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Justice Kennedy's Gendered World

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I. INTRODUCTION

In trying to understand how the Roberts Court will address issues of sex discrimination and equal protection, it would make sense to focus on the two new Justices on the Court and how they might vote in upcoming sex discrimination cases. After all, the difference between the stable Rehnquist Court of the 1990s and early 2000s and the new Roberts Court is Chief Justice Roberts and Justice Alito. However, for this Article, I am going to assume that what we have seen so far from Chief Justice Roberts and Justice Alito—that in issues of antidiscrimination law they will consistently vote with Justices Scalia and Thomas[1]—will remain true and that their future votes will not be difficult to predict.

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1. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2745 (2007); Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2165 (2007); Gonzales v. Carhart, 127 S. Ct. 1610, 1618 (2007); League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594, 2603–04 (2006). *But see* CBOCS West, Inc. v. Humphries, 76 U.S.L.W. 4322 (U.S. May 27, 2008) (reporting that Chief Justice Roberts and Justice Alito joined the majority in favor of a civil rights claim, with Justices Scalia and Thomas dissenting); Gomez-Perez v. Potter, 76 U.S.L.W. 4331 (U.S. May 27, 2008) (reporting that Justice Alito wrote the majority in favor of a civil rights claim, with Chief Justice Roberts joining Justices Scalia and Thomas dissenting).

Thus, rather than focusing on Chief Justice Roberts and Justice Alito, the focus should be on Justice Kennedy, the Justice whose vote will be the most important in determining the Court's approach to sex discrimination. Justice Kennedy is now believed to be the Court's median Justice[2]: the Justice who sits in the ideological center of the Court, so that half of the Justices are more conservative and half are more liberal.[3] The median Justice is not to be confused with a Justice who is ideologically moderate, as the median Justice can be very conservative or liberal, just not as conservative or liberal as the four other Justices to the ideological left or right.[4] In his role as the median Justice, Justice Kennedy has been enormously successful at having his views adopted by the Court as a whole. Last Term, in his first full Term as the new median Justice, Justice Kennedy dissented only twice and sided with the majority in all twenty-four closely divided cases.[5] Because of his new role and power on the Court, Justice Kennedy has been receiving increased attention.[6]

Despite this increased attention to Justice Kennedy and his twenty years on the Court,[7] little scholarly attention has been paid to his views and jurisprudence on sex discrimination. Scholars have focused on related issues, such as his overall philosophy about equality,[8] his moral roots,[9] and his views on employment

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2. *See* Charles Whitebread, *The Conservative Kennedy Court–What a Difference a Single Justice Can Make: The 2006-2007 Term of the United States Supreme Court*, 29 WHITTIER L. REV. 1, 3 (2007) (noting 2006-2007 as the year of the "rise of the Kennedy Court"); Robert Barnes, *Justice Kennedy: The Highly Influential Man in the Middle*, WASH. POST, May 13, 2007, at A1 (discussing Kennedy's new role as the median Justice).

3. *See generally* Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275 (2005) (analyzing how to effectively identify a median justice).

4. *See* Cass R. Sunstein, *The Myth of the Balanced Court*, THE AM. PROSPECT, Sept. 13, 2007, at 28, *available at* http://prospect.org/cs/articles?article=the_myth_of_the_balanced_court (discussing the ideological composition of the Roberts Court and explaining that today's median Justice is much more conservative than median Justices in the past).

5. *See* Posting of Jason Harrow to SCOTUSblog, http://www.scotusblog.com/wp/uncategorized/justice-kennedys-remarkable-ot06/ (June 28, 2007, 17:20 EST). The phrase "closely divided cases" refers to those cases decided by a 5 to 4 or 5 to 3 vote.

6. *See, e.g.*, Linda Greenhouse, *Clues to the New Dynamic on the Supreme Court*, N.Y. TIMES, July 3, 2007, at A11 (discussing Kennedy's role in two key decisions since he became the median Justice); Jeffrey Rosen, *Supreme Leader: The Arrogance of Justice Anthony Kennedy*, NEW REPUBLIC, June 18, 2007, at 16; Stuart Taylor Jr. & Evan Thomas, *The Power Broker*, NEWSWEEK, July 16, 2007, at 36 (detailing an exclusive interview with Justice Kennedy); Edward Lazarus, *The Current Supreme Court Term, and the Pivotal Role of "Swing" Justice Anthony Kennedy*, FINDLAW, Dec. 6, 2007, http://writ.news.findlaw.com/lazarus/20071206.html (last visited Apr. 5, 2008) (discussing the media attention Kennedy has received since becoming the Court's new median Justice).

7. Justice Kennedy has served on the Court for twenty years as of 2008, having taken his judicial oath on February 18, 1988. Harvard Law School, Justice Kennedy Comes Back to HLS to Mark 20 Years on the Supreme Court (Mar. 12, 2008), http://www.law.harvard.edu/news/2008/03/12_kennedy.php (last visited Apr. 5, 2008) [hereinafter Justice Kennedy Comes Back].

8. *See* Akhil Reed Amar, *Justice Kennedy and the Ideal of Equality*, 28 PAC. L.J. 515 (1997) (discussing the views of Justice Kennedy on equality and the role his views have played in a few key opinions).

9. *See* Stephen E. Gottlieb, *Three Justices in Search of a Character: The Moral Agendas of Justices O'Connor, Scalia and Kennedy*, 49 RUTGERS L. REV. 219, 221–23 (1996) (explaining how the conservative Justices use their moral beliefs in deciding cases).

discrimination,[10] race discrimination,[11] children's rights,[12] and constitutional interpretation.[13] However, no scholarly literature has focused on his views regarding sex and gender. This Article seeks to fill that void by analyzing Justice Kennedy's sex discrimination jurisprudence and, based on that jurisprudence, drawing conclusions about his thoughts on sex and gender.

This Article proceeds in three Parts. Part I reviews the cases involving sex discrimination[14] in which Justice Kennedy has participated while on the Court and how he has voted in those cases. In particular, because of Justice O'Connor's previous role as the median Justice,[15] this Part compares Justice Kennedy's votes to Justice O'Connor's for cases in which they both sat to predict how different the Court's approach to sex discrimination will be with Justice Kennedy as the median Justice. Part II analyzes Justice Kennedy's votes and opinions in sex discrimination cases and attempts to summarize his views. Finally, Part III evaluates Justice Kennedy's conceptions of gender in his opinions and votes. Ultimately, this Article concludes that Justice Kennedy's new role as median Justice is troubling for sex equality jurisprudence generally and constitutional sex discrimination cases specifically, as Justice Kennedy has shown a tendency, in cases arising in the parent–child context, to adhere to traditional and paternalistic gender roles.

II. JUSTICE KENNEDY'S SEX DISCRIMINATION VOTES

Justice Kennedy has received well-deserved praise for some key votes and opinions during his tenure. His switch in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[16] rescued *Roe v. Wade*[17] from being overruled.[18] He was also part of the majority that found the Virginia Military Institute's policy of sex segregation unconstitutional.[19] Furthermore, he authored the majority opinions in

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10. *See* Robin Olinger Bell, Comment, *Justice Anthony M. Kennedy: Will His Appointment to the United States Supreme Court Have an Impact on Employment Discrimination?*, 57 U. CINN. L. REV. 1037 (1989) (analyzing Justice Kennedy's appellate court decisions and how his appointment will impact employment discrimination).

11. *See* Heather K. Gerken, Comment, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 105 (2007) (discussing Justice Kennedy's views on race and arguing that his views differ from those of Justices O'Connor and Powell).

12. *See* Daniel Gordon, *America's Constitutional Dad: Justice Kennedy and His Intricate Children*, 44 IDAHO L. REV. 161, 162 (2007) (discussing Justice Kennedy's role as a "constitutional guardian of America's children").

13. *See* Lisa K. Parshall, *Embracing the Living Constitution: Justice Anthony M. Kennedy's Move Away From a Conservative Methodology of Constitutional Interpretation*, 30 N.C. CENT. L. REV. 25, 28 (2007) (discussing Justice Kennedy's "approach to constitutional interpretation" that "appears to have embraced the concept of a "'living Constitution'").

14. This Article uses the term *sex discrimination* very broadly to include all issues touching on sex and gender. For more of a description of how the Article uses the term, see *infra* text accompanying notes 21–27.

15. *See* Martin et al., *supra* note 3, at 1300.

16. 505 U.S. 833 (1992).

17. 410 U.S. 113 (1973).

18. Tony Mauro, *Lifting the Veil: Justice Blackmun's Papers and the Public Perception of the Supreme Court*, 70 MO. L. REV. 1037, 1040 (2005) (citations omitted); Posting of JB to Balkinization, http://balkin.blogspot.com/2004/08/from-blackmun-papers-day-roe-v-wade.html (Aug. 21, 2004, 18:21 EST).

19. United States v. Virginia, 518 U.S. 515, 518, 519 (1996).

the two leading cases furthering the constitutional rights of gays and lesbians, under principles of both equality and liberty.[20] However, these high profile victories for antidiscrimination jurisprudence mask Justice Kennedy's overwhelming pattern of voting against parties raising sex discrimination claims.

Before setting forth the numbers that prove this tendency, I will first explain the case-counting methodology I used to reach this conclusion. From the 1,900 cases that Justice Kennedy has participated in since he joined the Court in 1988,[21] I collected all cases that addressed some element of sex discrimination. I was broadly inclusive within this rubric. Obvious inclusions were cases addressing Title IX,[22] abortion, and the Violence Against Women Act,[23] because these statutes and topics directly affect women and raise issues of equality and discrimination.[24] I included all Title VII and equal protection cases involving claims of sex discrimination,[25] as well as gay rights cases because of the important relationship between sexual orientation and gender construction.[26] Finally, I included several miscellaneous cases that peripherally considered sex and gender issues, such as pregnancy, paternity, private club discrimination, and sex education. In total, Justice Kennedy has participated in sixty-six cases that have touched on sex discrimination issues as I have broadly defined them here.[27] A complete list of the categorized cases I studied appears in Appendix A.

