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Justice Kennedy's Most Important Constitutional Opinions

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I. Introduction

Justice Anthony M. Kennedy has served as an Associate Justice of the Supreme Court of the United States since February 18, 1988. During his more than 20 years on the Court, he has often been a swing vote – particularly since Justice O’Connor’s retirement in 2005. He has been in the middle of the decision-making because he is not part of a block of four conservative Justices (currently Chief Justice Roberts, and Justices Scalia, Thomas, and Alito), or a liberal block (recently Justices Stevens (now Kagan), Souter (now Sotomayor), Ginsburg, and Breyer).  

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For example, during the 2006 term Justice Kennedy was in the majority in all 24 cases decided by a 5-4 vote, while during the 2007 term he was in the majority in 8 of the 12 cases decided 5-4. See Richard G. Wilkins, Scott Worthington, Elisabeth Liljenquist, Adam Pomeroy, Amy Pomeroy, Supreme Court Voting Behavior: 2007 Term, 37 Hastings Const. L.Q. 287 (2010); Richard G. Wilkins, Scott Worthington, Peter J. Jenkins & Elisabeth Liljenquist, Supreme Court Voting Behavior: 2006 Term, 36 Hastings Const. L.Q. 51 (2008). See also Erwin Chemerinsky, The Kennedy Court, 9 Green Bag 335, 335 (2006) (“Justice Anthony Kennedy is clearly the swing vote . . . .”). Justice Kennedy, a native of Sacramento, California, received his B.A. from Stanford University in 1958, spending his senior year at the London School of Economics. He received his LL.B. from Harvard Law School in 1961. He was in private practice in San Francisco, California from 1961-63, and in Sacramento, California from 1963-75. In 1975 he was confirmed to sit on the United States Court of Appeals for the Ninth Circuit after being nominated by President Ford. President Reagan nominated him to be an Associate Justice of the Supreme Court in 1987, and he was confirmed and took his seat on February 18, 1988. From 1965-1988, he was a Professor of Constitutional Law at University of Pacific, McGeorge School of Law. Justice Kennedy continues to be a member of the Pacific, McGeorge faculty, and recently completed his 21st consecutive summer teaching in Pacific, McGeorge’s summer program in Salzburg, Austria.
Justice Kennedy has often been in a position to cast the decisive vote because his style of deciding avoids extremes of the styles used by the other Justices. At one extreme are the formalists, such as Justices Scalia, Thomas, and Alito, who give great weight to literal text. Near that view are Holmesians, who are often characterized by deference to government action and concern for underlying purposes of the law. Currently this describes Chief Justice Roberts, as it did Chief Justice Rehnquist and, of course, Justice Holmes himself. At the other extreme are the instrumentalists, such as former Justice Stevens, and current Justices Ginsburg, Breyer, Sotomayor, and Kagan, who give great attention to alternative social policy consequences of decisions. In between these views fall Justices whose opinions resemble those of Chief Justice John Marshall, in that they are concerned with consequences, but they give great weight to general principles underlying the law, including respect for precedent.2

This latter style may be called natural law, since the framers and ratifiers believed in inalienable natural law rights, whose general principles were embedded in the Constitution.3 Modern Justices who have reasoned in the tradition of Chief Justice Marshall are Justices Powell,}

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O'Connor, and Kennedy. Each of them at one time or another has been regarded as a swing vote.\(^4\)

As noted, Justice Kennedy has not regularly joined with the formalist and Holmesian wing, or with the instrumentalist wing, of the Court. Some scholars have analyzed his reasoning in various fields of law,\(^5\) and efforts have been made to find arguments that might attract his favor.\(^6\) This article has a different focus than the analysis of legal fields or advocacy. We have undertaken to evaluate Justice Kennedy’s majority, concurring, and dissenting opinions in terms of their importance for society and the law. We have found no single criteria by which to assess importance. Instead, we have used a balancing system whose elements are: (1) how many people are likely to be affected over time; (2) how important are the competing interests to individuals, society, or government; (3) how much impact is the opinion likely to have on the development of constitutional law; and (4) what effect the opinion is likely to have on the role of the Court in American legal history.

Applying these criteria to Justice Kennedy’s opinions, it is clear that he has made a number of significant contributions to American constitutional law. This is true both in terms of immediate results and as a harbinger of future developments, particularly when he has pointed out qualifications and limitations on majority opinions that have been written in the


instrumentalist mode. He has not supplied epigrams as did Justice Holmes, but his opinions contain moments of elegance beyond conventional recitation of facts, issues, rules, and reasons.

