ. v. Doyle* (1977): To prevail, Lozman must show that the retaliation was a substantial or motivating factor in his arrest rather than the city being able to prevail by showing that there was probable cause for his arrest. Simply put, if Lozman can show the arrest was substantially motivated by the council's ire toward him, he wins.

The standard applied in this case applies to school board meetings as well as city council meetings. Most school boards have public comment periods, and many encounter individuals who are persistent and sometimes challenging. The Court was clear, though, on the importance of allowing free speech in such public settings.

The Court opens the 2018–19 term on the first Monday in October. As always, there is a lot to look forward to.