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20. Lawrence v. Texas, 539 U.S. 558, 562, 578–79 (2003) (finding a Texas law banning same-sex sodomy to be a violation of the Due Process Clause); Romer v. Evans, 517 U.S. 620, 623 (1996) (finding that the Colorado constitutional amendment denying government protection to gays and lesbians violated the Equal Protection Clause).

21. DAVID G. SAVAGE, *Kennedy, Anthony McLeod*, *in* 2 GUIDE TO THE U.S. SUPREME COURT 1018, 1018–19 (4th ed. rev. 2004), *available at* http://library.cqpress.com/scc/gct4v2-227-9668-607236 (reporting 1,900 cases through the end of June 2007).

22. 20 U.S.C. §§ 1681–1688 (2000 & Supp. III 2003).

23. Pub. L. No. 103-322, 108 Stat. 1902 (codified in scattered sections of 18 U.S.C. and 42 U.S.C.).

24. *See, e.g.*, Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 815 (2007) (explaining the connection between reproductive rights cases and sex equality).

25. Certainly many Title VII race-discrimination claims would have an impact on Title VII sex discrimination claims as well, but they were not included because they are outside the scope of this Article. Race-based equal protection claims might also impact sex-based claims, but the impact of one on the other is diminished when one considers that claims based on race and sex are analyzed under different levels of scrutiny and have different constitutional histories. *See* David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 244–47 (2005) (comparing the constitutional levels of scrutiny for race-based and sex-based claims).

26. *See generally* Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL'Y 397 (2001) (discussing recent Supreme Court cases involving sexual orientation within the framework of sex discrimination); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) (arguing that discrimination against homosexuals is sex-based discrimination and that laws implicating such discrimination should receive heightened scrutiny); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988) (discussing the correlation between the perception of homosexuality and the meaning of gender in society).

27. I used Westlaw's "Terms and Connectors" search function in the Supreme Court database to find any cases in which Justice Kennedy has participated and in which the terms *abortion*, *sex*, *gender*, *gay*, *homosexual*, *pregnancy*, or any of their variations appeared in the syllabus of the Court's opinion. I then reviewed the cases for those in which the Court decided issues related to these concepts rather than those in which the Court merely mentioned the word.

Next, I classified each case as reaching a conclusion that is either for or against the claim of sex discrimination. Two cases, *Schenck v. Pro-Choice Network of Western New York*[28] and *Casey*, were split decisions in which one group of Justices ruled in favor of a portion of the sex discrimination claim[29] and another group of Justices ruled against a different part of the claim.[30] Most of the other cases had outcomes that were easy to classify. I considered the decision *for* the claim of sex discrimination if it struck down a restrictive abortion statute; interpreted the Equal Protection Clause, Title IX, or Title VII broadly to encompass a particular type of claimed discrimination or expand it procedurally; or ruled in favor of a party claiming that a law infringed upon gay rights. I considered the decision *against* the claim of sex discrimination if it did otherwise.

However, some cases were more difficult to classify. For instance, First Amendment protections have been important to the advancement of civil rights generally and women's rights in particular,[31] but I classified decisions ruling against the First Amendment claim as ruling for the sex discrimination claim where the two conflicted, such as in the abortion protest cases[32] and the various public accommodations[33] cases. A complete list of these cases and how I categorized their outcomes can also be found in Appendix A.

Finally, I determined Justice Kennedy's position in each case and whether he wrote his own opinion or simply joined one written by another Justice. These positions are also listed in Appendix A.

Analyzing Justice Kennedy's positions in these cases reveals a Justice who generally does not side with claims of sex discrimination. Overall, he voted against the sex discrimination claim 66% of the time (43.5 out of the 66 cases). Removing the twenty-three unanimous cases from the analysis demonstrates even starker results. In the nonunanimous cases, Justice Kennedy voted against the sex discrimination claim 78% of the time (33.5 out of 43 cases). Looking at the cases in which one Justice's switch would have changed the outcome shows that Justice Kennedy has almost never sided with the sex discrimination claim in close cases. In such cases, he voted against the sex discrimination claim 97.5% of the time (19.5 out of 20 cases). His one-half vote in favor of a sex discrimination claim in a closely divided case was his vote in *Casey* to preserve the "essential holding" of *Roe v. Wade*;[34] however, even that came with his vote to uphold all but one of the restrictive abortion provisions at issue in the case.[35] Thus, Justice Kennedy's high

28. 519 U.S. 357 (1997).

29. *Schenck*, 519 U.S. at 361; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 843–44 (1992).

30. *Schenck*, 519 U.S. at 385 (Scalia, J., concurring in part and dissenting in part); *Casey*, 505 U.S. at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

31. SAMUEL WALKER, THE RIGHTS REVOLUTION: RIGHTS AND COMMUNITY IN MODERN AMERICA 95–100 (1998) (explaining the importance of free speech to women's and civil rights movements).

32. Hill v. Colorado, 530 U.S. 703, 707 (2000); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 757 (1994); Frisby v. Schultz, 487 U.S. 474, 476 (1988).

33. Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000); Hurley v. Irish-American Gay, 515 U.S. 557, 559 (1995); N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1, 4 (1988).

34. 505 U.S. at 845–46 ("After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.").

35. *Id.* at 879–901.

profile votes in *Romer*, *Lawrence*, *Casey*, and *United States v. Virginia* are not representative of a broad commitment to sex equality in the law; rather, these votes are outliers in a relatively consistent body of jurisprudence voting against sex discrimination claims.

The following chart shows this voting pattern and breaks the pattern down even further by subject matter of the cases:

	Total	For	Against
Overall	66	22.5 (34%)	43.5 (66%)
Nonunanimous	43	9.5 (22%)	33.5 (78%)
Closely Divided	20	0.5 (2.5%)	19.5 (97.5%)
Abortion	21	1.5 (7%)	18.5 (88%)
Equal Protection	7*	3 (43%)	4 (57%)
Title IX	5	1 (20%)	4 (80%)
Title VII	24	14 (58%)	10 (42%)
Nonunanimous Title VII	12	3 (25%)	9 (75%)
Gay Rights	6*	2 (33%)	4 (67%)
Miscellaneous	4	2 (50%)	2 (50%)

*For these numbers, I have included *Romer v. Evans* in both the Equal Protection category as well as the Gay Rights category.

To further demonstrate the effect the new median Justice will have on the Roberts Court, it is worth comparing Justice Kennedy's votes in these cases to those of the last median Justice, Justice O'Connor. Justice O'Connor's time as median Justice was characterized by a strong tendency to vote for sex discrimination claims.[36] In comparison, Justice Kennedy's track record is quite different. Of the sixty-six cases studied here, Justice O'Connor and Justice Kennedy sat together for fifty-eight of them.[37] Eighteen of those cases were unanimous decisions, leaving forty cases in which there was at least some disagreement among the Justices. Justice O'Connor's and Justice Kennedy's votes in these forty cases can be broken down as follows:

(1) Justice O'Connor and Justice Kennedy agreed on the position against the sex discrimination claim 17 times (approximately 43% of the time).
(2) Justice O'Connor and Justice Kennedy agreed on the position in favor of the sex discrimination claim 9.5 times (approximately 24% of the time).

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36. *See* Paul Bender & Chelsea Sage Durkin, *Justice O'Connor's Race and Gender Jurisprudence*, 39 ARIZ. ST. L.J. 829, 830–31 (2007) (noting that Justice O'Connor voted in favor of women's groups in seventy-five percent of the fifty sex-discrimination cases analyzed).

37. Six cases were decided after Justice O'Connor left the Supreme Court. *See* Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007); Gonzales v. Carhart, 127 S. Ct. 1610 (2007); Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006); Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47 (2006); Scheidler v. Nat'l Org. for Women, Inc., 547 U.S. 9 (2006); Arbaugh v. Y & H Corp., 546 U.S. 500 (2006). There were two others in which she did not participate. *See* Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 844 (2001); Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 901 (1989).

(3) Justice O'Connor voted in favor of the sex discrimination claim 13.5 times when Justice Kennedy voted against it (approximately 34% of the time).
(4) In no case did Justice Kennedy vote for the sex discrimination claim when Justice O'Connor voted against it.

Stated differently, in their overlapping nonunanimous cases, Justice O'Connor voted for the sex discrimination claim approximately 58% of the time (23 out of 40 cases) whereas Justice Kennedy voted for the sex discrimination claim only approximately 24% of the time (9.5 out of 40 cases). Importantly, Justice Kennedy never voted for a sex discrimination claim when Justice O'Connor voted against it. A comparison of the two Justices' positions in the cases in which they sat together appears in Appendix B.

III. JUSTICE KENNEDY'S SEX DISCRIMINATION DOCTRINE

The data in the previous Part shows that Justice Kennedy's voting record is not one that is friendly to claims of sex discrimination. Especially when compared to Justice O'Connor, Justice Kennedy is a much more conservative Justice with respect to his views on sex discrimination. This Part looks at Justice Kennedy's voting and opinions in the sixty-six sex discrimination cases in which he has participated and attempts to set forth doctrinal themes from his sex discrimination jurisprudence. The next Part then analyzes Justice Kennedy's overarching views on gender.

I make the following observations fully aware of the difficulty of drawing general principles from a limited number of cases. A small sample size always presents a problem when performing such an analysis. Furthermore, trends and patterns may be more of a reflection on the peculiarities and actual merits of cases that reach the Court rather than an overall jurisprudential philosophy. Nonetheless, I offer the following analysis as the best summary I can make of Justice Kennedy's jurisprudence in this particular area over the past twenty years.