“Top 10" has become a conventional way of presenting the results of such an undertaking, and we have adopted it. Ten is the bottom of the list; one is the most important. Not surprisingly, most of Justice Kennedy’s important majority opinions are recent. A junior Justice is seldom called upon to write for the Court in important matters. However, Justice Kennedy is now the second most senior Justice, having been confirmed to the Court in 1988. Only Justice Scalia, who was confirmed in 1986, has served for more years.

Before discussing our rankings on the importance of Justice Kennedy’s majority opinions, it may be useful to provide a brief preview of our top ten. They are as follows:


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8.  It is appropriate here to make the usual kind of disclosures. Our top ten list may possibly have been affected by the fact that for 32 years the senior author has been a colleague of Justice Kennedy at University of the Pacific McGeorge School of Law. Two of his sons served as law clerks to the Justice when he was on the Ninth Circuit. The senior author is a Republican. The junior author, a Democrat, has not worked for Justice Kennedy and has met him only socially.
It might be wondered why the list does not include Planned Parenthood v. Casey,\(^9\) where the Court substituted an undue burden test for strict scrutiny in reviewing regulations applying to pre-viability abortions. The answer is that Justices O’Connor, Kennedy, and Souter published a “joint opinion,” so it is not possible to determine with precision how much of the opinion originated with Justice Kennedy. We have also discussed Casey extensively in another article.\(^{10}\)

II. The Top Ten Majority Opinions by Justice Kennedy

Number 10: Application of Rational Basis Scrutiny

If government action interferes with a liberty interest that is not considered fundamental, the Court will review the action by engaging in rational basis review. Rational basis review is the most deferential of the various standards of review used by the Court. It reflects a view that the Constitution’s creation of three branches implies that each branch should respect the work of the other branches, and should not intrude inappropriately into the work of another branch.\(^{11}\) Recognition of the concept can be traced back to McCulloch v. Maryland.\(^{12}\)


\(^{10}\) See Kelso & Kelso, supra note 4 (discussing the Casey opinion in depth). In his book on Justice Kennedy, Frank J. Colucci says that Kennedy had a great deal to do with the opinion, and he details the ideas that he attributes to Kennedy. COLUCCI, supra note 5, at 52-58.

\(^{11}\) See generally ERWIN CHEMERSINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 652 (2d ed. 2002) (“The Supreme Court generally has been extremely deferential to the government when applying the rational basis test. . . . [I]t is very rare for the Supreme Court to find that a law fails the rational basis test.”).

\(^{12}\) 17 U.S. 316 (1819) (Chief Justice John Marshall there said that if the end was legitimate, all appropriate means not prohibited and consistent with the letter and spirit of the Constitution, are constitutional, with the degree of necessity being for Congress).
Justice Kennedy applied rational basis review for a 6-3 Court in *Heller v. Doe*.

In *Heller*, there was a clash between the defendant’s liberty interest in freedom from confinement in an institution for the mentally retarded, and the interest of his family and the state in having him in an environment where he would not be a threat to himself or others. The defendant individual contended that under the Equal Protection Clause it was not rational to apply in his case the standard of clear and convincing proof when proof beyond a reasonable doubt was used for involuntary confinement of mentally ill persons.

Justice Kennedy wrote that a state could authorize involuntary civil commitment of mentally retarded persons on a clear and convincing standard of proof, even though the standard of proof beyond a reasonable doubt was used for involuntary commitment of mentally ill persons. As a foundation for this conclusion, Justice Kennedy first recited principles established by previous decisions regarding the rational basis standard of review. He said there is a strong presumption of validity for any classification that does not involve fundamental rights or proceeding along suspect lines. Thus, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis

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14 *Id.* at 314-15. The Court did not consider whether standards of review more demanding than rational basis should be applied because this contention had not been raised until after decisions in the lower courts. *Id.* at 318-19. See Mari-Rae Sopper, Comment, *Heller v. Doe: Involuntary Commitment Under a Reasonable Doubt*, 72 Denv. U.L. Rev. 491 (1995) (mentally ill and mentally retarded should be treated equally in the adjudicative process required to deny them their constitutional right to liberty); Mark V. Wunder, Comment, *Equal Protection and the Mentally Retarded: A Denial of Quasi-Suspect Status in City of Cleburne v. Cleburne Living Center*, 72 Iowa L. Rev. 241 (1986) (mentally retarded should be considered a quasi-suspect class).

