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Three Terms of the Kennedy Court: Projecting the Future of Constitutional Doctrine

Kenneth M Murchison

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THREE TERMS OF THE KENNEDY COURT:
PROJECTING THE FUTURE OF CONSTITUTIONAL DOCTRINE

by

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THREE TERMS OF THE KENNEDY COURT

THREE TERMS OF THE KENNEDY COURT: PROJECTING THE FUTURE OF CONSTITUTIONAL DOCTRINE

Abstract

This Article evaluates the likely direction of constitutional doctrine now that Justice Kennedy is clearly the pivotal justice on most controversial constitutional issues. The article begins with a summary of Justice Kennedy’s positions on a range of constitutional issues and of his influence on constitutional doctrine in the decade before Chief Justice Roberts and Justice Alito joined the Court. It then examines the closely divided decisions of the last three terms and projects how constitutional doctrine is likely to change for the foreseeable future. Finally, it considers the extent to which stare decisis, changes in Justice Kennedy’s thought, and the likely appointment of new justices might qualify the projections.
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Typically, observers of the United State Supreme Court identify the Court by the name of its chief justice. Thus, articles and books often refer to the Marshall Court, the Taney Court, the Taft Court, and the Warren Court, to mention only a few of the most famous. The basis for the identification is undoubtedly the special position the chief justice enjoys as the first among a court of equals. In conference, the chief justice speaks first and votes first after the discussion is completed.\(^1\) In addition, a chief justice who is part of the majority chooses the author of the majority opinion.\(^2\) Perhaps not surprisingly, chief justices are often members of the majority in important cases and frequently choose themselves to author the Court’s opinions.\(^3\)

The ideological division on the current Court justifies a modification of this tradition. Recent appointments to a sharply divided Supreme Court have made Associate Justice Anthony Kennedy the critical vote on most important constitutional issues that divide the Court. Thus, at least for the present, the appropriate label for the contemporary Supreme Court appears to be the Kennedy Court rather than the Roberts Court.

This Article describes how Justice Kennedy came to be the most important justice and offers a preliminary evaluation of the influence Justice

\(^{1}\)Henry J. Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France* 215 (7th ed. 1998). Until sometime in the 1970s, the Court followed a somewhat different procedure in which the chief justice spoke first but voted last. That method arguably gave the chief justice even greater influence, because the chief justice always knew the precise division of the Court when casting the final vote. *Id.* at 215, n. 126.

\(^{2}\)TVA v. Hill, 437 U.S. 153 (1978), is an example of when a chief justice used his power as chief justice to assign a majority opinion to himself. For a brief description of how Chief Justice Burger voted and assigned the opinion in the case, see Kenneth M. Murchison, *The Snail Darter Case: TVA Versus the Endangered Species Act* 125-26 (2007).

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Kennedy is likely to have on constitutional doctrine in the coming years. It begins with brief description of how the recent appointments have accentuated Justice Kennedy’s influence and a summary of the impact that Justice Kennedy had on constitutional doctrine prior to the recent changes in the makeup of the Court. The next two sections describe how the Court’s recent decisions demonstrate the central hypothesis that Justice Kennedy is now the ideological center of the Court and highlight areas where Justice Kennedy’s vote might be crucial for a change in doctrinal direction. The final analytic section examines three factors that might operate to limit the increased influence of Justice Kennedy in the future. The conclusion offers an early assessment of likely changes in the constitutional doctrine of the future.

A BRIEF BACKGROUND

During the 2005 Term, new justices joined the United States Supreme Court for the first time in more than a decade. Most commentators expected the appointments of Chief Justice Roberts and Justice Samuel Alito  to move the Court further to the right and thus to shift the ideological balance of a Court whose decisions had completely satisfied no one. Supporters of the New Deal legacy lamented the rise of new federalism restraints on the ability of Congress to deal with national problems. Devotees of the Warren Court deplored the shrinking of the rights of criminal defendants and minorities

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5 President George W. Bush nominated Chief Justice Roberts. Following Senate confirmation, he took his seat on September 29, 2005. Id.

6President Bush also nominated Justice Alito . Following Senate confirmation, he took his seat on January 31, 2006. Id.


and the expanded protection for economic interests. If any disciple of Justice Frankfurter’s judicial restraint still existed, she undoubtedly lamented the expansion of Supreme Court power in a variety of directions, an expansion that culminated in the Court rather than Congress resolving the disputed presidential election of 2000. Even the new conservatives – who have won the majority of victories during the last decade when before the appointment of Chief Justice Roberts – were dismayed by the failure to overrule Roe v. Wade or to outlaw all race-based affirmative action programs and by the continuing limits on the ability of states to impose capital punishment and the expanded protections afforded women and homosexuals.

Few observers thought replacing Chief Justice Rehnquist with Judge John Roberts of the District of Columbia Circuit would produce any dramatic

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shift in the Court’s decisional pattern. Instead, they assumed that the new Chief Justice, like his predecessor, would generally side with Justices Scalia and Thomas on ideologically divisive issues.

The appointment of Judge Samuel Alito of the Third Circuit to replace Justice O’Connor was a different matter. Despite having been appointed by President Ronald Reagan, Justice O’Connor had been a centrist on the Rehnquist Court on several crucial issues. By contrast, most observers expected Justice Alito to align himself more closely with the new Chief Justice and Justices Scalia and Thomas, thus increasing the size of that ideological grouping to four.

When the new justices vote as expected, the obvious impact of the shift in the Court’s membership is to increase the influence of Justice Anthony Kennedy. Although Justice Kennedy joined the Scalia-Thomas bloc with some frequency in recent years, he often backed away from the most extreme positions that those two justices endorsed. As a result, he shared the Court’s center with Justice O’Connor from 1995 to 2005. Each (or both) of them occasionally slowed the rightward drift of the Court by joining with Justices Stevens, Souter, Ginsburg, and Breyer to create a more left-leaning majority. Now that Justice Alito is expected to be a more consistent part of the ideological bloc on the right, Justice Kennedy’s position becomes even more important. When he joins Chief Justice Roberts and Justices Scalia, Thomas, and Alito, he creates a majority for the right wing of the Court. When he joins the other four justices, he creates a majority with the more liberal justices.

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21Justice Kennedy’s views were even more influential in the early and middle years of the 1990s. Between the 1991 Term and the 1997 Term, he dissented only 43 times in 667 cases that the Court disposed of by signed opinion. Earl M. Waltz, Anthony Kennedy and the Jurisprudence of Respectable Conservatism, in Rehnquist Justice: Understanding the Court Dynamic 140 (Earl M. Waltz, ed., 2003).
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As noted above, Justice Kennedy shared the center of the Court with Justice O’Connor throughout the 1990s and the first five years of the new century. As a result, he contributed to alterations of the landscape of constitutional doctrine in a wide variety of areas. In many of these cases, Justice Kennedy articulated a position that significantly qualified the majority that he joined. The remainder of this section first summarizes some of these areas and then describes them in more detail.

Justice Kennedy and Justice O’Connor most commonly joined with Chief Justice Rehnquist and Justices Scalia and Thomas to form a majority for constitutional change. That majority reinvigorated federalism limits on congressional power, established the Equal Protection Clause as a restraint on affirmative action programs and state election procedures, and strengthened the Takings Clause as a limit on state regulatory power. At the same time, it narrowed the scope of the woman’s right to choose an abortion, the rights of criminal defendants, and some First Amendment claims.

Less frequently, Justice Kennedy (either by himself or with Justice O’Connor) formed a majority with Justices Stevens, Souter, Ginsburg, and Breyer or their predecessors. Those majorities reaffirmed the woman’s right to choose an abortion, provided substantial protection for women under the Equal Protection Clause, declined to invalidate all race-based affirmative action, confirmed a broad congressional power to adopt comprehensive federal statutes, and broadly defined what constitutes a “public use” under the Takings Clause.

Finally, Justice Kennedy also provided the crucial vote in some cases when the Court divided on less ideologically predictable lines. Two of the most important areas decided by such majorities involved the dormant Commerce Clause as a restriction on state regulation of economic activity and substantive due process as a limit on punitive damages in tort suits in state courts.

Federalism Issues

Some of the most significant decisions of the Rehnquist Court concerned the extent to which federalism restrains the powers of federal and state government. Justice Kennedy often provided a crucial vote in delineating these limits.

Justice Kennedy and Justice O’Connor joined with Chief Justice Rehnquist and Justices Scalia and Thomas in a series of decisions that

\[22\text{U.S. Const. amend. XIV, § 1: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”}\\
\[23\text{U.S. Const. amend. V: “[N]or shall private property be taken for public use, without just compensation.”}

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narrowed congressional authority to regulate private conduct. In 1995 and 2000, Justice Kennedy joined opinions by Chief Justice Rehnquist denying congressional power to regulate “noneconomic” activities because of their aggregate effect on interstate commerce,\(^\text{24}\) although in the 1995 case his concurring opinion stressed the continued breadth of congressional power under the Commerce Clause.\(^\text{25}\) Justice Kennedy also authored the opinion invalidating Congress’ attempt to use Section 5 of the Fourteenth Amendment to require strict scrutiny for state actions that substantially burden an individual’s free exercise of religion,\(^\text{26}\) and he joined opinions finding that Congress lacked power under the Fourteenth Amendment to ban trademark and patent infringement by states\(^\text{27}\) or to prohibit discrimination against those who are disabled\(^\text{28}\) or elderly.\(^\text{29}\)

Indeed, Justice Kennedy would have imposed stricter limits on congressional power under the Fourteenth Amendment than a majority of the Supreme Court eventually established. He sided with Chief Justice Rehnquist and Justices Scalia and Thomas in dissent when Justice O’Connor joined Justice Stevens’ opinion holding that the Fourteenth Amendment authorized Congress to grant damages against states that failed to make reasonable accommodations for the disabled to attend court.\(^\text{30}\) He also joined Justices Scalia and Thomas in dissenting from Chief Justice Rehnquist’s opinion holding that the Fourteenth Amendment allowed Congress to extend the Family Medical Leave Act to states.\(^\text{31}\)

Justice Kennedy was also decisive in marking an important qualification to the decisions limiting congressional authority. In 2005, he sided with the justices who had dissented in the cases limiting federal power and joined a decision that refused to extend those decisions to require that comprehensive statutes create exceptions for localized activity.\(^\text{32}\)


\(^{25}\)\textit{Lopez}, 514 U.S. at 568 (Kennedy, J., concurring).