A. Equal Protection

Justice Kennedy has a split record in the seven equal protection cases that have raised sex discrimination-related claims. A chronological look at the cases may partially explain the split. In Justice Kennedy's first three equal protection sex discrimination-related cases, he sided with the claimant and against the government. His most prominent equal protection case is *Romer v. Evans*, in which he wrote that government action based on animus toward a particular group—in *Romer*, gay men and lesbians—does not survive rational basis review.[38] The decision in *Romer* came in-between two other cases in which he joined the majority striking down sex-discriminatory state action: *J.E.B. v. Alabama ex rel. T.B.*,[39]

38. 517 U.S. 620, 632 (1996) ("[Amendment 2's] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.").

39. 511 U.S. 127 (1994).

considering peremptory challenges used in a sex-discriminatory manner,[40] and *United States v. Virginia*,[41] considering a challenge to Virginia's all male military academy.[42] All three cases were decided between 1994 and 1996. They are important cases that expanded equal protection principles to women and gay men and lesbians[43] in key areas of civic life.

However, in the cases decided after 1996, Justice Kennedy adopted a much more restrictive equal protection jurisprudence. He twice sided against finding that Congress violated the Constitution in differentiating among foreign-born children of United States citizens based on whether the citizen was a man (the father) or a woman (the mother).[44] In addition, he twice sided against broad interpretations of Congress's power to implement the Equal Protection Clause under Section 5 of the Fourteenth Amendment.[45]

As discussed further in depth below, three of these latter cases involved issues in which it is most clear that Justice Kennedy accepts gender stereotypes—government action that implicates parent–child relationships. Both of the citizenship cases turned on how the Justices viewed the differences between the relationships mothers and fathers have with their children at birth.[46] Justice Kennedy's conception of equal protection allows the government to treat mothers and fathers differently, and therefore he sided with the majority upholding Congress's differential treatment.[47] Similarly, *Nevada Department of Human Resources v. Hibbs* was another Fourteenth Amendment case that also involved government regulation of the family. The case specifically addressed Congress's power under the Family and Medical Leave Act to enforce the Equal Protection Clause under Section 5 of the Fourteenth Amendment.[48] In that case, Justice Kennedy wrote an opinion dissenting from the Court's holding that Congress had the authority under Section 5 to regulate state-created family leave policies. According to Justice Kennedy, Congress did not have enough evidence of sex discrimination to intrude upon this traditionally state regulated area.[49]

With only seven cases to draw upon, observations of patterns cannot be stated with a great deal of certainty. However, it does appear that Justice Kennedy's early equal protection cases, in which he found that women and gay men and lesbians excluded from civic participation were entitled to constitutional protection, are more friendly to sex discrimination claims than his opinions in the more recent

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40. *Id.* at 129–30.

41. 518 U.S. 515 (1996).

42. *Id.* at 519.

43. The *Romer* Court, however, did not apply heightened scrutiny to claims based on sexual orientation.

44. Nguyen v. I.N.S., 533 U.S. 53, 73 (2001); Miller v. Albright, 523 U.S. 420, 445–46 (1998) (O'Connor, J., concurring).

45. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 744 (2003) (Kennedy, J., dissenting); United States v. Morrison, 529 U.S. 598, 627 (2000).

46. *See Miller*, 523 U.S. at 424; *Nguyen*, 533 U.S. at 56–57.

47. *Miller*, 523 U.S. at 424; *Nguyen*, 533 U.S. at 56–57.

48. *Hibbs*, 538 U.S. at 724–25.

49. *Id.* at 746 (Kennedy, J., dissenting) ("The evidence to substantiate this charge [that states have discriminated in the past] must be far more specific, however, than a simple recitation of a general history of employment discrimination against women. . . . Persisting overall effects of gender-based discrimination at the workplace must not be ignored; but simply noting the problem is not a substitute for evidence which identifies some real discrimination the family leave rules are designed to prevent.").

equal protection cases, in which he accepted different treatment of mothers and fathers and endorsed limiting Congress's power to restrict discrimination based on sex.

B. Abortion

Justice Kennedy is hailed in some circles as the Justice who saved *Roe v. Wade*.[50] In 1992, *Planned Parenthood v. Casey* offered the Court a clear opportunity to overrule *Roe*.[51] Based on the votes of the individual Justices in cases prior to *Casey*, the Third Circuit concluded that the strict scrutiny standard from *Roe* was no longer binding because enough Justices had expressed doubts about *Roe* in cases following the landmark decision to create a majority of Justices who would apply a different, less-exacting standard.[52] However, *Casey*'s famous joint opinion preserved what it called the "essential holding" of *Roe*, despite the fact that *Casey* did much of what the Third Circuit had predicted[53]: it jettisoned *Roe*'s strict scrutiny standard in favor of a more lenient "undue burden" test.[54] Justice Kennedy was one of the authors of the joint opinion and thus one of the five Justices in *Casey* who voted to preserve the "essential holding" of *Roe*.[55]

What is sometimes overlooked in the praise for Kennedy's *Roe*-saving position in *Casey* is the way he and the other Justices voted on the particular provisions of Pennsylvania's Abortion Control Act. Planned Parenthood challenged six separate provisions,[56] and the Supreme Court upheld five of them.[57] The Court struck down the spousal notification provision, which required married women to notify their spouses before obtaining an abortion,[58] but upheld Pennsylvania's "medical emergency" definition,[59] stringent informed consent requirement,[60] twenty-four hour waiting period,[61] judicial bypass procedure,[62] and reporting and recordkeeping requirements.[63] Justice Kennedy showed great sympathy for women who were victims of domestic violence in agreeing with four other Justices that the spousal notification provision constituted an undue burden because women married to

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50. *See* Mauro, *supra* note 18.

51. Posting of JB, *supra* note 18.

52. *See* Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 697 (3d Cir. 1991) ("In these circumstances, we conclude that it would be inconsistent with the teachings of [the Supreme Court] for lower courts to apply the strict scrutiny test of *Roe* [] to all abortion regulations."), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992).

53. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

54. *Id.* at 876.

55. *Id.* at 843.

56. *Id.* at 844. The Court considered the informed consent provision and the twenty-four hour waiting period in the same section of the opinion but nonetheless separately analyzed them.

57. *Id.* at 879–901.

58. *Id.* at 898.

59. *Id.* at 880.

60. *Id.* at 884–85.

61. *Id.* at 887.

62. *Id.* at 899. Judicial bypass is a procedure in which minor women who do not want to obtain their parent's consent for an abortion can get a judge to approve of the procedure.

63. *Id.* at 901.

abusive husbands might not want to inform them of their abortion decision.[64] However, he failed to exhibit the same sympathy for poor and working-class women who would be burdened by the waiting period requirement because of their inability to make repeated appointments, or for minors required to get parental consent or talk with a judge about a private medical procedure.[65]

Unfortunately for abortion rights and sex-equality jurisprudence, this less heralded part of *Casey* is much more indicative of Justice Kennedy's abortion jurisprudence. In fact, other than Pennsylvania's spousal notification requirement, Justice Kennedy has not considered any other abortion restriction unconstitutional. Under Justice Kennedy's views regarding abortion, restrictions on dilation and extraction abortions,[66] all variations of parental notification and consent statutes,[67] restrictions on the performance of abortions to physicians only,[68] and viability tests[69] are all constitutional. He has also joined with Court majorities that have broadly interpreted severability jurisprudence to require piecemeal invalidation of abortion statutes rather than declaring them unconstitutional *in toto*.[70]

Justice Kennedy has likewise been hostile toward abortion providers who have tried to gain protection for their services in the face of virulent anti-abortion protests. He has joined in opinions that have interpreted a variety of federal statutes such as RICO,[71] the federal extortion statute,[72] and 42 U.S.C. § 1985 in ways that restrict abortion providers' legal recourse against protesters.[73] Furthermore, he has voted only once, in the face of a First Amendment objection, in favor of a state restriction on abortion protesters.[74]

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64. *Id.* at 898 ("Women do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family.").

65. *See id.* at 937–38 (Blackmun, J., dissenting) (explaining that the twenty-four hour waiting period and parental consent provisions are unconstitutional because they cause undue delay and burden for women seeking an abortion).

66. Gonzales v. Carhart, 127 S. Ct. 1610, 1619, 1639 (2007); Stenberg v. Carhart, 530 U.S. 914, 956–57, 979 (2000) (Kennedy, J., dissenting).

67. Lambert v. Wicklund, 520 U.S. 292, 297 (1997) (per curiam); Hodgson v. Minnesota, 497 U.S. 417, 480–81 (1990) (Kennedy, J., concurring in the judgment in part and dissenting in part); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 510 (1990).

68. Mazurek v. Armstrong, 520 U.S. 968, 969, 974–75 (1997) (per curiam).

69. Webster v. Reprod. Health Servs., 492 U.S. 490, 519–20 (1989).

70. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 323, 332 (2006); Leavitt v. Jane L., 518 U.S. 137, 143–44, 146 (1996) (per curiam); Dalton v. Little Rock Family Planning Servs., 516 U.S. 474, 477 (1996) (per curiam).

71. 18 U.S.C. §§ 1961–1968 (2000).

72. *Id.* § 1951.

73. Scheidler v. Nat'l Org. for Women, Inc., 547 U.S. 9, 12, 16 (2006) (extortion); Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 395, 411 (2003) (RICO); Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 264 (1994) (Souter, J., concurring) (RICO); Bray v. Alexandria Women's Health Ctr., 506 U.S. 263, 287–88 (1993) (Kennedy, J., concurring) (Section 1985).

74. Frisby v. Schultz, 487 U.S. 474, 475, 488 (1988) (voting to uphold the constitutionality of a private residence picketing restriction challenged by an abortion protester). For cases in which Kennedy voted against such restrictions, see Hill v. Colorado, 530 U.S. 703, 792 (2000) (Kennedy, J., dissenting); Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 385, 395 (1997) (Scalia, J., concurring in part and dissenting in part); Madsen v. Women's Health Ctr., 512 U.S. 753, 784 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part).

Although appointed by a President who seemed intent on appointing Justices to overturn *Roe v. Wade*, Justice Kennedy's views on abortion were unknown at the time he joined the Court.[75] In *Casey* he proved that he would not go so far as overturning *Roe*. But he also was part of an opinion that, as he emphasized almost a decade later in dissenting from the Court's approval of a bubble zone of protection around women entering abortion clinics, described abortion as "an act fraught with consequences for others," including "the woman who must live with the implications of her decision" to take advantage of a procedure that "some deem nothing short of an act of violence against innocent human life."[76] Although his seemingly profound moral difficulty with the act of abortion has not yet led him to overturn *Roe*, it has led him to approve almost every abortion restriction that the Court has considered.

C. Title IX

Justice Kennedy has joined in only one opinion in a Title IX case that has ruled in favor of a sex discrimination claim. In *Franklin v. Gwinnett County Public Schools*,[77] he joined a unanimous Court that found that successful Title IX claimants could be awarded damages, not merely injunctive relief.[78] However, in the other Title IX cases that have come before the Court, he has voted against a broad interpretation of Title IX. Justice Kennedy's Title IX jurisprudence creates high barriers for those who wish to sue schools for sexual harassment by teachers;[79] prohibits students from suing schools for sexual harassment by other students;[80] rejects claims for retaliation if a school takes adverse action against a "whistleblower";[81] and excludes from Title IX coverage umbrella organizations that receive payments from federally funded schools.[82]

In only one of these cases did Justice Kennedy write his own opinion. His dissent in *Davis v. Monroe County Board of Education* reveals Justice Kennedy's views regarding sex discrimination claims in the educational setting. Invoking the First Amendment and federal statutes that protect particular classes of students in schools, Justice Kennedy displays in his dissent an underlying fear that the educational mission of schools would be impeded if the Court allowed unrestricted liability for sexual harassment claims.[83] This position is consistent with his other

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75. *See* Stuart Taylor Jr., *Judge Kennedy: Tilting Right but Not Far*, N.Y. TIMES, Nov. 15, 1987, at A1, A30.

76. *Hill*, 530 U.S. at 791 (Kennedy, J., dissenting) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992)) (internal quotation marks omitted).

77. 503 U.S. 60 (1992).

78. *Id.* at 62, 76.

79. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 276, 277 (1998) (prohibiting recovery of damages unless a school official with the "authority to institute corrective measures" on behalf of the school district has "actual notice" of the behavior and displays deliberate indifference).

80. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 656–58 (1999) (Kennedy, J. dissenting).

81. *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 184–85, 195–96 (2005) (Thomas, J., dissenting).

82. *See* NCAA v. Smith, 525 U.S. 459, 461–62 (1999).

83. *See Davis*, 526 U.S. at 664–68 (Kennedy, J., dissenting) (citing various provisions of the Individuals with Disabilities Act, 20 U.S.C. §§ 1400–1482 (1994)).

nonunanimous Title IX votes. When faced with the competing concerns of those suffering sex discrimination[84] and schools trying to teach students without facing federal liability,[85] Justice Kennedy has sided with the schools.

D. Title VII

In stark contrast to the small number of Title IX cases, Justice Kennedy has participated in twenty-four Title VII sex discrimination cases while on the Court. Half have been unanimous opinions, and in all but one of those unanimous opinions, the Court found for the sex discrimination claimant.[86] The unanimous cases run the gamut from procedural issues—such as the definition of "employer,"[87] the availability of front pay as a remedy,[88] and the scope and nature of federal court jurisdiction over Title VII cases[89]—to weightier substantive issues—such as whether the statute covers same-sex harassment,[90] whether it protects against fetal protection policies,[91] and what degree of hostility in the work environment constitutes sexual harassment.[92] During Justice Kennedy's tenure on the Court, the only case in which a unanimous Court ruled against a Title VII sex discrimination rights claim is *Clark County School District v. Breeden*,[93] in which the Court ruled that a single incident of harassment was not enough to constitute discrimination under Title VII.[94]

More interesting than Justice Kennedy's votes in these unanimous opinions are his votes in the twelve nonunanimous Title VII cases. In those cases, he voted against the sex discrimination claimant nine times and in favor of the claimant only three. The three cases in which he voted for the sex discrimination claimant all involved the expansion of substantive liability under Title VII. In the companion cases of *Burlington Industries, Inc. v. Ellerth*[95] and *Faragher v. City of Boca Raton*,[96] he wrote for the majority in the former and sided with the majority in the latter. Both holdings expanded Title VII's vicarious liability rules for employers to include liability when a supervisor sexually harasses another employee.[97] Several years later, he also sided with the majority in deciding that a constructive discharge could constitute an adverse employment action.[98] All three of these cases expanded the conduct for which employers could be held liable under Title VII.

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84. *Gebser*, 524 U.S. at 284 ("We have a measure of latitude to shape a sensible remedial scheme.").

85. *Cf. id.* at 289–90 (expressing concern about the financial implications of holding schools vicariously liable).

86. *See infra* app. A.

87. Arbaugh v. Y & H Corp., 546 U.S. 500, 503 (2006); Walters v. Metro. Educ. Enters., Inc., 519 U.S. 202, 204 (1997).

88. Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 846 (2001).

89. Yellow Freight Sys. v. Donnelly, 494 U.S. 820, 821 (1990).

90. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 76 (1998).

91. UAW v. Johnson Controls, Inc., 499 U.S. 187, 190 (1991).

92. Harris v. Forklift Sys., Inc., 510 U.S. 17, 20 (1993).

93. 532 U.S. 268 (2001) (per curiam).

94. *Id.* at 271.

95. 524 U.S. 742 (1998).

96. 524 U.S. 775 (1998).

97. *Faragher*, 524 U.S. at 779–80; *Ellerth*, 524 U.S. at 746, 765–66.

98. Pa. State Police v. Suders, 542 U.S. 129, 132, 143 (2004).

In the other nine cases, Justice Kennedy sided with the employer in finding procedural barriers to the sex discrimination claim. These procedural issues included the retroactive application of precedent,[99] awards of attorney fees[100] and punitive damages,[101] the method of taxing Title VII awards,[102] and the authority of the Equal Employment Opportunity Commission to award damages against the federal government.[103] Most recently, Justice Kennedy sided with four other Justices in denying a Title VII pay discrimination claim based on a cramped reading of the statute of limitations.[104] The Court ruled that a pay discrimination claimant must bring her action when the first act of pay discrimination occurs; each subsequent paycheck reflecting a differential in pay does not restart the statute of limitations.[105] This decision has been roundly criticized as a severe restriction on pay discrimination lawsuits because the information contributing to pay decisions is often kept secret by employers.[106] However, it is consistent with Justice Kennedy's overall reluctance to open procedural avenues to Title VII sex discrimination claimants.

Trying to discern a principle from these varied cases is difficult. In the "easy" cases (those in which the Court did not split), Justice Kennedy, like the rest of the members of the Court, has been a reliable vote in favor of sex discrimination claimants. However, in the more difficult split cases, Justice Kennedy has shown a difference between substantive and procedural issues. He has been willing to expand Title VII substantively to allow for more claims that promote sex equality, but he has been consistently resistant to any procedural expansion of Title VII.

E. Gay Rights

Justice Kennedy's greatest contributions in furthering sex and gender equality have come in the area of gay rights. *Romer v. Evans*[107] and *Lawrence v. Texas*[108] are landmark decisions in this area, and Justice Kennedy wrote both opinions.[109] His opinion in *Romer* interpreted equal protection principles to protect gay men and lesbians from government action based on animus.[110] Likewise, his opinion in

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99. Landgraf v. USI Film Prods., 511 U.S. 244, 286 (1994); Florida v. Long, 487 U.S. 223, 225–26 (1988).

100. Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 754, 766 (1989).

101. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 528, 546 (1999).

102. United States v. Burke, 504 U.S. 229, 230, 242 (1992).

103. West v. Gibson, 527 U.S. 212, 213, 224 (1999).

104. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2165 (2007).

105. *Id.* at 2167–72.

106. *See, e.g.*, Scott A. Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 FORDHAM L. REV. 981, 987, 990–95 (2007) (describing the "harshness" of the rule from *Ledbetter*); Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 80 (2007) (criticizing the majority's formalistic reasoning that ignored evidence that employers often keep pay decisions secret, thus making such decisions difficult for potential pay discrimination plaintiffs to discover).

107. 517 U.S. 620 (1996).

108. 539 U.S. 558 (2003).

109. *Lawrence*, 539 U.S. at 561; *Romer*, 517 U.S. at 621.

110. *Romer*, 517 U.S. at 632 ("[Amendment 2's] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.").

Lawrence speaks eloquently to the importance of self-definition free from government imposed views relating to the morality of sexual orientation or forms of sexual activity.[111]

However, much has been written about the doctrinal limitations of both decisions,[112] and the effects of those doctrinal limitations continue today. For instance, the Eleventh Circuit relied on both *Romer*'s and *Lawrence*'s limited holdings in upholding Florida's sweeping prohibition on gay adoption.[113] Because Justice Kennedy did not grant sexual orientation protected status in *Romer*, the Eleventh Circuit did not apply heightened scrutiny and therefore found that Florida's prohibition did not run afoul of equal protection concerns.[114] The court found that the legislature was motivated by something other than mere animus, namely, concern for children.[115] Similarly, because Justice Kennedy did not find any fundamental right to be at issue in *Lawrence*, Florida's prohibition did not raise a substantive due process issue.[116] If either case had given more explicit doctrinal protection to gay rights claims, the Eleventh Circuit would have likely reached a different result.[117]

Justice Kennedy's other decisions relating to gay rights have not been protective of these rights. As discussed in the next sub-Section, he twice found unconstitutional state public accommodations requirements that allowed gay men and lesbians to take part in important aspects of civic life.[118] Furthermore, he twice voted with a unanimous Court to give deference to the military when confronted with a challenge based on sexual orientation.[119]

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111. *Lawrence*, 539 U.S. at 567 ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.").