\(^{26}\)City of Boerne v. Flores, 521 U.S. 507 (1997).


\(^{32}\)Gonzales v. Raich, 545 U.S. 1 (2005).
Justice Scalia who concurred only in the judgment in that case, Justice Kennedy joined the majority opinion written by Justice Stevens.

Justice Kennedy played an equally pivotal role in the cases recognizing new state immunities from federal regulations. He joined Judge O’Connor’s opinion holding that Congress could not force New York to enact a low level nuclear waste law that met federal standards and Justice Scalia’s opinion declaring that Congress could not require local law enforcement officials to participate in the implementation of the federal statute that required background checks for gun purchases.

Justice Kennedy’s role was especially prominent in the decisions establishing state immunity from private actions for damages. He concurred in opinions ruling that states were immune from private actions for damages in federal courts when those actions were based on statutes enacted under the Commerce Clause and the Copyright and Patent Clause. He also authored the opinion holding that the immunity applied to claims brought in state court as well as those filed in federal court and joined the opinion extending the immunity to adjudications by federal agencies.

Perhaps surprisingly for a Court that tried to rein in federal power, the Supreme Court frequently concluded that valid federal law preempted additional state regulations. The Court invalidated most of these state laws

33Id. at 33 (Scalia, J., concurring in the judgment).
37U.S. Const. Art. I, § 8, cl. 3: “The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes. . . .”
38U.S. Const. Art. I, § 8, cl. 8: “The Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. . . .”
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by substantial majorities of which Justice Kennedy was a part.\textsuperscript{42} He dissented only once in the preemption cases;\textsuperscript{43} and in the one case when the Court divided five to four, he was a member of the majority.\textsuperscript{44}

In 1992, the Supreme Court decided the first in a series of important preemption cases considering when federal regulatory statutes precluded private actions for damages under state law. The 1992 decision was a fragmented one in which the Court concluded that the Federal Cigarette Labeling and Advertising Act preempted certain failure-to-warn claims, but not claims based on express warranty, intentional fraud or misrepresentation, or conspiracy.\textsuperscript{45} Justice Kennedy joined Justice Blackmun’s concurring and

\textsuperscript{42}See, e.g., Crosby, 530 U.S. 363 (unanimous decision); Locke, 529 U.S. 89 (opinion by Justice Kennedy, for a unanimous Court); Foster, 522 U.S. 67 (unanimous decision except that Justices Scalia, Kennedy, and Thomas did not join in Part III of the Court’s opinion); Doctor’s Associates, Inc., 517 U.S. 681 (eight-member majority with Justice dissenting).

\textsuperscript{43}Mid-Continent Freight Systems, Inc., 545 U.S. 440 (Kennedy, J., dissenting joined by Chief Justice Rehnquist and Justice O’Connor).

\textsuperscript{44}American Ins. Ass’n, 539 U.S. 396.

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dissenting opinion that would also have allowed the failure-to-warn claims.\(^\text{46}\) Since 1995, the Court has addressed the issue of preemption of private remedies in a steady stream of cases. The decisions vary, depending on the particular federal statute involved; the Court has found that some of them preempt state claims,\(^\text{47}\) but others do not.\(^\text{48}\) Significantly, Justice Kennedy was a member of the majority in all twelve of the cases involving claims of preemption of private remedies. In the two cases in which the Court divided five to four, he provided a decisive vote.\(^\text{49}\)

When the federalism questions shifted to state power, Justice Kennedy was more willing to imply federalism limits on state legislative

\(^{46}\) *Cipollone*, 505 U.S. at 530.


\(^{48}\) *Bates v. Dow Agrosciences LLC*, 544 U.S. 432 (2005) (Federal Insecticide, Fungicide, and Rodenticide Act does not preempt claims for defective design, defective manufacture, negligent testing, breach of express warranty, or violation of state Deceptive Trade Practices Act; failure to warn claims are referred to court of appeals for further analysis); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) (Federal Boat Safety Act does not preempt common law tort claims arising out of failure to install propeller guards on boat engine); *Atherton v. FDIC*, 519 U.S. 213 (1997) (Financial Institutions Reform, Recovery, and Enforcement Act does not preempt state negligence standard in liability action against former officers and directors of federally insured savings institution); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (Medical Device Amendments do not preempt claims based on state or local requirements that are equal to, or substantially identical to, requirements imposed under federal law); see also *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996) (Judicial recognition of federal maritime wrongful death action does not preempt application of state wrongful death and survival statute to accidents in which nonseamen are injured in territorial waters).

\(^{49}\) *Geier*, 529 U.S. 861; *Medtronic*, 518 U.S. 470.
power than the group with which he generally sided. In a case from Arkansas, he agreed with Justices Stevens, Souter, Ginsburg, and Breyer that the Constitution prohibits states from limiting the number of terms a representative or senator can serve in Congress.\(^{50}\) Similarly, he has found fairly stringent limits on state regulatory power in the dormant Commerce Clause, although the Court’s division has been less ideologically predictable on that issue.\(^{51}\) In one important case, his opinion for a divided Court ruled that a local waste management ordinance requiring that all waste in the county be delivered to a single privately owned transfer station violated the dormant Commerce Clause.\(^{52}\)

**Separation of Powers Questions**

Justice Kennedy has consistently voted with the majority in separation of powers cases,\(^{53}\) but the majority in many of these cases was a substantial one. He joined the unanimous opinion that rejected President Clinton’s claim that he was entitled to a temporary immunity from private lawsuits while serving as President.\(^{54}\) He was also part of a six-member majority that invalidated the Line Item Veto Act.\(^{55}\) In the later case, he added a concurring opinion declaring that “the failure of political will [in limiting federal spending] does not justify unconstitutional remedies.”\(^{56}\)

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\(^{51}\)Another example of a five-four decision in which Justice Kennedy provided the decisive fifth vote for the majority is Granholm v. Heald, 544 U.S. 460 (2005). In *Granholm*, Justice Kennedy’s majority opinion concluded that state statutes allowing only in-state wineries to ship wine directly to consumers violated the dormant Commerce Clause. For other cases in which Justice Kennedy joined larger majorities recognizing limits based in the dormant Commerce Clause, see Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997); Oregon Waste Systems, Inc. v. Department of Environmental Quality, 511 U.S. 93 (1994); Chemical Waste Management v. Hunt, 504 U.S. 334 (1992).


\(^{53}\)Justice Kennedy did not participate in *Morrison v. Olson*, 487 U.S. 654 (1988), even though the case was argued and decided after he joined the Court. In *Morrison*, a seven-member majority upheld the federal statute authorizing appointment of a special prosecutor to investigate claims against the President and other top administration officials.


\(^{56}\)Id. at 449.
When the Court faced the issue of standing to invoke the federal judicial power, Justice Kennedy has frequently provided a centrist vote. He joined the major decisions of the Rehnquist Court constricting standing in environmental cases, but he regularly added or joined concurring opinions that declined to restrict standing as much as others – particularly Justice Scalia – wanted. In 2000, he joined a seven-member majority in a decision holding that Congress could grant users of a river standing to enforce permit limits under the Clean Water Act, although he again added a concurring opinion.

Justice Kennedy has also adopted an influential centrist position in decisions regarding the power of the judiciary to review the detention and trial of alleged enemy combatants. He and Justice O’Connor both joined Justices Stevens, Souter, Ginsburg, and Breyer in ruling that federal courts have jurisdiction to consider habeas corpus petitions from alleged enemy combatants detained by the military at the United States naval base in Guantanamo Bay, Cuba. However, Justice Kennedy concurred only in the judgment because he thought that Justice Steven’s majority opinion failed to balance the relevant separation of powers concerns. In a second case, Justice Kennedy joined Justice O’Connor’s plurality opinion construing the Due Process Clause of the Fifth Amendment to require that a United States citizen being held as an enemy combatant be given a meaningful opportunity to contest the factual basis for the detention before a neutral decision maker. On the other hand, he along with Justices O’Connor, Scalia, and Thomas joined Chief Justice Rehnquist’s opinion requiring an alleged enemy...


58 See, e.g., Steel Co., 523 U.S. at 110 (O’Connor, J., concurring joined by Kennedy, J.); Lujan II, 504 U.S. at 579; (Kennedy, J., concurring in part and concurring in the judgment); see generally Blumm, Justice Kennedy and the Environment: Property, States-Rights, and a Persistence Search for Nexis, 82 Wash. L. Rev. 667 (2007).


61 Id. at 197 (Kennedy, J., concurring).


63 Id. at 485 (Kennedy, J., concurring in the judgment).

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combatant to file his habeas corpus petition in the district where he was incarcerated.65

Most fundamentally, Justice Kennedy has consistently supported the expansion of the judicial role in constitutional law.66 This expansion has proceeded in two ways. Most obviously, the domain of constitutional law has expanded. Siding with Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas, Justice Kennedy supported the reinvigoration of federalism limits on congressional power67 and constitutional protections for property68 as well as strict scrutiny for race-based programs of affirmative action and the appropriateness of the Court resolving the disputed presidential election of 2000.69 At the same time, he joined Justices Stevens, Souter, Ginsburg, and Breyer and sometimes Justice O’Connor to allow standing in some environmental cases,70 to provide broader protection under the Equal Protection Clause for women and homosexuals,71 to expand some substantive due process claims,72 and to invalidate some death penalty statutes.73 The result has been an increase in both the number and complexity of constitutional doctrines. In addition, Justice Kennedy has vigorously supported the principle that the Supreme Court interpretation of the Constitution is final. Thus, he has concurred in decisions that resisted congressional attempts to overrule or circumvent Supreme Court decisions involving the Commerce Clause,74 the protections afforded criminal defendants,75 and the guarantee of the free exercise of religion.76

66See generally Keck, supra note 12.
67See notes 24-40 supra and accompanying text.
68See notes 99-107 infra and accompanying text.
70See notes 57-61 supra and accompanying text.
71See notes 95-96 infra and accompanying text.
72See notes 83-87 infra and accompanying text.
73See notes 113-16 infra and accompanying text.
75Dickerson, 530 U.S. 428 (2000).
Protection of Individual Rights

Justice Kennedy’s positions regarding rights claims of individuals are more difficult to characterize. In a number of important cases, the Court has divided along the lines that predominate in federalism and separation of powers cases. However, in other cases involving individual rights, the Court’s division has crossed its normal ideological lines. In both groups of cases, Justice Kennedy often provided a pivotal vote, and he frequently articulated a position that qualified the position of the majority he joined.