112. *See, e.g.*, Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1411 (2004) (discussing the "limited utility of *Lawrence*"); Kate Girard, Note, *The Irrational Legacy of* Romer v. Evans*: A Decade of Judicial Review Reveals the Need for Heightened Scrutiny of Legislation that Denies Equal Protection to Members of the Gay Community*, 36 N.M. L. REV. 565, 565–66 (2006) (detailing *Romer*'s limits and concluding that "a decade of lower court precedent cites *Romer* for the rule that law that classifies on the basis of sexual orientation is presumed valid so long as the statute is rationally related to any legitimate state interest"); Brian Hawkins, Note, *The* Glucksberg *Renaissance: Substantive Due Process Since* Lawrence v. Texas, 105 MICH. L. REV. 409, 412 (2007) (providing an empirical study concluding that *Lawrence* has had a limited effect in the lower courts because of, among other things, its "lack of guidance").

113. Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 815–17, 826–27 (11th Cir. 2004).

114. *Id.* at 818 (finding that *Romer* required only rational basis review).

115. *Id.* at 818–20.

116. *Id.* at 817 (finding that *Lawrence* did not require heightened substantive due process analysis).

117. As this Article was in the last stages of editing, the Ninth Circuit decided Witt v. Dep't of Air Force, No. 06-35644, 2008 U.S. App. LEXIS 10794 (9th Cir. May 21, 2008). In *Witt*, the majority decision interpreted *Lawrence* as applying intermediate scrutiny and remanded the case to apply that standard to the military's "Don't Ask, Don't Tell" policy for gay men and lesbians. *See id.* at *29–30, 38. The concurring and dissenting opinion in the case read *Lawrence* as requiring strict scrutiny. *Id.* at *55–56. Justice Kennedy's opaque language in *Lawrence* led directly to the differences among the Ninth and Eleventh Circuit judges.

118. Boy Scouts of Am. v. Dale, 530 U.S. 640, 642, 661 (2000); Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 559, 581 (1995).

119. Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47, 50, 68–70 (2006); *see also* Carlucci v. Doe, 488 U.S. 93, 94, 103–04 (1988).

F. First Amendment Free Speech

Justice Kennedy has been hailed as a First Amendment libertarian.[120] According to one study, during the period from 1994 to 2002, he was the most pro-free speech Justice among all the members of the Court.[121] This tendency is apparent in some of Justice Kennedy's free speech rulings in sex discrimination cases but not all.

Free speech issues arise in the context of sex discrimination cases in a variety of contexts. Usually, the First Amendment arises as a defense when the government tries to impose a requirement that furthers sex equality but also restricts speech. The Supreme Court has decided seven such cases while Justice Kennedy has been on the Court: three in the abortion protester context,[122] three in the public accommodations context,[123] and one in the Title VII context.[124] Two other First Amendment cases decided during Kennedy's time on the Court involved claims that the First Amendment right to express an anti-sex equality position was being restricted by government regulation.[125]

Justice Kennedy's views on these complex cases are difficult to categorize. In the first three cases, all decided within Justice Kennedy's first two years on the Court, he sided with the government. In a unanimous opinion, he agreed with the rest of the Court that New York's public accommodations law forbidding "discrimination by certain private clubs"[126] was not facially invalid under the First Amendment, although he did join in a concurring opinion written by Justice O'Connor indicating that the law might be unconstitutional as applied to some private organizations.[127] He also joined in another unanimous decision finding that the First Amendment does not give private universities blanket protection from the discovery of results of internal investigations into sex discrimination allegations.[128] In both of these cases, Justice Kennedy refused to read the First Amendment so broadly as to encompass new protections, although both left open possibilities of some First Amendment application in the area of sex discrimination. In the other case decided in Justice Kennedy's first two years, which also happened to be his first abortion-related case, he sided with the majority finding that a local ordinance forbidding picketing an individual's residence was not unconstitutional as applied to anti-abortion protesters picketing an abortion doctor's house.[129]

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120. *See* Helen J. Knowles, *The Supreme Court as Civic Educator: Free Speech According to Justice Kennedy*, 6 FIRST AMENDMENT L. REV. 252, 252 (2008).

121. *See* Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994–2002*, http://www.law.ucla.edu/volokh/howvoted.htm (last visited Apr. 5, 2008) (providing an update of Eugene Volokh, *How the Justices Voted in Free Speech Cases*, *1994–2000,* 48 UCLA L. REV. 1191 (2001)).

122. Hill v. Colorado, 530 U.S. 703, 707 (2000); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 757 (1994); Frisby v. Schultz, 487 U.S. 474, 476 (1988).

123. *Boy Scouts of Am.*, 530 U.S. at 644; *Hurley*, 515 U.S. at 559; N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1, 4 (1988).

124. Univ. of Pa. v. EEOC, 493 U.S. 182, 184–85 (1990).

125. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 51 (2006); Rust v. Sullivan, 500 U.S. 173, 177–78 (1991).

126. *N.Y. State Club Ass'n*, 487 U.S. at 4.

127. *Id.* at 19–20 (O'Connor, J., concurring).

128. *Univ. of Pa.*, 493 U.S. at 201–02.

129. Frisby v. Schultz, 487 U.S. 474, 476, 488 (1988).

However, in each of the later six cases, Justice Kennedy consistently sided against the position that would promote sex equality, regardless of the implications on First Amendment issues. In two abortion protester cases, he dissented, arguing that government regulation of protest violated the First Amendment.[130] Similarly, in two cases in which Boston[131] and New Jersey[132] tried to open public accommodations to gay groups, Justice Kennedy sided with the majority, holding that the First Amendment did not require private organizations to include the participation of gay members or groups.[133] However, in two cases in which the government action threatened anti-sex discrimination speech, he sided with the government. In the first case, he agreed with a 5 to 4 majority that federal regulations can prohibit clinics that receive federal funds from engaging in abortion counseling.[134] In the other case, he was part of the unanimous decision that found that universities do not have a First Amendment right to prohibit military recruiters from their campus because they disapproved of the military's policy on sexual orientation.[135]

These cases are certainly few in number, especially when broken down chronologically: three were decided in the first two years, while six cases were decided in the next eighteen years. To the extent a pattern has emerged in the six cases decided after Justice Kennedy's initial years on the Court, however, it appears that he adjusts his First Amendment jurisprudence to vote against a claim of sex discrimination. Sometimes his First Amendment views protect speech, and other times they do not; in all circumstances, however, the sex discrimination claim loses.

IV. GENDER ACCORDING TO JUSTICE KENNEDY

Justice Kennedy's voting pattern in sex discrimination cases should cause concern for advocates of sex equality. The doctrinal trends and patterns that emerge from looking at the individual cases as categorized above are also troubling. However, even more concerning for the future are the general notions of gender that lurk behind Justice Kennedy's jurisprudence. Throughout his substantive opinions and votes relating to sex discrimination is the theme that, in cases addressing the parent–child relationship, Justice Kennedy adheres to a very traditional and paternalistic notion of gender roles.

As discussed above, Justice Kennedy has voted to uphold claims of sex discrimination in some high profile cases and voted against such claims in many other cases. Reconciling these cases, especially in the context of equal protection and due process, requires a closer look at notions of gender as reflected in the parent–child relationship.

In cases not involving the parent–child relationship, Justice Kennedy has diverged from patriarchal and traditional notions of gender. In his first sex

130. Hill v. Colorado, 530 U.S. 703, 765 (2000) (Kennedy, J., dissenting); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 785–86 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part).

131. Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995).

132. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

133. *Boy Scouts of Am.*, 530 U.S. at 642, 644; *Hurley*, 515 U.S. at 559.

134. Rust v. Sullivan, 500 U.S. 173, 176–78 (1991).

135. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 70 (2006).

discrimination equal protection case, *J.E.B. v. Alabama ex rel. T.B.*,[136] Justice Kennedy wrote a separate concurrence emphasizing that an individual denied jury service because of a peremptory challenge based on sex suffers an injury "to personal dignity and to the individual's right to participate in the political process."[137] This explanation of the reasons for applying equal protection principles to such sex-based actions implicitly rejected the reasoning of *Hoyt v. Florida*,[138] the Supreme Court case that upheld a state restriction on women's eligibility for jury service.[139] The Court in that case specifically relied on gender stereotypes in finding that the restriction was justified because a "woman is still regarded as the center of home and family life."[140] Justice Kennedy's concurrence in *J.E.B.* did not mention *Hoyt*, although the majority that he did not join mentioned the case;[141] nonetheless, he rejected application of stereotypes about gender roles to limit women's civic participation.

In *United States v. Virginia*,[142] Justice Kennedy joined in Justice Ginsburg's majority opinion that expressly rejected the idea of basing state action on gender stereotypes.[143] In this case, Virginia argued that women were not capable of participating in the military institute's rigorous training without changing essential characteristics of the program;[144] however, the Court refused to accept such generalizations about women's nature and physical capabilities.[145] Justice Ginsburg wrote the following: "[G]eneralizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."[146] Like his vote in *J.E.B.*, Justice Kennedy's vote in *Virginia* demonstrates his belief that gender stereotypes that do not address the parent–child relationship cannot be the basis for state action and differentiation based on sex.