The Court’s normal ideological division has dominated abortion and equal protection cases as well as the decisions reinvigorating of the protections of the Takings Clause. As Justice Kennedy promised in his confirmation hearing, he has embraced the idea that due process protects substantive rights beyond those enumerated in the Constitution. He has also recognized the woman’s right to choose an abortion as one of those rights, although he has joined opinions constricting the scope of that particular right. Likewise, he has broadly interpreted the Equal Protection Clause to provide expanded constitutional protection for women and homosexuals, strict scrutiny for programs designed to aid racial and ethnic minorities, and Supreme Court review of state recount procedures in presidential elections. In addition, he was a member of the majority in the one case in which the Court revived the Privileges or Immunities Clause. When interpreting the Takings Clause, Justice Kennedy has steered a middle course, joining opinions finding some regulations to be takings while allowing the government to condemn property for economic development and to establish a temporary moratorium on development. With respect to the rights of criminal defendants, Justice Kennedy generally sided with Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas except in death penalty cases where he authored several important opinions finding the death penalty unconstitutional in specific circumstances. In free speech cases, he voted to invalidate both state and federal flag-burning statutes, but he has favored restricting protections available to public employees.

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77 U.S. Senate Committee on the Judiciary: S. Hrg. 100-1037, Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States pp. 85-86, 164-65, 179-80 (available at http://www.gpoaccess.gov/congress/senate/judiciary/sh100-1037/browse.html). I am grateful to Professor Lori Ringhand of the University of Georgia Law School for this reference. She used it in a presentation at the 2007 meeting of the Southeastern Association of Law Schools and later provided me with the specific page references. The context of these comments makes them particularly noteworthy. The Senate – with the Democrats again in majority after the 1986 congressional elections – confirmed Justice Kennedy after defeating the nomination of Robert Bork, who explicitly rejected the idea of unenumerated rights.
Perhaps the most dramatic decision of the Rehnquist Court era was the 1992 case in which a majority of the Supreme Court refused to overturn *Roe v. Wade*. Justice Kennedy joined Justices O’Connor and Souter as authors of the joint plurality opinion; they combined with Justices Blackmun and Stevens to reaffirm *Roe’s* “essential holding,” which recognized a woman’s right to choose an abortion as constitutionally protected. Even as the justices who authored the plurality reaffirmed the essential holding of *Roe*, they demonstrated that the Court would be considerably more willing to allow regulations of abortions so long the regulations did not place an “undue burden” on the woman’s right. Indeed, the Court sustained all but one of the regulations before it in the 1992 case. Eventually, however, Justice Kennedy split with Justices O’Connor and Souter over the scope of the state’s power to regulate abortions. In 2000, he joined Chief Justice Rehnquist and Justices Scalia and Thomas in dissenting from a decision holding that a state ban on dilation and extraction abortions placed an undue burden on the woman’s right to choose.

Justice Kennedy has also been willing to use the Due Process Clauses of the Fifth Amendment and the Fourteenth Amendment to protect other individual rights not specifically enumerated in the Constitution. He authored the opinion holding that the right of sexual intimacy extended to homosexuals, and he has consistently joined the majority that has limited the amount that injured parties can collect in punitive damages. He also provided the crucial vote to invalidate a statute imposing pension liability for

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78 410 U.S. 113 (1973).
80 *Id.* at 876-79.
81 The court upheld the statutory definition of emergency, the informed consent requirements, the 24-hour waiting period, the parental consent provision, and the reporting and record-keeping requirements. *Id.* at 879-87, 898-901. The only provision that the plurality found imposed an undue burden on women seeking abortions was the spousal notification provision. *Id.* at 887-98.
83 U.S. Const. amend. V: “[N]or shall any person be deprived of life, liberty, or property without due process of law . . . .”
84 U.S. Const. amend. XIV, § 1: “No state shall deprive any person of life, liberty, or property without due process of law. . . .”
former employees of coal companies, even though he was the only justice who relied on substantive due process as the basis for the decision.  

In cases involving equal protection claims, Justice Kennedy has generally been a member of the majority, although the makeup of the majority has varied. He formed a majority with the more conservative members of the Court in most of the cases in which the Court was narrowly divided. In a few cases, however, he joined the more liberal members of the Court;

Justices Kennedy and O’Connor generally sided with Chief Justice Rehnquist and Justices Scalia and Thomas to form a majority with respect to equal protection issues. That majority stopped Florida’s attempt to recount ballots in the 2000 presidential election and invalidated racially based voting districts and affirmative action programs. In the last two groups of cases, he joined Justice O’Connor in refusing to forbid all use of race, but he was less willing than she was to find race-based programs constitutional. The difference between the views of the two justices surfaced most clearly in the case challenging the affirmative action program at the University of Michigan Law School. Justice O’Connor accepted the use of race as one of a number of factors in selecting applicants. Justice Kennedy argued that the law school program was unconstitutional because it placed too much reliance on race in the admissions process.

In the October 1995 Term, both Justice Kennedy and Justice O’Connor joined Justices Stevens, Souter, Ginsburg, and Breyer in decisions expanding protections for women and homosexuals. Justice Ginsburg wrote

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91 But see Richmond v. J.A. Croson Co., 488 U.S. 469 (1985) (Kennedy, J., concurring in part in the judgment) (accepting the “moral imperative of racial neutrality” as “the driving force of the Equal Protection Clause.”).

92 Grutter v. Bollinger, 539 U.S. 306, 387 (2003) (Kennedy, J., dissenting); Bush v. Vera, 517 U.S. 952 (1999) (Kennedy, J., concurring in the plurality opinion that rejected the argument that all use of race to assign political districts was unconstitutional, an argument that Justice Thomas advanced in his opinion concurring in the judgment).


94 Id. at 387 (Kennedy, J., dissenting).
the opinion for that majority in a case which provided enhanced protections against gender discrimination without explicitly making gender discrimination a suspect classification. Justice Kennedy himself authored the opinion that invalidated a state constitutional amendment because it reflected “animus” toward homosexuals.

When the Court resurrected the Privileges or Immunities Clause of the Fourteenth Amendment in 1999, Justice Kennedy was a member of the six-justice majority. He joined Justice Stevens’ opinion that upheld the right of recent arrivals in a state to receive the state same welfare payments as other citizens of the state.

Justice Kennedy has also been a pivotal vote in defining the extent to which the Takings Clause limits governmental control of real property. He occasionally joined a majority holding that government regulations can constitute a taking for which compensation is require. On the other hand, he has been tolerant of temporary controls on development, and he has broadly defined the government’s authority to condemn property.

Both Justice Kennedy and Justice O’Connor (along with Justice White) were part of a six-member majority that held a state coastal regulation was a taking because it denied the owner all economically viable use of his property, but Justice Kennedy qualified his support of that holding in a concurring opinion. Subsequently, Justice Kennedy joined an opinion invalidating permit conditions as takings. He also authored a 2001 opinion joined by Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas holding that a property owner could raise a takings claim to a regulation established prior to the owner’s acquisition of the property. In addition, Justice Kennedy provided the crucial fifth vote to invalidate a regulation imposing pension obligations on a company that had formerly had coal

97U.S. Const. amend. XIV, § 1: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . .”
100Id. at 1032 (Kennedy, J., concurring in the judgment).
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mining operations;\textsuperscript{103} however, as noted above,\textsuperscript{104} he relied on due process rather than the Takings Clause.

On the other hand, Justice Kennedy joined Justices O’Connor, Stevens, Souter, Ginsburg, and Breyer in rejecting a claim that a temporary moratorium on development around Lake Tahoe was a taking.\textsuperscript{105} Furthermore, in a controversial 2005 opinion holding that the Takings Clause did not preclude a local government from condemning land for an economic development project,\textsuperscript{106} Justice Kennedy provided the crucial fifth vote and wrote a concurring opinion.\textsuperscript{107}

In criminal cases, both Justice Kennedy and Justice O’Connor usually sided with the Chief Justice Rehnquist and Justices Scalia and Thomas to support the narrow definition of the constitutional rights of criminal defendants\textsuperscript{108} although Justice O’Connor seems to have been more willing to break that pattern.\textsuperscript{109} Insofar as Justice Kennedy is concerned, one can identify at least two important exceptions to the pattern. First, Justice Kennedy has been part of the group that has tried to limit the reach of an ideologically diverse majority’s broad interpretation of the Sixth Amendment right to a jury trial in criminal cases. Second, Justice Kennedy has sided with Justices Stevens, Souter, Ginsburg, and Breyer and, sometimes Justice O’Connor, to invalidate the death sentence in several important capital punishment cases.

Justice Kennedy has not generally supported the Court’s expansion of the right to a jury trial in issues relating to the enhancement of criminal sentences. In the first two cases expanding the right, he dissented,\textsuperscript{110} but he was part of the majority that applied those decisions to capital defendants.\textsuperscript{111}

\textsuperscript{104}See text accompanying note 84 supra.
\textsuperscript{107}Id. at 490 (Kennedy, J., concurring).
\textsuperscript{111}Ring v. Arizona, 536 U.S. 584 (2002).
Subsequently, he provided the crucial fifth vote for Justice Breyer’s majority opinion granting advisory status to the federal sentencing guidelines.\textsuperscript{112}

Justice Kennedy’s most significant influence in criminal law cases has undoubtedly come in death penalty cases. Although he and Justice O’Connor sided with Chief Justice Rehnquist and Justices Scalia and Thomas to uphold death sentences in a number of cases,\textsuperscript{113} he has sometimes been a swing justice in capital punishment cases. He (and Justice O’Connor) occasionally joined Justices Stevens, Souter, Ginsburg, and Breyer in setting aside the death penalty on procedural grounds,\textsuperscript{114} and he authored opinions finding the death penalty unconstitutional for the mentally retarded\textsuperscript{115} and for juveniles over the age of 16.\textsuperscript{116}

Justices often divide differently from their usual ideological groupings in First Amendment cases, and Justices Kennedy’s opinions in the vast doctrinal area of free speech claims defy easy characterization.\textsuperscript{117} In several important areas, he supported the expansion of the First Amendment claims. Perhaps most importantly, he has vigorously opposed limits on campaign contributions and spending,\textsuperscript{118} and he has dissented from decisions upholding injunctions against abortion protestors.\textsuperscript{119} He has also supported the decisions requiring public institutions to grant equal access to religious

\textsuperscript{112}United States v. Booker, 543 U.S. 220 (2005).


\textsuperscript{116}Roper v. Simmons, 543 U.S. 551 (2005). Although Justice O’Connor joined the majority in \textit{Atkins}, she dissented in \textit{Roper}.

\textsuperscript{117}For a recent attempt at a general explanation, see Helen J. Knowles, \textit{The Supreme Court As Civic Educator: Free Speech According to Justice Kennedy}, 6 First Amend. L. Rev. 250 (2008).


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groups, and he was part of the majorities invalidating both state and federal statutes making it a crime to burn the United States flag. At the same time, he has joined a majority narrowly construing the rights of public employees to protest policies to which they object, and he wrote the opinion of the Court concluding that substantial truth rather than literal accuracy is the test for quotations in defamation actions. In pornography cases, Justice Kennedy has again adopted a centrist position. He concurred in the opinion allowing the government to criminalize possession of child pornography, but authored the one invalidating the federal statute that declined to extend that authority to pornography which used adult actors who appeared to be children.

Justice Kennedy has also carved out a distinctive position in cases regarding freedom of religion. In Establishment Clause cases, he authored the opinion prohibiting an invocation at a secondary school graduation because of its coercive effect, and he joined the majority that invalidated the use of invocations at high school football games. At the same time, he has been willing to grant governments considerable discretion to display religious symbols. In cases raising Free Exercise Clause claims, Justice Kennedy has been a consistent member of the majority. He concurred silently in a case rejecting strict scrutiny for laws of general applicability even when they imposed a burden on religious practices and in a case upholding a state

126U.S. Const. amend. I: “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . .”
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decision to exclude theology students from a state scholarship program.\textsuperscript{131} In addition, he authored the opinion of the Court holding that a local ordinance restricting the animal sacrifices of the Santeria religion violated the Free Exercise Clause.\textsuperscript{132}

DECISIONS SINCE 2005

The decisions of the Supreme Court’s first three terms since John Roberts became Chief Justice confirm Justice Kennedy’s crucial impact on a closely divided Court. They continue the basic trend of the last three decades, a gradual but consistent move to the right. At the same time, they demonstrate the considerable extent that the views of Justice Kennedy define how far that trend extends and create some important exceptions to it.

2005 Term

The 2005 Term was a transitional one. Although Chief Justice Roberts was confirmed before the term began, Justice Alito did not take his seat until January 31, 2006.\textsuperscript{133} Justice O’Connor continued to serve until Justice Alito was confirmed, so the Court’s previous ideological division continued for about 30 percent of the decisions of the term. Partially because of the transition, five-to-four divisions were relatively uncommon as compared to the last years of the Rehnquist Court.\textsuperscript{134} Nonetheless, the decisions rendered after Justice Alito joined the Court began to show the increased importance of Justice Kennedy when the court was closely divided.

Justice O’Connor was part of the Court for the first twenty-six opinions the Supreme Court issued during the 2005 Term, and her presence tended to hide Justice Kennedy’s new influence on the Court. In the cases in which Justice O’Connor was part of the Court, she and Justice Kennedy continued to share the center when the Court was narrowly divided. Both joined Chief Justice Roberts and Justices Scalia and Thomas to form a five-member majority upholding a death penalty verdict even though the state appellate court set aside two of the “special circumstances” found by the Appellate Court.

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\textsuperscript{133} See note 6 supra.
\textsuperscript{134} Statistics for the Supreme Court’s October Term 2005, 75 U.S.L.W. 3029 (July 18, 2006); see generally Lori A. Ringhand, The Roberts Court: Year 1, 73 Tenn. L. Rev. 607 (2006).
Likewise, they both joined with Justices Stevens, Souter, Ginsburg, and Breyer in rejecting the power of the United States Attorney General to forbid physicians from prescribing drugs covered by the federal Controlled Substances Act for use in physician-assisted suicides authorized by state law. On the other hand, Justice O’Connor broke with Justice Kennedy to join Justices Stevens, Souter, Ginsburg, and Breyer in holding that the state was not immune from liability in a proceeding initiated by a bankruptcy trustee to set aside preferential transfers by the debtor to state agencies.

Other factors in the 2005 Term also tended to mask Justice Kennedy’s increasing influence on the Court. Under Chief Justice Roberts, the Court produced more unanimous decisions than had been typical in the last years of the Rehnquist Court. In a few cases, Justice Breyer joined the new Chief Justice and Justices Scalia, Kennedy, Thomas, and Alito to produce six-member majorities. In one important case, Chief Justice Roberts broke with his normal ideological allies and sided with Justices Stevens, Souter, Ginsburg, and Breyer to set aside a property forfeiture because the state procedures did not require sufficient efforts to provide actual notice to the property owner. Moreover, Justice Kennedy dissented nine times during the term, more than either of the two new justices and the same number as Justice Scalia.

Nonetheless, careful examination of the cases from the 2005 Term reveals Justice Kennedy’s increasingly important role as the pivotal justice. He sided with the majority in nine of the thirteen decisions in which the Court divided five to four or five to three. As expected, he most often sided with Chief Justice Roberts and Justices Scalia, Thomas, and Alito, but he joined Justices Stevens, Souter, Ginsburg, and Breyer three times and an ideologically mixed majority once. Although Justice Kennedy dissented in four cases in which the Court had a five-member majority, the decisions did...
not reflect any general shift in the ideological makeup of the Court. Only one of the cases was an important constitutional case, and it occurred before Justice O’Connor left the Court. In that decision, Justice O’Connor again joined Justices Stevens, Souter, Ginsburg, and Breyer to create another exception to the prohibition against congressional creation of private actions for damages against the state, this time allowing Congress to subordinate a state entity to other creditors in a federal bankruptcy proceeding.

Justice Kennedy wrote the crucial opinion in four of the six cases in which he formed a five-member majority with the Chief Justice, Justices Scalia and Thomas, and either Justice O’Connor or Justice Alito. He wrote two majority opinions and two concurring opinions that significantly qualified the position of the other justices in the majority.

Three of the cases were criminal prosecutions. Two involved the death penalty. In one, Justice Kennedy joined Justice Scalia’s opinion upholding a death sentence even though the state appellate court set aside two of the “special circumstances” on which the jury based its sentencing recommendation. In the other, he joined Justice Thomas’ opinion that rejected a challenge to the Kansas capital statute, which required the death penalty if the aggravating circumstances of the crime were not outweighed by the mitigating circumstances. The third criminal justice decision declined to exclude evidence from all searches in which the police violated the “knock and announce” procedures for executing warrants. In this case, however,

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148 See notes 30-31 supra and accompanying text.
152 Brown v. Sanders, 546 U.S. 212 (2006). Justice O’Connor was part of the five-member majority in this case.
Justice Kennedy filed an opinion concurring in part and dissenting in part and concurring in the judgment.\(^{155}\)

Justice Kennedy wrote the opinion for a five-member majority in a case restricting the First Amendment rights of public employees.\(^{156}\) That opinion concluded that an employee had no First Amendment protection for speech made as part of his or her official duties.

Finally, Justice Kennedy sided with the Chief Justice and Justices Scalia, Thomas, and Alito in two important cases involving issues of statutory construction, but in both cases he articulated a unique position. Although he agreed to a remand to determine whether a wetland fell within the coverage of the Clean Water Act,\(^{157}\) his concurring opinion\(^{158}\) articulated a significantly different test for determining the extent of the “waters of the United States” than the one suggested in Justice Scalia’s plurality opinion. In a challenge to a reapportionment of the Texas legislature, he wrote the opinion of the Court. He sided with Chief Justice Roberts and Justices Scalia, Thomas and Alito with respect to the challenge to the entire redistricting statute, but he joined the other four justices to form a five-member majority finding that the creation of one district violated the Voting Rights Act.\(^{159}\)

Justice Kennedy joined Justices Stevens, Souter, Ginsburg, and Breyer to form five-member majorities in three cases. As noted above,\(^{160}\) Justice Kennedy also authored an important administrative law opinion that was joined by Justice O’Connor as well as Justices Stevens, Souter, Ginsburg, and Breyer. That decision denied the Attorney General the power to forbid the dispensing of drugs covered by the Controlled Substances Act.\(^{161}\)

Two of the decisions in which Justice Kennedy sided with Justices Stevens, Souter, Ginsburg, and Breyer to form a five-member majority involved criminal law issues. In one, Justice Kennedy joined Justice Souter’s opinion refusing to allow a spouse to consent to a search of the marital

\(^{155}\)Id. at 602.


\(^{158}\)Rapanos, 547 U.S. at 759.


\(^{160}\)See note 136 supra and accompanying text.

residence when the defendant was present and expressly refused to consent. In the other, Justice Kennedy wrote the majority opinion allowing a habeas corpus claim based on the alleged innocence of the petitioner.

The third criminal case in which Justice Kennedy joined Justices Stevens, Souter, Ginsburg, and Breyer concerned the procedures for trying detainees at Guantanamo Bay, and it was one of the most controversial decisions of the 2005 Term. The majority ruled that the President had no inherent authority to create military commissions to try alleged enemy combatants being detained at Guantanamo Bay, Cuba. Justice Kennedy, however, wrote a separate opinion concurring in part.

The case in which Justice Kennedy joined a five-member majority formed on less predictable lines involved a relatively narrow issue. Along with Chief Justice Roberts and Justices Souter and Alito, he joined Justice Ginsburg’s opinion upholding the dismissal of a habeas corpus petition as untimely.

2006 Term

If anyone had lingering doubts, the October 2006 term confirmed that Justice Kennedy is now the decisional fulcrum of the Supreme Court. He was almost always part of the majority, and each time the Court divided five to four, he was one of the five. Moreover, his opinion was crucial to define the parameters of rulings when the Court was closely divided because he was the member of the majority most likely to form a new majority with the dissenters.