The same can be said of his opinions in *Romer* and *Lawrence*. Both opinions protect against gender stereotyping in civic life, albeit, like *J.E.B.* and *Virginia*, outside the context of the parent–child relationship. At issue in *Romer* was a state constitutional amendment that prohibited any government action aimed at protecting homosexuals from discrimination. Colorado attempted to justify the amendment based on the public's moral disapproval of men and women who step outside their traditional gender roles and form intimate relationships with someone of the same sex.[147] Justice Scalia stated in his dissent that such moral condemnation

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136. 511 U.S. 127 (1994).
137. *Id.* at 153 (Kennedy, J., concurring in the judgment).
138. 368 U.S. 57 (1961).
139. *Id.* at 69.
140. *Id.* at 62.
141. *Id.* at 131 n.3, 134.
142. 518 U.S. 515 (1996).
143. *Id.* at 519–20.
144. *Id.* at 520–23, 540.
145. *Id.* at 545–46. For a more complete discussion of the Court's rejection of stereotypes in *United States v. Virginia*, see David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. (forthcoming 2008) (manuscript at 64 & nn.279–82), *available at* http://ssrn.com/ abstract=1083816.
146. United States v. Virginia, 518 U.S. at 550.
147. Brief for Petitioners at 40, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 310026 (citing "the contours of social and moral norms" as providing a rational basis for Amendment 2); *id.* at 46 ("The implicit endorsement of homosexuality fostered by laws granting special protections

is an appropriate basis for state classifications.[148] However, in his majority opinion, Justice Kennedy called such moral condemnation "animus"[149] and concluded that such animus cannot form the basis for prohibiting gays and lesbians from seeking government protection.[150] Likewise, in *Lawrence*, Justice Kennedy found that moral beliefs about gendered notions of proper sexual partners and activities cannot form the basis for laws that deny certain liberties under the Due Process Clause.[151] Thus, in both *Romer* and *Lawrence*, Justice Kennedy refused to accept rigid gender roles as the basis for civic condemnation.

From these four cases, it appears that Justice Kennedy disapproves of gender stereotyping;[152] however, he takes the opposite view when cases present issues involving gendered notions of the parent–child relationship. In sex discrimination cases involving the parent–child relationship, Justice Kennedy relies on traditional and paternalistic gender stereotypes about nontraditional fathers,[153] idealized mothers, and second-guessing women's decisions.

Cases involving the father–child relationship most directly illustrate Justice Kennedy's preoccupation with traditional parenting gender roles. In both *Miller v. Albright*[154] and *Nguyen v. I.N.S.*,[155] Justice Kennedy voted to uphold a federal statute imposing stricter requirements for proof of citizenship on children of unwed parents whose father is a United States citizen than on children whose mother is a United States citizen.[156] Because Justice Kennedy's vote in *Miller* was based on third-party standing principles,[157] his opinion on the merits for the majority in *Nguyen* is most instructive. In that opinion, Justice Kennedy specifically stated that he would not rely on stereotypes but rather biological fact: the mother must be present at birth while the same is not necessarily true for the father.[158] He noted that for mothers, birth is a time at which there is an opportunity "to develop a real, meaningful relationship" with the child, while fathers will not necessarily even "know that a child was conceived" and their identity will not always be known to "even the mother."[159]

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could undermine the efforts of some parents to teach traditional moral values.").

148. *Romer*, 517 U.S. at 644 (Scalia, J., dissenting).

149. *Id.* at 632 (majority opinion).

150. *Id.* at 635–36.

151. *See* Lawrence v. Texas, 539 U.S. 558, 571 (2003).

152. Despite this broad condemnation of sex stereotyping from Justice Kennedy, he did not join the majority in *Price Waterhouse v. Hopkins* that found that Title VII prohibits employers from relying on stereotypes. *See* 490 U.S. 228, 294 (1989) (Kennedy, J., dissenting) ("I think it important to stress that Title VII creates no independent cause of action for sex stereotyping."). Nor did his condemnation of sex stereotyping bring him to conclude that Congress could fight sex stereotyping by enacting the Family and Medical Leave Act and applying it to the states. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 748–49 (2003) (Kennedy, J., dissenting) (implicitly rejecting sex stereotyping but concluding that there was a lack of evidence of such stereotyping supporting the outcome).

153. By "nontraditional fathers," the author refers to those fathers who fall outside the norm of the married father whose wife cares for the children.

154. 523 U.S. 420 (1998).

155. 533 U.S. 53 (2001).

156. *Nguyen*, 533 U.S. at 73; *Miller*, 523 U.S. at 445–46 (O'Connor, J., concurring in the judgment).

157. *Miller*, 523 U.S. at 445–46 (O'Connor, J., concurring in the judgment).

158. *Nguyen*, 533 U.S. at 68, 73. Justice Kennedy referred to this fact as one of the "most basic biological differences" between men and women. *Id.* at 73.

159. *Id.* at 65.

Despite Justice Kennedy's statement to the contrary in *Nguyen*, he did rely on gender stereotypes of women and men and their relationship to their children in *Nguyen*. Justice O'Connor's dissent rightly decries the majority's use of stereotypes, including overbroad generalizations that birth guarantees a meaningful relationship between mother and child, that fathers present at birth cannot form such a relationship themselves, that mothers should care for their children but fathers can ignore them, and that men are irresponsible fathers.[160] Justice Kennedy, who in other contexts has advocated against the use of gender-based stereotypes,[161] relied heavily on them in *Nguyen*. What separates *Nguyen* from the other cases is its context: the parent–child relationship. *Nguyen* exemplifies two themes that are central to Justice Kennedy's conception of gender: his scorn for nontraditional fatherhood and his idealization of motherhood.

Justice Kennedy's disdain for nontraditional fatherhood appears in other cases. In *Michael H. v. Gerald D.*, a substantive due process case, the Court upheld the constitutionality of California's statutory presumption that a child born to a married couple is the husband's child despite evidence that another man is the child's biological father.[162] Again, Justice Kennedy's vote with the majority[163] reinforces the idealized notion of parenthood that he specifically praised in *Nguyen*. The idea behind the Court's holding in *Michael H.* presumes that married couples have an ideal relationship with each other and with "their" children, whereas unmarried fathers can be lawfully cast aside. Justice Kennedy's dissent in *Nevada Department of Human Resources v. Hibbs* walks a similar line by approving more generous parenting leave policies for women than for men.[164] According to Justice Kennedy, men who step outside the traditional role of fathers and take time off from work to care for their children can be treated differently by the state. Not only do these opinions ignore the reality of changed family relationships where fathers play a significant parenting role,[165] they also further the stereotype that fathers are not as involved with their children.[166]

Justice Kennedy's idealization of motherhood is also apparent in cases involving pregnancy and abortion. In *UAW v. Johnson Controls, Inc.*[167] and *Ferguson v. City of Charleston*,[168] he voted against fetal protection policies but wrote or joined in separate opinions emphasizing the need to protect the fetus from

160. *Id.* at 86–87, 92, 94 (O'Connor, J., dissenting); *see also* Kim Shayo Buchanan, Lawrence v. Geduldig*: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1296 (2007) (noting *Nguyen*'s promotion of "the stereotype that men, but not women, should be legally entitled to abdicate responsibility for their nonmarital children").

161. *See supra* text accompanying notes 136–51.

162. 491 U.S. 110, 113, 131–32 (1989).

163. Justice Kennedy joined all but footnote six of Justice Scalia's majority opinion. *Id.* at 113. That footnote specified a particular form of substantive due process analysis that Justice Kennedy believed could be too constraining for future cases. *See id.* at 132 (O'Connor, J., concurring in part).

164. *See* 538 U.S. 721, 751 (2003) (Scalia, J., dissenting).

165. *Michael H.*, 491 U.S. at 157 (Brennan, J., dissenting) (calling the majority's view a "cramped vision of 'the family'" and not in keeping with the times).

166. Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 37 n.142 (1997).

167. 499 U.S. 187 (1991).

168. 532 U.S. 67 (2001).

the woman who puts herself in a potentially harmful position.[169] In *Johnson Controls*, he joined Justice White's concurring opinion that refused to categorically declare that all gender-specific fetal protection policies violated Title VII.[170] In *Ferguson*, he wrote a separate opinion concurring in the judgment, emphasizing that a pregnant woman who ingests cocaine risks harming her fetus and that a state can punish a woman who uses drugs during her pregnancy.[171] According to Justice Kennedy, such a woman "has so little regard for her own unborn that she risks causing him or her lifelong damage and suffering."[172] In both cases, Justice Kennedy indicates that an ideal mother would not place her fetus in harm's way—even for employment purposes or because of addiction—and within certain bounds, employers and the state can punish women who step outside this idealized notion of motherhood.

Justice Kennedy's abortion jurisprudence shows similar reliance on the idealized mother.[173] In *Gonzales v. Carhart*,[174] the most recent abortion case heard by the Court, Justice Kennedy justified the restriction on abortion methods by stating that "[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child."[175] He emphasized his idealization of women's relationship to their children by relying heavily on stories of women who second-guessed their decisions to abort, or, in other words, women who realize that such action fails to live up to the ideal of motherhood.[176] Justice Ginsburg's dissent decries this reliance on "ancient notions about women's place in the family and under the Constitution."[177] But Justice Kennedy's reliance on these notions about a woman's proper place, particularly with respect to motherhood, is consistent with his other cases that rely on idealized motherhood, even if it not consistent with the Court's general reluctance to engage in sex stereotyping.