During the October 2006 term, Justice Kennedy dissented in only two cases, and he wrote only one dissenting opinion. That record made him a

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162 Georgia v. Randolph, 547 U.S. 103 (2006). This decision had a five-three majority because Justice Alito did not participate in the decision.
163 House v. Bell, 547 U.S. 518 (2006). This decision had a five-three majority because Justice Alito did not participate in the decision.
164 Hamden v. Rumsfeld, 548 U.S. 557 (2006). This decision had a five-three majority because Chief Justice Roberts did not participate in the decision.
165 Id. at 636.
member of the majority in more than ninety-seven percent of the sixty-eight cases that the Court decided by signed opinion after argument.168 The other justices dissented in eight to twenty-six cases.169

In twenty-four cases, the Court had a five-member majority, and Justice Kennedy was part of the majority in each of the cases. As in the 2005 Term, he sided most frequently with Chief Justice Roberts and Justices Scalia, Thomas, and Alito.170 However, he joined Justices Stevens, Souter, Ginsberg, and Breyer in twenty-five percent of the closely divided cases.171 Perhaps most interestingly, the Court decided five cases with a five-member majority that crossed the Court’s normal ideological divisions. Although those cases produced four different majorities,172 Justice Kennedy was one of the five in each of them.

The nine decisions of the 2006 term involving capital punishment and standing issues provide the strongest confirmation of Justice Kennedy’s new influence. In both areas, the remainder of the Court consistently broke into its typical ideological groupings on each of the cases. Justice Kennedy adopted

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168 Statistics for the Supreme Court’s October 2006 Term, 76 U.S.L.W. 3052, 3053 (Aug. 8, 2007) [hereinafter, 2006 Term Statistics]. In one of these cases, Watters v. Wachovia Bk, N.A., 550 U.S. ___, 127 S. Ct. 1559 (2007), the Court divided 5 to 3 because Justice Thomas did not participate.

169 Chief Justice Roberts dissented in eight cases, Justice Alito in ten, Justice Scalia in fourteen, Justices Souter and Thomas in 16, Justice Breyer in 17, Justice Ginsburg in 20, and Justice Stevens in 26. 2006 Term Statistics, supra note __, at 3053.


middle positions that decided with one group in five cases and the other in four.

Seven of the twenty-four cases with a five-member majority involved challenges to the imposition of capital punishment. Chief Justice Roberts and Justices Scalia, Thomas, and Alito voted to reject the challenges in all seven cases, and Justices Stevens, Souter, Ginsberg, and Breyer voted to set aside the sentences in all seven cases. Justice Kennedy voted to affirm the death sentences in three cases and to reverse them in four. Moreover, he authored four of the seven opinions, rejecting challenges to the death penalty in two and ruling in favor of the challenge in two.

Each of the three capital punishment decisions in which Justice Kennedy sided with Chief Justice Roberts and Justices Scalia, Thomas, and Alito involved a case in which the Ninth Circuit had reversed a district court decision and granted habeas corpus relief to a defendant who had been sentenced to death. Justice Kennedy authored the majority opinion in the first and third of these decisions. In the first, Justice Kennedy’s opinion upheld a jury instruction on mitigation. The instruction directed the jury to consider “[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.” That language was sufficient, he concluded, to inform the jury that it should consider evidence that the defendant would live a constructive life if incarcerated because of the religious conversion he had experienced during a previous incarceration. In the third of the Ninth Circuit cases, Justice Kennedy concluded that the court of appeals should have deferred to the trial court’s determination regarding whether a prosecution challenge for cause should be sustained.

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179 Ayers, 549 U.S. at 9.

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Thomas authored the remaining opinion in a capital punishment case reversing the Ninth Circuit.\footnote{Schriro v. Landrigan, 550 U.S. 465 (2007).} He rejected a claim that the district court’s failure to investigate mitigating evidence denied the defendant his right to effective counsel in a case when the defendant directed his counsel not to present any mitigating evidence.

The four cases in which Justice Kennedy joined with Justices Stevens, Souter, Ginsberg, and Breyer to grant habeas relief all involved death penalty cases from Texas. Two of the cases turned on a Texas statute\footnote{See Texas Code Crim. Proc. Ann. Art. 37.071, § 2(e)(1) (Vernon 2006).} requiring a death sentence if the defendant engaged in conduct deliberately with the reasonable expectation the conduct would result in his victim’s death and if it was probable that the defendant would commit future violent acts constituting a continuing threat to society. In both cases, Justice Stevens authored opinions finding a reasonable likelihood that the instructions prevented jurors from giving meaningful consideration to constitutionally relevant mitigating evidence. The first case involved the testimony of family members describing the defendant’s unhappy childhood as well as expert testimony that explained the defendant’s violent propensities as attributable to neurological damage and childhood neglect and abandonment.\footnote{Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007).} In the second case, the defendant introduced mitigating evidence of his mental illness, his father’s extensive abuse of him and his mother, and his substance abuse.\footnote{Brewer v. Quarterman, 550 U.S. 286 (2007).} Justice Kennedy wrote the opinions in the other two cases in which he formed a majority to grant habeas relief in capital cases. One of Justice Kennedy’s opinions concluded that a capital defendant was not required to show egregious harm from the use of a jury instruction when the Supreme Court determined that an instruction was constitutionally invalid after the defendant’s trial.\footnote{Smith v. Texas, 550 U.S. 297 (2007).} In the remaining case, Justice Kennedy authored an opinion finding that the Fifth Circuit standard for mental competency was overly restrictive.\footnote{Panetti v. Quarterman, 551 U.S. ___, 127 S. Ct. 2842 (2007).} Justice Kennedy concluded that the standard was too restrictive because it ignored the possibility that delusions might put the defendant’s awareness of the connections between his crime and sentence in a context so far removed from reality that the punishment can serve no proper purpose.

The Court decided two standing cases in the 2006 Term, and Justice Kennedy was the decisive vote to grant standing in one case and to deny it in the other. In April 2007, he joined Justices Stevens, Souter, Ginsburg, and Breyer in a ruling that allowed Massachusetts to challenge the Environmental

\footnotesize{181 Schriro v. Landrigan, 550 U.S. 465 (2007).}
\footnotesize{183 Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007).}
\footnotesize{184 Brewer v. Quarterman, 550 U.S. 286 (2007).}
\footnotesize{185 Smith v. Texas, 550 U.S. 297 (2007).}
\footnotesize{186 Panetti v. Quarterman, 551 U.S. ___, 127 S. Ct. 2842 (2007).}
Protection Agency’s finding that carbon dioxide was not an air pollutant.\textsuperscript{187} Two months later, he sided with the dissenters in the Massachusetts case; this majority ruled that an organization of individuals opposed to the endorsement of religion lacked standing to challenge the creation of a White House office to coordinate faith-based initiatives.\textsuperscript{188} However, in the second case, Justice Kennedy rejected Justice Scalia’s opinion\textsuperscript{189} arguing that a 1968 decision\textsuperscript{190} allowing taxpayer standing to challenge federal appropriations on the ground that they violated the Establishment Clause of the First Amendment\textsuperscript{191} should be overruled. His concurring opinion defended the earlier decision as “correct.”\textsuperscript{\textsuperscript{192}}

In thirteen of the twenty-four cases with a five-member majority, Justices Kennedy sided with Chief Justice Roberts and Justices Scalia, Thomas, and Alito.\textsuperscript{193} As noted in the preceding paragraphs, four of the thirteen involved capital punishment and standing issues. The remainder involved an assortment of constitutional questions, issues relating to time limits to file suit or to appeal, and problems of statutory construction.

The decisions in which Justice Kennedy sided with Justices Scalia and Thomas and the new members of the Court included four important constitutional decisions in addition to capital punishment and standing. Justice Kennedy provided the crucial votes to expand congressional control over a woman’s right to choose an abortion\textsuperscript{194} and to limit congressional control over the 


\textsuperscript{189}Justice Scalia’s opinion concurring in the judgment in \textit{Hein}, 551 U.S. at ___, 127 S. Ct. at 2573, argued that \textit{Flast} should be overruled.

\textsuperscript{190}\textit{Flast} v. Cohen, 392 U.S. 83 (1968).

\textsuperscript{191}U.S. Const. amend. I: “Congress shall make no law respecting an establishment of religion . . . .”

\textsuperscript{192}Hein, 551 U.S. at ___, 127 S. Ct. at 2572 (Kennedy, J., concurring).

\textsuperscript{193}See note 170 supra.

authority over campaign finance.\textsuperscript{195} At the same time, his vote expanded state power to control speech by students in secondary schools\textsuperscript{196} and restricted the ability of states to adopt race-based affirmative action programs.\textsuperscript{197}

Justice Kennedy carved distinctive positions in all four cases. He authored opinions in two and joined concurring opinions in the other two. He authored the opinion for the Court in the abortion case,\textsuperscript{198} which retreated from the 2000 decision that had invalidated a similar state law.\textsuperscript{199} Justice Kennedy concluded that the failure to include an exception for preservation of the pregnant woman’s health did not impose an unconstitutional burden on the woman’s right to choose an abortion. Although conceding that the statute would be unconstitutional if it subjected women to significant health risks, Justice Kennedy concluded that the conflicting medical evidence on that issue


\textsuperscript{198}Gonzales v. Carhart, 550 U.S. 124 (2007).

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was sufficient for the statute to survive a facial attack. In the affirmative-action case, Justice Kennedy joined Chief Justice Roberts’ majority opinion that the race-based programs before the Court were unconstitutional,200 but he authored a concurring opinion indicating that race-based programs might be permissible in some cases.201 In the two First Amendment cases, Justice Kennedy joined concurring opinions by other justices. One was a campaign-finance case;202 in it, he joined Justice Scalia’s concurring opinion,203 which took a very narrow view of Congress’ power to regulate the financing of political campaigns. In the case limiting the free speech rights of high school students,204 Justice Kennedy joined Justice Alito’s concurring opinion. That opinion described the Court’s holding as a narrow one that “provide[d] no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue. . . .”205

The procedural cases reflected the current Court’s willingness to limits access to court and to appeals.206 In all three cases, Justice Kennedy joined the conservative majority without amplifying his views. Justice Alito’s opinion in the first concluded that subsequent effects of past discrimination do not restart the clock for an equal employment charge.207 Justice Thomas authored the majority opinion in the other two cases. One ruled that an application for a writ of certiorari from a denial of a state habeas corpus petition does not toll one-year statute of limitation for filing a federal petition.208 The other refused to extend the fourteen-day period for appealing the denial of a habeas appeal even though the district court had signed an order allowing seventeen days for the appeal.209

201Id. at ___, 127 S. Ct. at 2788 (Kennedy, J., concurring).
203Id. at ___, 127 S. Ct. at 2674 (Scalia, J., concurring).
205Id. at ___, 127 S. Ct. at 2636 (Alito, J., concurring).
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The last two five-four decisions in which Justice Kennedy sided with Chief Justice Roberts and Justices Scalia, Thomas, and Alito involved issues of statutory construction. Rejecting a long-standing precedent in antitrust law, Justice Kennedy authored an opinion that subjected vertical price restraints to the rule of reason normally used in antitrust cases. He also joined an opinion by Justice Alito holding that the Endangered Species Act requirement for consultation with the Fish and Wildlife Service for any federal action that might jeopardize an endangered species did not apply to federal approval of a state permit program under the Clean Water Act.