The particular abortion restrictions Justice Kennedy has voted to uphold further demonstrate his reliance on the stereotype of idealized motherhood. According to Justice Kennedy, state laws requiring more information be given to a woman considering abortion,[178] a waiting period for a woman to reconsider her decision,[179] and testing to ensure that a viable fetus is not being aborted[180] do not place an undue burden on the rights of mothers. In Justice Kennedy's gendered world, a woman needs this form of state protection because a true mother—an ideal mother—would not kill her child. Only when the circumstances of a woman's life are so out of step

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169. *Ferguson*, 532 U.S. at 89–90 (Kennedy, J., concurring in the judgment); *Johnson Controls*, 499 U.S. at 219 (White, J., concurring in part and concurring in the judgment).

170. *Johnson Controls*, 499 U.S. at 211 (White, J., concurring in part and concurring in the judgment).

171. *Ferguson*, 532 U.S. at 89–90 (Kennedy, J., concurring in the judgment).

172. *Id.*

173. *Mother* is the word Justice Kennedy uses to describe a woman seeking an abortion even though that woman is specifically seeking to avoid becoming a mother. *See, e.g.*, Gonzales v. Carhart, 127 S. Ct. 1610 (2007) (using the word *mother* throughout).

174. 127 S. Ct. 1610 (2007).

175. *Id.* at 1634.

176. *Id.*

177. *Id.* at 1649 (Ginsburg, J., dissenting).

178. Planned Parenthood of Se. Pa v. Casey, 505 U.S. 833, 885 (1992).

179. *Id.* at 887.

180. Webster v. Reprod. Health Servs., 492 U.S. 490, 519–20 (1989).

with idealized motherhood—when her husband is abusing her and threatening her physical well-being—is Justice Kennedy convinced that the ideal has to give way to reality and that the state cannot intrude to force such married women to notify their abusive husbands of their choice to abort.[181] Only in such extreme situations does the conception of idealized motherhood subside; otherwise, the state can force its view of idealized motherhood on women.

Justice Kennedy's conception of the traditional parent–child relationship not only includes disapproval of nontraditional fatherhood and an idealized notion of motherhood, but it also includes a paternalistic view of women's capacity to make decisions, particularly young women. Justice Kennedy's paternalism is evident in his views on the various forms of state involvement in restrictions on abortion, including allowing the government to prohibit abortions based on the concern that women will regret their decision,[182] permitting the state to presume that women do not fully consider the implications of having an abortion,[183] and allowing the federal government to seize medicine from women who wish to medically induce abortion.[184]

The Court's decisions regarding the provision of information to women who want or are considering an abortion most clearly reflect Justice Kennedy's paternalism. As already discussed, Justice Kennedy's abortion jurisprudence allows the state to require doctors to give women more information than doctors believe is medically necessary before they perform the procedure.[185] With respect to his opinions on restrictions on abortion protesters, Justice Kennedy believes the state should allow opportunities for protesters to change women's minds because these protesters may know better than women entering clinics.[186] On the other hand, the state does not have to give women full information regarding abortion as a family planning alternative; it can instead withhold that information from women because it disapproves of their choice[187] and even tell women who request information about abortion that it is not an "appropriate method of family planning."[188] Thus, according to Justice Kennedy, the state must allow people opposed to abortion to communicate that view to women seeking an abortion but can restrict women's access to information that might lead them to decide to have an abortion.[189] Justice Kennedy's views allow for state-supported manipulation of information designed to change a woman's mind, the very essence of paternalism.

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181. *See Casey*, 505 U.S. at 897 (plurality opinion).

182. *Gonzales*, 127 S. Ct. at 1634–35.

183. *Casey*, 505 U.S. at 885.

184. Benten v. Kessler, 505 U.S. 1084, 1084–85 (1992) (per curiam). *Benten* did not decide this issue on the merits but the result permitted the government to confiscate a dose of RU-486.

185. *See Casey*, 505 U.S. at 882–84.

186. *See* Hill v. Colorado, 530 U.S. 703, 789–91 (2000) (Kennedy, J., dissenting) (describing the "profound difference" protesters can have in a woman's decision to have an abortion).

187. Rust v. Sullivan, 500 U.S. 173, 192–93 (1991).

188. *Id.* at 180 (internal quotation marks omitted) (citing 42 C.F.R. § 59.8(b)(5) (1989)).

189. Justice Kennedy also voted to uphold the Adolescent Family Life Act, which restricted federal funds for counseling related to premarital sexual activity and pregnancy to groups that did not counsel about or provide abortions. Bowen v. Kendrick, 487 U.S. 589, 596–97, 622 (1988). The Court rejected an Establishment Clause challenge, *id.* at 618, and Justice Kennedy argued in a separate concurring opinion that funds could flow to a pervasively sectarian organization as long as the funds did not further religion. *Id.* at 624–25 (Kennedy, J., concurring).

Similarly, according to Justice Kennedy, minors in particular are incapable of making the decision to have an abortion and need the state's intervention. Justice Kennedy has broadly approved of state laws requiring minors who want an abortion to communicate with their parents, either to get their consent[190] or merely to notify them beforehand.[191] The basis of these rulings is Justice Kennedy's belief that parents, who know better, can counsel and make decisions for their minor daughters, who know worse.[192]

Thus, Justice Kennedy's gendered world is really only partially so. His high profile cases reflect a world in which gender stereotyping has no place in civic life. The state cannot rely on women's traditionally stereotyped role as homemakers to exclude them from a jury or military school nor can it rely on moral denunciations of same sex partners to exclude or punish gays and lesbians. However, a closer analysis of his sex discrimination cases reveals that Justice Kennedy endorses the oldest of stereotypes—those regarding the parenting of nontraditional fathers, women's role as mothers,, and the need for state-sanctioned protection of women. These stereotypes control his reasoning in cases touching on the parent–child relationship, and in these cases, Justice Kennedy's gendered world emerges.

V. CONCLUSION

With Justice Kennedy as the new median Justice on the Court, those fighting against sex discrimination must hope that he will join Justices Stevens, Souter, Breyer, and Ginsburg in close cases. However, based on an analysis of his previous cases, Justice Kennedy is far from a reliable vote for sex equality. Despite some undeniably important rulings in favor of sex equality, in sex discrimination cases that raise the parent–child relationship, Justice Kennedy tends to vote based on his traditional and paternalistic gendered view of the world.

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190. *See Casey*, 505 U.S. at 899 (upholding a Pennsylvania parental consent statute).

191. *See, e.g.*, Lambert v. Wicklund, 520 U.S. 292, 297 (1997) (per curiam) (upholding a Montana parental notification statute); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 517 (1990) (upholding an Ohio parental notification statute); Hodgson v. Minnesota, 497 U.S. 417, 496–97 (1990) (Kennedy, J., concurring in the judgment in part and dissenting in part) (upholding a Minnesota statute that required two-parent notification).

192. *See, e.g.*, *Akron Ctr.*, 497 U.S. at 520 ("It is both rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature."); *Hodgson*, 497 U.S. at 483 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("[A] [s]tate has an interest in seeing that a child, when confronted with serious decisions such as whether or not to abort a pregnancy, has the assistance of her parents in making the choice.").

APPENDIX A: JUSTICE KENNEDY'S SEX DISCRIMINATION CASES

Case	Cite	Issue	Outcome (pro sex equality, anti sex equality)	Kennedy vote on outcome	Kennedy position
New York State Club Association v. City of New York	487 U.S. 1 (1988)	First Amendment	pro	pro	majority (9-0)
Florida v. Long	487 U.S. 223 (1988)	Title VII	anti	anti	majority (5-4)
Frisby v. Schultz	487 U.S. 474 (1988)	Abortion/First Amendment	pro	pro	majority (6-3)
Bowen v. Kendrick	487 U.S. 589 (1988)	Sexual education	anti	anti	majority (5-4)
Carlucci v. Doe	488 U.S. 93 (1988)	Gay rights	anti	anti	majority (9-0)
Price Waterhouse v. Hopkins	490 U.S. 228 (1989)	Title VII	pro	anti	dissent (6-3)
Lorance v. AT&T Technologies, Inc.	490 U.S. 900 (1989)	Title VII	anti	anti	majority (5-3)
Michael H. v. Gerald D.	491 U.S. 110 (1989)	Substantive due process/Fatherhood	anti	anti	majority (5-4)
Independent Federation of Flight Attendants v. Zipes	491 U.S. 754 (1989)	Title VII	anti	anti	majority (6-2)
Webster v. Reproductive Health Services	492 U.S. 490 (1989)	Abortion	anti	anti	majority (5-4)
University of Pennsylvania v. EEOC	493 U.S. 182 (1990)	Title VII/First Amendment	pro	pro	majority (9-0)
Yellow Freight System, Inc. v. Donnelly	494 U.S. 820 (1990)	Title VII	pro	pro	majority (9-0)
Hodgson v. Minnesota	497 U.S. 417 (1990)	Abortion	pro	anti	dissent (5-4)
Ohio v. Akron Center for Reproductive Health	497 U.S. 502 (1990)	Abortion	anti	anti	majority (6-3)
International Union v. Johnson Controls	499 U.S. 187 (1991)	Title VII	pro	pro	majority (9-0)
Rust v. Sullivan	500 U.S. 173 (1991)	Abortion/First Amendment	anti	anti	majority (5-4)
Franklin v. Gwinnett County Public Schools	503 U.S. 60 (1992)	Title IX	pro	pro	majority (9-0)
United States v. Burke	504 U.S. 229 (1992)	Title VII	anti	anti	majority (7-2)
Planned Parenthood of Southeastern Pennsylvania v. Casey	505 U.S. 833 (1992)	Abortion	pro/anti	pro/anti	majority (5-4)