All but one of the cases in which Justice Kennedy joined with Justices Stevens, Souter, Ginsburg, and Breyer involved the standing and capital punishments issues described above. The remaining decision concerned the Bankruptcy Code. The majority opinion by Justice Stevens concluded that a bankruptcy judge could deny a petition to convert a liquidation to a reorganization when the debtor misrepresented the value of property in the bankruptcy estate.

The majority did not form along the Court’s normal ideological divisions in the five remaining cases with only a five-member majority. In each of these cases, Justice Kennedy joined a majority opinion written by another justice without a separate amplification of his views.

The Court produced the same majority – Chief Justice Roberts and Justices Kennedy, Souter, Breyer, and Alito – in only two of these cases that crossed the usual ideological divide. The most significant was undoubtedly Justice Breyer’s opinion concluding that a punitive damages award based in part on the jury’s desire to punish a defendant for harming nonparties was a denial of due process. In the other decision from this majority, Justice

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210 Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).
214 See notes 182-87 supra and accompanying text.
Alito’s majority opinion concluded that attempted burglary was a “violent felony” under a federal sentencing statute.  

The remaining three decisions involved different majorities on relatively narrow issues. Justice Kennedy, Chief Justice Roberts, and Justices Stevens and Alito joined Justices Ginsburg’s opinion allowing the United States to remove a tort suit against a federal employee to federal court. Justice Kennedy, Chief Justice Roberts, and Justices Scalia and Breyer joined Justice Thomas in holding that the debt limitation for the Territory of Guam must be calculated using the assessed valuation of property in the territory rather than the appraised value of the property. Finally, Justices Kennedy, Souter, Breyer, and Alito joined Justice Ginsburg’s opinion holding that a state could not regulate the mortgage subsidiary of a national bank.

2007 Term

Justice Kennedy’s increased influence continued to manifest itself in the 2007 Term although the numbers were not quite as dramatic as the previous year. As in the 2005 Term, a first glance seems to suggest a break in the pattern, but closer scrutiny confirms Justice Kennedy’s continuing influence in directing the future of constitutional doctrine.

Justice Kennedy was less consistently a member of the majority in the 2007 than he was in the 2006 Term. He dissented ten times, and he wrote

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four dissenting opinions. More significantly, he was a member of the minority in four of sixteen of the cases in which the Court had only a five-member majority; and he authored dissenting opinions in two of those cases.

More careful analysis of the 2007 cases reveals that the dissents summarized do not alter Justice Kennedy’s position as the decisional fulcrum of the current Supreme Court when it is closely divided on constitutional issues. Four of his ten dissents concerned questions of statutory construction. The constitutional cases involved the dormant Commerce Clause and the Confrontation Clause issues where the Court’s recent decisions cross its more typical ideological divide; a facial challenge to Washington’s open primary; and the narrow question of whether states can give Supreme Court decisions greater retroactive effect that the Court itself gives them in federal litigation. On most of the major constitutional decisions, Justice Kennedy sided with the majority; and his views are likely to

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224Kentucky Retirement System, ___ U.S. at ___, 128 S. ct. at 2371 (Kennedy, J., dissenting); Irizarry, ___ U.S. at ___, 128 S. Ct. at 2204 (Kennedy, J., joining dissent of Breyer, J.); Santos, ___ U.S. at ___, 128 S. Ct. at 2035 (Kennedy, J., joining dissent of Alito, J.); Ali, ___ U.S. at ___, 128 S. Ct. at 841 (Kennedy, J., dissenting).


define the contours of future doctrine. In addition, he is likely to provide the crucial vote in resolving the issues raised in the two cases that were affirmed by an equally divided Court.\textsuperscript{231}

In the 2007 Term, Justice Kennedy formed a majority with Chief Justice Roberts and Justices Scalia, Thomas, and Alito in five of the sixteen cases that had only a five-member majority, and three of those decisions involved important constitutional issues. In the first of these decisions, an opinion by Chief Justice Roberts concluded that neither a decision of the International Court of Justice nor a presidential memorandum stating that the United States would satisfy its international obligation by having state courts give effect to the international decision required state courts to follow the decision rather than the state’s generally applicable rules governing successive filing of petitions for habeas corpus.\textsuperscript{232} In the second of the constitutional decisions, Justice Scalia authored an opinion recognizing that the Second Amendment created a personal right to possess handguns for self-defense.\textsuperscript{233} That opinion is an unusual one for Justice Scalia because it narrowly defines the new right and leaves many important questions unresolved, an approach that suggests Justice Kennedy’s individualized balancing approach\textsuperscript{234} is likely to have considerable influence in defining the


\textsuperscript{234} \textit{See}, e.g., Hamden v. Rumsfeld, 548 U.S. 557 (2006); Rapanos v. United States, 547 U.S. 715 (2006). The campaign finance cases form an important exception to
future extent of the doctrine. The third constitutional case in which Justice Kennedy sided with the Chief Justice and Justices Scalia, Thomas, and Alito involved campaign financing. Not surprisingly, he concurred in Court’s holding that campaign financing provisions which allowed a candidate to accept larger contributions when facing an opponent who provided more that $350,000 to his or her campaign from personal funds were unconstitutional. However, he would have gone further than the majority. He joined Justice Scalia’s concurrence, which urged the Court to reverse an earlier decision upholding the campaign finance law against a facial challenge.

Justice Kennedy also joined the Chief Justice and Justices Scalia, Thomas, and Alito in two additional cases. He authored an opinion narrowly defining when Section 10(b) of the Securities Exchange Act authorized private actions for damages. In addition he joined another opinion by Chief Justice Roberts. It denied Indian tribal courts jurisdiction over a claim that a bank had discriminated against tribal members with respect to a loan secured by land on the Indian reservation.

In four cases, Justice Kennedy formed five-member majorities with Justices Stevens, Souter, Ginsberg, and Breyer. Two involved significant constitutional questions, and Justice Kennedy authored the majority opinions in both. One upheld the availability of habeas corpus review for Guantanamo detainees who are being tried by military commissions authorized by

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235 See notes 118, 139 supra and accompanying text.
237 Id. at ___, 127 S. Ct. at 2664.
Congress. The other ruled that the death penalty was an unconstitutional punishment for the crime of raping a minor.

Justice Kennedy also wrote the opinion in one of the nonconstitutional cases. He concluded that an individual facing deportation had to be allowed to withdraw a motion to depart the United States voluntarily until the Immigration and Naturalization Service decided a separate motion to reopen the individual’s deportation proceeding. In the other nonconstitutional case, Justice Kennedy concurred in Justice Breyer’s opinion holding that the assignee of a claim for money has standing to litigate the underlying claim.

The Supreme Court divided along nontypical lines in seven of the sixteen cases with a five-member majority. The seven cases produced seven different majorities, although both Chief Justice Roberts and Justice Thomas were members of the majority in six of the cases. Most of the cases involved issues of statutory construction. The only constitutional issue concerned the respective rights of states over boundary waters.

Justice Kennedy was a member of the majority in only three cases with nontypical majorities, and he did not author any of the majority opinions in those cases. Justice Kennedy, the Chief Justice, and Justices Stevens and Ginsberg joined Justice Breyer’s opinion holding that driving under the

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248 Only Justices Breyer and Alito, each of who was a member of the majority in two cases, were less frequent members of the majority in these cases, and each of them did not participate in one of the cases.
influence was not a “violent felony” for purposes of a federal sentence-enhancement provision.\textsuperscript{249} Along with the Chief Justice and Justices Scalia and Thomas, Justice Kennedy joined Justice Souter’s opinion limiting punitive damages to an amount equal to compensatory damages in admiralty cases.\textsuperscript{250} Finally, Justice Kennedy together with the Chief Justice, and Justices Souter and Thomas joined Justice Ginsberg’s opinion upholding Delaware’s refusal to grant permission for construction of a liquefied natural gas unloading terminal that would extend some 2,000 feet from New Jersey’s shore into territory of Delaware.\textsuperscript{251}

Justice Kennedy wrote dissenting opinions two of the four cases with nontypical, five-member majorities in which he dissented. One opinion\textsuperscript{252} came in a case in which Justice Thomas wrote for a majority of himself, the Chief Justice, and Justices Scalia, Ginsburg, and Alito. The majority opinion concluded that the grant of tort immunity in a federal statute extended to all federal law enforcement officers, not just officers enforcing customs and excise laws.\textsuperscript{253} Justice Kennedy’s other dissenting opinion involved the provision in Kentucky’s retirement system governing disability retirement for hazardous positions.\textsuperscript{254} Speaking for a majority of himself, the Chief Justice, and Justices Stevens, Souter, and Thomas, Justice Breyer concluded that the provisions did not discriminate on the basis of age.\textsuperscript{255}

In the final two cases, Justice Kennedy concurred in dissenting opinions written by other justices. In one, Justice Stevens wrote for a majority of himself, the Chief Justice, and Justices Scalia, Thomas, and Alito,\textsuperscript{256} but Justice Kennedy joined Justice Breyer’s dissent.\textsuperscript{257} The majority


\textsuperscript{250}Exxon Shipping Co. v. Baker, ___ U.S. ___, 128 S. Ct. 2605 (2008). Justice Alito did not participate in \textit{Exxon Shipping}, and the result might well have been different if he had participated. Before reaching the issue of the amount of damages, an equally divided Court affirmed the Ninth Circuit ruling that a corporation could be liable in punitive damages for the acts of its managerial employee. Had Justice Alito voted to reverse the lower court on that issue, the Supreme Court would never have reached the question of the amount of punitive damages.


\textsuperscript{253}\textit{Id.} at ___, 128 S. Ct. at 831 (majority opinion).


\textsuperscript{255}\textit{Id.} at ___, 128 S. Ct. at 2361 (majority opinion).

\textsuperscript{256}Irizarry v. United States, ___ U.S. ___, 128 S. Ct. 2194 (2008).
ruled that a trial judge had no duty to notify a defendant before departing from
the federal sentencing guidelines. In the final case, Justice Scalia authored a
plurality opinion for himself and Justices Souter, Thomas, and Ginsburg in a
case in which the Court ruled that “proceeds” of an illegal gambling operation
meant profits, not gross receipts. Justice Stevens concurred only in the
judgment, and Justice Kennedy joined Justice Alito’s dissent.

FUTURE INFLUENCE

The decisions of the first three terms since Chief Justice Roberts and
Justice Alito joined the Supreme Court demonstrate the likely shape of
constitutional doctrine under the current Supreme Court. Moreover, whether
significant change occurs in particular areas depends largely on the vote of
Justice Kennedy.

One can anticipate little change in two groups of decisions: those
where Justice Kennedy and Justice O’Connor previously joined with Chief
Justice Rehnquist and Justices Scalia and Thomas to form a majority and
those in which Justice Kennedy (and, sometimes, Justice O’Connor)
previously joined with Justices Stevens, Souter, Ginsburg, and Breyer to form
a majority. In both groups of decisions, a five-member majority remains
despite Justice Alito’s replacement of Justice O’Connor. Justice Kennedy’s
delineation of the doctrinal limits is, however, likely to be crucial in some of
those areas because he has written concurring opinions that qualify the views
expressed in majority opinions.

By contrast, significant modifications are more likely to occur in
cases where Justice Kennedy dissented when Justice O’Connor joined with
Justices Stevens, Souter, Ginsburg, and Breyer to form a majority. Once
again, Justice Kennedy’s views are likely to dominate the future in those areas
because he often distinguished his opinion from the more absolute views of
Justices Scalia and Thomas. Justice Kennedy’s views are also likely to be
important in cases involving economic due process even though the Court has
tended to split along nonideological lines. Finally, Justice Kennedy’s views
are likely to be crucial in future litigation regarding the newly recognized
right under the Second Amendment. The paragraphs that follow summarize
some of these areas where Justice Kennedy’s views are likely to be influential
in the future.

257Id. at ___, 128 S. Ct. at 2204 (Breyer, J., dissenting).
259Id. at ___, 128 S. Ct. at 2031 (Stevens, J., concurring in the judgment).
260Id. at ___, 128 S. Ct. 2035 (Alito, J., dissenting).
Federalism Issues

As noted above, Justice Kennedy and Justice O’Connor both joined with Chief Justice Rehnquist and Justices Scalia and Thomas to impose new limits to congressional power based on principles of federalism. One can, however, detect subtle differences in the doctrines they articulated. On issues of congressional power, Justice Kennedy was more willing than Justice O’Connor to extend the authority to use comprehensive statutes to regulate interstate commerce. He was, however, less willing to allow Congress to grant private individuals damage remedies against states either by grounding the statute in Congress’ power to enforce the Fourteenth Amendment or by creating exceptions to the prohibition against private damage actions in statutes based on congressional powers enumerated in Article I.

Cases before and after Justice O’Connor left the Court show that Justice Kennedy’s view of the Commerce Clause is somewhat broader than the views of the other members of the new federalism majority. He joined Justice Steven’s majority opinion holding that comprehensive federal statutes did not have to create exceptions for noneconomic activities that do not substantially affect interstate commerce. More recently, he wrote a concurring opinion that effectively modified the narrow definition of the reach of the Clean Water Act announced in Justice Scalia’s plurality opinion.

On the other hand, Justice Kennedy has consistently supported the Court’s 1996 decision that the Commerce Clause did not authorize Congress to create damage remedies against the state. He concurred in decisions reaffirming the principle, and he authored the opinion holding that the immunity applied to suits in state court as well as claims filed in federal court. He also supported extending the Commerce Clause immunity to federal power under the Patent and Copyright Clause and to

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261 Gonzales v. Raich, 545 U.S. 1 (2005).
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administrative adjudications. Most significantly, he stayed with Chief Justice Rehnquist and Justices Scalia and Thomas in dissent in 2006 when Justice O’Connor joined the majority holding that Congress could subject states to bankruptcy claims. Justice Kennedy has also consistently opposed congressional attempts to circumvent the immunity for damage actions against the state by relying on the power to enforce the Fourteenth Amendment. Here again, he adhered to his position even when Chief Justice Rehnquist authored a majority opinion upholding congressional power to subject states to private actions for violations of the Family Medical Leave Act and when Justice O’Connor abandoned the federalism majority to allow private actions for damages when state denied a disabled individual access to the courts.

As far as federalism limits on state power are concerned, the Supreme Court has continued since 2005 to address preemption claims regarding both state regulations and private claims for damages under state law as well as dormant Commerce Clause issues when no federal statute covers the

269 Garrett, 531 U.S. at 374 (Kennedy, J., concurring); Kimmel, 528 U.S. at 82-90.
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As was true prior to 2005, the Court has not generally been narrowly divided in the preemption cases. However, in the one case with a five-member majority, Justice Kennedy was a part of that majority. By contrast, Justice Kennedy was a member of the minority in both cases involving the dormant Commerce Clause.

Separation of Powers Questions

Standing doctrine is the area in which Justice Kennedy has most clearly articulated a distinctive view of separation of powers, and the cases of the 2006 Term confirm that his views are likely to remain pivotal now that Chief Justice Roberts and Justice Alito have joined the Court. Although he frequently joined the decisions limiting standing, he has articulated two particular positions that are likely to prove influential on the new Court. He joined opinions allowing Congress to permit private enforcement of environmental statutes by persons who use the resource that the violator has polluted and holding that states have even broader powers to seek judicial redress under environmental statutes. Both positions reject the narrow interpretation of injury that Justice Scalia has articulated in several cases denying standing in environmental cases.

Justice Kennedy has also articulated a centrist position with respect to detainees from the so-called war on terrorism. He allowed detainees to

275 See Department of Revenue v. Davis, ___ U.S. ___, 128 S. Ct. 1801 (2008) (income tax structure, which exempted interest on bonds issued by Kentucky or its subdivisions from state income tax but taxed interest income on bonds from other states and their subdivisions, did not violate the dormant Commerce Clause); United Hauler’s Ass’n, Inc. v. Oneida-Herkimer Solid waste Management Authority, 550 U.S. 330 (2007) (county flow control ordinances that required businesses hauling waste in counties to bring waste to facilities owned and operated by publicly owned corporation did not violate the dormant Commerce Clause).

276 See notes 41-49 supra and accompanying text.

277 Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007); see also Altria Group, Inc. v. Good, ___ U.S. ___, 129 S. Ct. 538 (2008), another preemption decision from early in the 2008 Term in which Justice Kennedy was part of a five-member majority.


challenge their detentions at Guantanamo Bay, Cuba\textsuperscript{281} refused to allow the President to try detainees by military commission without express congressional authorization,\textsuperscript{282} and recognized their right to appeal convictions by military commissions to civilian courts even when the military commissions had been authorized by Congress.\textsuperscript{283} On the other hand, he was willing to imply presidential authority to detain suspected terrorists;\textsuperscript{284} and he concurred in the dismissal of a petition for habeas corpus because it was not filed in the district where the individual was being held by military authorities.\textsuperscript{285}

As the specific decisions discussed in this section indicate, Justice Kennedy has continued to support a broad view of the judicial function. He joined the right-leaning majority to recognize judicially enforceable rights under the Second Amendment,\textsuperscript{286} but he also supported expanded limits on the death penalty,\textsuperscript{287} and refused to agree that all use of race in affirmative action programs was unconstitutional.\textsuperscript{288}

Protection of Individual Rights

The recent terms confirm that Justice Kennedy’s views have already significantly altered constitutional doctrine with respect to several individual rights. In the first three terms since Justice O’Connor retired, the court has issued important decisions regarding a woman’s right to choose an abortion, the use of race in affirmative action programs, free speech, the death penalty, and the Second Amendment. In all of these areas, Justice Kennedy was an essential member of the majority.

The abortion and affirmative action cases marked the triumph of positions that Justice Kennedy had previously urged in dissent. Although Justice Kennedy’s ostensibly applied the “undue burden” test\textsuperscript{289} in the recent

abortion case, his articulation of the test gave significantly greater weight to the state’s desire to protect the potential of human life and allowed the statute to survive a facial challenge even though it lacked an exception to protect the health of the pregnant woman.290 Similarly, Justice Kennedy refused to forbid all use of race in affirmative action programs in the secondary school case that the Court decided in 2007.291 He continued, however, to examine raced-based classifications with great suspicion as he had done when dissenting from the case involving the admissions program of the University of Michigan Law School.292 One can, therefore, anticipate that the Court will be less willing to uphold race-based programs now that Justice Kennedy rather than Justice O’Connor is the determinative justice on this issue. Indeed, supporters of affirmative action might fear that the new Court might lead the Court to overrule the Michigan Law School case if it decides to review another affirmative action program involving university admissions.

With respect to the First Amendment, the recent opinions go in conflicting directions. The Court expanded the protections for those financing political campaigns, but narrowed them for public employers and students.

On campaign financing, Justice Kennedy had previously advocated greater First Amendment protection than the Court’s majority has recognized.293 Thus, one can hardly find it surprising that Justice Kennedy joined the 2007 decision that invalidated the federal prohibition against “issue ads” in political campaigns as applied to particular advertisements294 or the provision allowing candidates to accept larger contributions when they faced an opponent personally financing his or her campaign.295 However, his decision in 2007 to join Justice Scalia’s concurring opinion296 that would have reversed the 2003 decision297 upholding the federal prohibition against a facial challenge is noteworthy.


291Parents Involved in Community Schools, 551 U.S. at ___, 127 S. Ct. at 2788.


296Wisconsin Right to Life, ___ U.S. at ___, 127 S. Ct. at 2674 (Scalia, J., concurring).