Case	Cite	Issue	Outcome (pro sex equality, anti sex equality)	Kennedy vote on outcome	Kennedy position
Benten v. Kessler	505 U.S. 1084 (1992)	Abortion	anti	anti	majority (7-2)
Bray v. Alexandria Women's Health Clinic	506 U.S. 263 (1993)	Abortion	anti	anti	majority (6-3)
Harris v. Forklift Systems, Inc.	510 U.S. 17 (1993)	Title VII	pro	pro	majority (9-0)
National Organization for Women, Inc. v. Scheidler	510 U.S. 249 (1994)	Abortion	anti	anti	majority (9-0)
J.E.B. v. Alabama *ex rel*. T.B.	511 U.S. 127 (1994)	Equal Protection	pro	pro	majority (6-3)
Landgraf v. USI Film Products	511 U.S. 244 (1994)	Title VII	anti	anti	majority (8-1)
Madsen v. Women's Health Center, Inc.	512 U.S. 753 (1994)	Abortion/First Amendment	pro	anti	dissent (6-3)
Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston	515 U.S. 557 (1995)	Gay rights/First Amendment	anti	anti	majority (9-0)
Dalton v. Little Rock Family Planning Services	516 U.S. 474 (1996)	Abortion	anti	anti	majority (9-0)
Romer v. Evans	517 U.S. 620 (1996)	Equal Protection/Gay rights	pro	pro	majority (6-3)
Leavitt v. Jane L.	518 U.S. 137 (1996)	Abortion	anti	anti	majority (5-4)
United States v. Virginia	518 U.S. 515 (1996)	Equal Protection	pro	pro	majority (7-1)
Walters v. Metropolitan Educational Enterprises, Inc.	519 U.S. 202 (1997)	Title VII	pro	pro	majority (9-0)
Schenck v. Pro-Choice Network of Western New York	519 U.S. 357 (1997)	Abortion	pro/anti	anti/anti	dissent (6-3), majority (8-1)
Lambert v. Wicklund	520 U.S. 292 (1997)	Abortion	anti	anti	majority (9-0)
Mazurek v. Armstrong	520 U.S. 968 (1997)	Abortion	anti	anti	majority (6-3)
Oncale v. Sundowner Offshore Services	523 U.S. 75 (1998)	Title VII	pro	pro	majority (9-0)
Miller v. Albright	523 U.S. 420 (1998)	Equal Protection/Fatherhood	anti	anti	majority (6-3)
Gebser v. Lago Vista Independent School District	524 U.S. 274 (1998)	Title IX	anti	anti	majority (5-4)
Burlington Industries, Inc. v. Ellerth	524 U.S. 742 (1998)	Title VII	pro	pro	majority (7-2)

Case	Cite	Issue	Outcome (pro sex equality, anti sex equality)	Kennedy vote on outcome	Kennedy position
Faragher v. City of Boca Raton	524 U.S. 775 (1998)	Title VII	pro	pro	majority (7-2)
NCAA v. Smith	525 U.S. 459 (1999)	Title IX	anti	anti	majority (9-0)
Davis v. Monroe County Board of Education	526 U.S. 629 (1999)	Title IX	pro	anti	dissent (5-4)
West v. Gibson	527 U.S. 212 (1999)	Title VII	pro	anti	dissent (5-4)
Kolstad v. American Dental Association	527 U.S. 526 (1999)	Title VII	anti	anti	majority (5-4)
United States v. Morrison	529 U.S. 598 (2000)	Equal Protection/Section 5	anti	anti	majority (5-4)
Boy Scouts of America v. Dale	530 U.S. 640 (2000)	Gay rights/First Amendment	anti	anti	majority (5-4)
Hill v. Colorado	530 U.S. 703 (2000)	Abortion/First Amendment	pro	anti	dissent (6-3)
Stenberg v. Carhart	530 U.S. 914 (2000)	Abortion	pro	anti	dissent (5-4)
Ferguson v. City of Charleston	532 U.S. 67 (2001)	Fourth Amendment/Pregnancy	pro	pro	majority (6-3)
Clark County School District v. Breeden	532 U.S. 268 (2001)	Title VII	anti	anti	majority (9-0)
Pollard v. E.I. du Pont de Nemours & Co.	532 U.S. 843 (2001)	Title VII	pro	pro	majority (8-0)
Nguyen v. I.N.S.	533 U.S. 53 (2001)	Equal Protection/Fatherhood	anti	anti	majority (5-4)
Edelman v. Lynchburg College	535 U.S. 106 (2002)	Title VII	pro	pro	majority (9-0)
Scheidler v. National Organization for Women, Inc.	537 U.S. 393 (2003)	Abortion	anti	anti	majority (8-1)
Nevada Department of Human Resources v. Hibbs	538 U.S. 721 (2003)	Equal Protection/Section 5	pro	anti	dissent (6-3)
Desert Palace v. Costa	539 U.S. 90 (2003)	Title VII	pro	pro	majority (9-0)
Lawrence v. Texas	539 U.S. 558 (2003)	Gay rights	pro	pro	majority (6-3)
Pennsylvania State Police v. Suders	542 U.S. 129 (2004)	Title VII	pro	pro	majority (8-1)
Jackson v. Birmingham Board of Education	544 U.S. 167 (2005)	Title IX	pro	anti	dissent (5-4)
Ayotte v. Planned Parenthood of Northern New England	546 U.S. 320 (2006)	Abortion	anti	anti	majority (9-0)

Case	Cite	Issue	Outcome (pro sex equality, anti sex equality)	Kennedy vote on outcome	Kennedy position
Arbaugh v. Y & H Corp.	546 U.S. 500 (2006)	Title VII	pro	pro	majority (8-0)
Scheidler v. National Organization for Women, Inc.	547 U.S. 9 (2006)	Abortion	anti	anti	majority (8-0)
Rumsfeld v. Forum for Academic & Institutional Rights	547 U.S. 47 (2006)	Gay rights/First Amendment	anti	anti	majority (8-0)
Burlington Northern & Santa Fe Railway Co. v. White	548 U.S. 53 (2006)	Title VII	pro	pro	majority (9-0)
Gonzales v. Carhart	127 S. Ct. 1610 (2007)	Abortion	anti	anti	majority (5-4)
Ledbetter v. Goodyear Tire & Rubber Co.	127 S. Ct. 2162 (2007)	Title VII	anti	anti	majority (5-4)

APPENDIX B: JUSTICE KENNEDY AND JUSTICE O'CONNOR COMPARED

Nonunanimous Cases	Cite	Kennedy vote on outcome	O'Connor vote
Florida v. Long	487 U.S. 223 (1988)	anti	anti
Frisby v. Schultz	487 U.S. 474 (1988)	pro	pro
Bowen v. Kendrick	487 U.S. 589 (1988)	anti	anti
Price Waterhouse v. Hopkins	490 U.S. 228 (1989)	anti	pro
Michael H. v. Gerald D.	491 U.S. 110 (1989)	anti	anti
Independent Federation of Flight Attendants v. Zipes	491 U.S. 754 (1989)	anti	anti
Webster v. Reproductive Health Services	492 U.S. 490 (1989)	anti	anti
Hodgson v. Minnesota	497 U.S. 417 (1990)	anti	pro
Ohio v. Akron Center for Reproductive Health	497 U.S. 502 (1990)	anti	anti
Rust v. Sullivan	500 U.S. 173 (1991)	anti	pro
United States v. Burke	504 U.S. 229 (1992)	anti	pro
Benten v. Kessler	505 U.S. 1084 (1992)	anti	anti
Planned Parenthood of Southeastern Pennsylvania v. Casey	505 U.S. 833 (1992)	pro/anti	pro/anti
Bray v. Alexandria Women's Health Center	506 U.S. 263 (1993)	anti	pro
J.E.B. v. Alabama *ex rel* T.B.	511 U.S. 127 (1994)	pro	pro
Landgraf v. USI Film Products	511 U.S. 244 (1994)	anti	anti
Madsen v. Women's Health Center, Inc.	512 U.S. 753 (1994)	anti	pro
Romer v. Evans	517 U.S. 620 (1996)	pro	pro
Leavitt v. Jane L.	518 U.S. 137 (1996)	anti	anti
United States v. Virginia	518 U.S. 515 (1996)	pro	pro
Schenck v. Pro-Choice Network of Western New York	519 U.S. 357 (1997)	anti/anti	pro/anti
Mazurek v. Armstrong	520 U.S. 968 (1997)	anti	anti
Miller v. Albright	523 U.S. 420 (1998)	anti	anti
Gebser v. Lago Vista Independent School District	524 U.S. 274 (1998)	anti	anti
Burlington Industries, Inc. v. Ellerth	524 U.S. 742 (1998)	pro	pro
Faragher v. City of Boca Raton	524 U.S. 775 (1998)	pro	pro
Davis v. Monroe County Board of Education	526 U.S. 629 (1999)	anti	pro
West v. Gibson	527 U.S. 212 (1999)	anti	pro
Kolstad v. American Dental Association	527 U.S. 526 (1999)	anti	anti
United States v. Morrison	529 U.S. 598 (2000)	anti	anti
Boy Scouts of America v. Dale	530 U.S. 640 (2000)	anti	anti
Hill v. Colorado	530 U.S. 703 (2000)	anti	pro
Stenberg v. Carhart	530 U.S. 914 (2000)	anti	pro
Ferguson v. City of Charleston	532 U.S. 67 (2001)	pro	pro

Nonunanimous Cases	Cite	Kennedy vote on outcome	O'Connor vote
Nguyen v. I.N.S.	533 U.S. 53 (2001)	anti	pro
Scheidler v. National Organization for Women, Inc.	537 U.S. 393 (2003)	anti	anti
Nevada Department of Human Resources v. Hibbs	538 U.S. 721 (2003)	anti	pro
Lawrence v. Texas	539 U.S. 558 (2003)	pro	pro
Pennsylvania State Police v. Suders	542 U.S. 129 (2004)	pro	pro
Jackson v. Birmingham Board of Education	544 U.S. 167 (2005)	anti	pro