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On the other hand, the decisions involving speech by a student and a public employee both restricted free speech rights. The case involving the student was Justice Kennedy’s first case involving free speech in the public school context, but he had previously joined an opinion narrowly defining First Amendment rights in the public employment context. 298

The Court’s death penalty cases provide clear confirmation of Justice Kennedy’s enhanced position as the pivotal justice on the Court in cases involving individual rights. On the procedural issues that arise with some regularity, his vote ordinarily determines whether the death sentence will be affirmed or reversed. 299 He also provided the crucial vote and wrote the opinion in the case declaring the death penalty unconstitutional for rape of a child. 300

Beyond these cases, the addition of Chief Justice Roberts and Justice Alito is likely to give Justice Kennedy’s position new importance in at least three other areas involving individual rights: establishment of religion, procedural due process for terrorism detainees, and the Second Amendment. In the religion cases, Justice Kennedy’s differences from Justice O’Connor 301 were subtle but significant now that he is the pivotal justice. The outcome of the detainee cases remains one of the most uncertain issues before the Court, 302 and Justice Kennedy’s balancing approach is likely to be determinative. The recognition of an individual right to self-defense under the Second Amendment 303 is likely to produce a flood of litigation. Once again, Justice Kennedy’s views will be crucial in defining the reach of the new right.

299 See notes 173-86 supra and accompanying text.
302 See notes 62-65, 241 supra and accompanying text.
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THREE CAVEATS

Predicting the future direction of Supreme Court decisions is always risky. Isolating any one factor as this Article has done means ignoring others that may push in a different direction. This section briefly discusses three factors that might make Justice Kennedy’s influence somewhat less significant than the preceding paragraphs have predicted.

*Stare Decisis*

At first glance, the doctrine of *stare decisis* seems to have the potential to impose a substantial limit on how much Justice Kennedy might change constitutional doctrine in the immediate future.\(^{304}\) After all, *stare decisis* was a principal ground on which Justices Kennedy, O’Connor, and Souter defended their decision to preserve the “essential holding” of *Roe v. Wade*. \(^{305}\) One might, therefore, expect that a similar commitment to the doctrine will preclude Justice Kennedy from reversing other recent decisions where he was a previous member of the minority now that another justice more aligned with his views has replaced Justice O’Connor.

When one looks more generally at Justice Kennedy’s opinions, however, *stare decisis* does not appear to have significantly limited his positions as a member of the Supreme Court. As the abortion case itself reveals, the refusal to overrule a decision does not preclude substantial modification of the doctrines articulated in the case that is reaffirmed. In addition, Justice Kennedy has not been bashful in reversing prior opinions in other cases when he agrees with a new majority position that the earlier decision was wrong.

Modification of doctrine is a powerful mechanism for changing the law. As noted above, the reaffirmation of *Roe v. Wade* did not preclude the Court from invalidating most of the state regulations challenged in the 1992 case;\(^{306}\) and decisions in the 2006 Term reflect Justice Kennedy’s continued willingness to modify doctrines significantly without overruling them. By modifying the meaning of the “undue burden” that defines the limits of


\(^{306}^\)Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (upholding all but one of the abortion restrictions challenged in the case).
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governmental power to regulate abortions, his opinion for the Court sustained a federal statute that would almost certainly have been invalid under Justice O'Connor’s previous application of the same test. Similarly, his concurring opinion in the recent school desegregation case showed greater willingness to overturn race-based affirmative action programs than Justice O'Connor had demonstrated when she was the pivotal justice in the University of Michigan Law School case.

Justice Kennedy has also been willing to reverse prior holdings when a new majority will join him. During the Rehnquist Court era, three of the most notable examples were decisions involving the death penalty for the mentally retarded and juveniles and criminal prosecutions for homosexual conduct. In the 2006 Term, two of the five-four decisions confirmed Justice Kennedy’s willingness to overrule precedents he believed were incorrectly decided. In the antitrust case, his opinion for the Court replaced the per se rule established in a 1911 decision with a rule of reason for evaluating the legality of vertical price restraints. Similarly, he joined Justice Scalia’s concurring opinion in the campaign finance case. Rather than simply distinguishing the Court’s opinion upholding the 2002 campaign finance law against a facial challenge, Justice Scalia advocated abandoning the earlier precedent.

Taken together, these opinions indicate that precedents are not likely to be a significant obstacle when Justice Kennedy wants to reshape

311 Grutter v. Bollinger, 539 U.S. 306 (2003); see also id. at 387 (Kennedy, J., dissenting).
316 Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).
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constitutional law doctrine. They suggest that he will generally prefer to modify doctrines to achieve the result he prefers. However, they also demonstrate that he will not hesitate to reverse decisions in which he was a member of the minority when he regards the decisions as having wrongly decided important issues.

The Possibility of Future Changes in Justice Kennedy’s Thought

Because Supreme Court justices hold tenure during good behavior, 319 a change in a justice’s views while he or she is a member of the Court can modify constitutional law significantly. 320 Indeed, a recent article documents that Justice Kennedy’s views have drifted to the left, especially during his first decade on the Court; 321 and one can certainly identify areas such as capital punishment in he has changed his position. 322 Nonetheless, dramatic changes in the future seem less likely. For one thing, Justice Kennedy’s ideological position in the center of the Court has been relatively constant for the last decade. Moreover, he has been a member of the Court for more than 20 years and has articulated positions in most important areas of constitutional law. The likelihood that he will, in the future, decide that any of those positions are fundamentally mistaken seems small.

To suggest that Justice Kennedy’s constitutional thought is firmly established does not mean that his vote will always be easy to predict. In a variety of areas, Justice Kennedy has articulated positions that require individualized consideration of the facts in the particular case. This individualized approach extends to many important areas including standing, 323 abortion regulation, 324 affirmative action, 325 protections for

319 U.S. Const. art. III, § 1.
321 Id. at 1505 (Figure 5), 1509.
homosexuals, and the due process rights of individuals detained on charges of supporting terrorism. In all of those areas, commentators may frequently find it difficult to predict how Justice Kennedy will analyze the particular facts before the Court in specific cases.

Future Changes in the Court

Most obviously, new Supreme Court appointments could change the significance of Justice Kennedy’s position on the Court. This qualification is an important one because additional appointments by the new President seem likely. The recent stability of the Court’s membership for a decade is unusual in United States history, and it is unlikely to repeat in the next decade. Justice John Paul Stevens will be 89 years old in 2009, Justice Ginsburg who will be 76 is reported to have health problems that might incline her to retire, and rumors abound that Justice Souter would also like to retire. Thus, the new President may well have two or more appointments to make.

Although President Ronald Reagan appointed Justice Kennedy, his influence is likely to continue unabated because a Democrat was elected President. Anyone appointed by a Democratic President to replace Justices Stevens or Ginsburg will almost certainly be more closely allied with Justices Souter and Breyer than with the Chief Justice and Justices Scalia, Thomas, and Alito. Thus, Justice Kennedy is likely to remain the decisive vote when the Court divides five to four.

A Republican President would have been likely to appoint either a centrist in the mold of Justices O’Connor and Kennedy or, more likely, a conservative like Chief Justice Roberts and Justice Alito. Either type of appointment would reduce the significance of Justice Kennedy’s vote. Adding two more centrists would mean that the Chief Justice and Justices Scalia, Thomas, and Alito would have a majority whenever one of the centrists joined with them; all three would have to join Justices Breyer and Souter to produce a majority. Justice Kennedy’s influence would decline even further if a Republican President appointed additional conservatives in the Roberts-Alito model. Two more conservatives would create a conservative majority that could overrule the decisions where Justice Kennedy has joined with Justices Stevens, Souter, Ginsburg, and Breyer to form a majority.

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CONCLUSION

For the foreseeable future, one may appropriately describe the present Supreme Court as the Kennedy Court because Justice Kennedy’s opinion will generally define the Supreme Court’s position in cases where the Court is closely divided. As a result, the Supreme Court is likely to adhere to doctrines established when he has been in the majority in the past and to modify or to overrule doctrines where he previously joined Chief Justice Rehnquist and Justices Scalia and Thomas in dissent.

The alignments that are most likely to prove stable are those in cases where Justice Kennedy has been a member of the majority in the past. This group includes both cases in which Justice and Justice O’Connor formed a majority with Chief Justice Rehnquist and Justices Scalia and Thomas and those in which Justice Kennedy joined with Justices Stevens, Souter, Ginsburg, and Breyer to form a majority. These cases cover a wide range of issues including the federalism limits on federal power, standing, and the death penalty cases. In many of these areas, Justice Kennedy has placed a peculiar stamp on the doctrine either by authoring the majority opinion or articulating a position that qualifies the doctrine set forth in opinion for the majority that he has joined. To the extent that the narrow majorities in these cases produce differences of emphasis, Justice Kennedy’s position is likely to be determinative because he will be the member of the majority most likely to form a different majority with the dissenters.

By contrast, constitutional doctrine is less likely to remain stable in cases in which Justice Kennedy has previously been a member of the minority because Justice O’Connor formed a majority with Justices Stevens, Souter, Ginsburg, and Breyer. Because Justice Alito is less likely to stay with that majority, Justice Kennedy is likely to be the swing justice, and his views are likely to define the extent of the shift in constitutional doctrine. Important areas of constitutional doctrine that are subject to this potential shift include the prohibition against federal statutes granting private remedies against

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states, regulations of abortions, limits on campaign financing, race-based affirmative-action programs, free speech rights of students and public employees, the protections afforded by the Establishment and Free Exercise Clauses of the First Amendment, and the scope of the Second Amendment.

Justice Kennedy’s influence is unlikely to wane over the next several terms. Despite his joining the plurality opinion in *Casey*, *stare decisis* will not substantially limit his ability to change existing constitutional doctrine. In the past, he has been willing to distinguish or overrule Rehnquist precedents with which he disagreed, and he continued both practices in the recent terms. Given the length of Justice Kennedy’s service on the Court, fundamental changes in his views seem unlikely. Nonetheless, commentators may find it hard to predict his vote in close cases because he tends to favor doctrines that required individualized consideration of the facts. If his influence diminishes, it will most likely occur because of changes in the Court. The outcome of the 2008 presidential election will limit the significance of those changes. Ironically, Justice Kennedy’s influence is likely to remain pivotal because the country elected a Democratic President.

The general direction of a Court in which Justice Kennedy is the pivotal justice will be a continuation of the past three decades. The Supreme Court will continue to accept an activist approach that sees the Court as the ultimate arbiter of nearly all constitutional issues. Generally speaking, the Court will modestly limit the powers of Congress and the states, expand powers of the President, limit the ability of individuals to challenge governmental actions not directed specifically at them, and contract the reach of individual rights with some modest exceptions regarding women, capital punishment, homosexuals, abortion, and affirmative action. In nearly all of these cases, Justice Kennedy’s views are likely to be pivotal in setting the parameters of the Court’s doctrine and to resist the more absolute formulation of doctrines urged by Justices Scalia and Thomas.

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331 See generally Keck, supra note 12.

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