15 509 U.S. at 320.
for the classification.\textsuperscript{16} In making that decision, the Court is not to judge the wisdom, fairness, or logic of legislative choices. However, with typical lawyerly caution to preserve an appropriate role for the judiciary, Justice Kennedy added that the Court must “find some footing in the realities of the subject addressed by the legislature.”\textsuperscript{17}

With regard to finding such footing, the state has no obligation to produce evidence to sustain the rationality of a statutory classification. However, Kentucky offered three justifications for its rule, any one of which, said Kennedy, would suffice to establish a rational basis. They were: (1) mental retardation is easier to diagnose than is mental illness so there is less risk of erroneous determinations; (2) the same is true regarding the presence of danger or a threat of danger to self, family, or others; and (3) the prevailing methods of treatment for the mentally retarded are much less invasive than those given the mentally ill.\textsuperscript{18}

Justice Souter, dissenting with Justices Blackmun and Stevens, said that any difference in the difficulty of proof does not justify discriminating against the retarded in allocating the risk of error. Placing more weight on consequences than on deference to the legislature, as often occurs under the instrumentalist decisionmaking style, Justice Souter noted that there were no studies or record evidence to show any differences in therapeutic regimes that would explain the

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} \textit{Id. at} 321.

\textsuperscript{18} \textit{Id. at} 321-26. Justice Kennedy also noted that in old English law there was a distinction in the treatment accorded “idiots” (the mentally retarded) and “lunatics” (the mentally ill). He said this common sense distinction has been continued today because most states have separate involuntary commitment laws for the two groups. \textit{Id. at} 326.
less rigorous standards for those alleged to be mentally retarded than for those alleged to be mentally ill.\textsuperscript{19}

The importance of the Kennedy opinion arises not only from the fact that he presented a thorough review of law pertaining to rational basis review, but that he added the qualification that there always must be footing in the subject addressed by the legislature. Later he was to find no such footing in two cases involving laws that discriminated against homosexuals, \textit{Romer v. Evans}\textsuperscript{20} and \textit{Lawrence v. Texas}.\textsuperscript{21} In \textit{Lawrence}, only an interest in morality was suggested as a support for criminalizing sodomy. In \textit{Romer}, an interest in protecting the views of landlords was not plausibly the goal of a law which swept far beyond protecting that group of people.\textsuperscript{22}

It might be suggested that Justice Kennedy was really holding in these two cases that there is a fundamental right to engage in homosexual relationships. However, there is no such mention in \textit{Romer} and \textit{Lawrence}. All three cases can be reconciled by saying that if an

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\textsuperscript{19} \textit{Id.} at 337-46 (Souter, J., joined by Blackmun & Stevens, JJ., and O’Connor, J., as to Part II, dissenting); \textit{id.} at 334 (O’Connor, J., concurring in the judgment in part and dissenting in part). There was also disagreement over whether it was rational to allow close relatives to participate in the proceeding, with the right to call and cross-examine witnesses, regarding the mentally retarded but not for the mentally ill. For the majority, Justice Kennedy said the legislature could have found a rational basis for concluding that family members might have valuable insights with respect to the mentally retarded since the condition often arises early in the development period. \textit{Id.} at 330-33. Justice O’Connor also agreed with this conclusion. \textit{Id.} at 334 (O’Connor, J., concurring in the judgment in part and dissenting in part). Three Justices in dissent concluded that it was not rational for family members to participate in effect as “a second prosecutor” in one case and not the others. \textit{Id.} at 346-49 (Souter, J., joined by Blackmun, Stevens & O’Connor, JJ., dissenting).

\textsuperscript{20} 517 U.S. 620 (1996).

\textsuperscript{21} 539 U.S. 558 (2003).

\textsuperscript{22} \textit{Lawrence v. Texas} is discussed \textit{infra} text accompanying notes 96-100; \textit{Romer v. Evans} is discussed \textit{infra} text accompanying note 101.
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individual’s liberty is being interfered with by a state, there will be a plausible challenge under the Equal Protection or Due Process clauses, unless the law is rationally related to a legitimate government interest.

The number of people directly affected by *Heller* is not likely ever to be large. Its holding is important, of course, to certain persons with mental impairment. But the reason for recognizing the opinion as of some general importance is the comment it contains about the fact that even under rational basis review the Court is prepared to make judgments about whether in the real world the means are rationally related to the ends. This reservation could make a real difference in any number of cases where the instrumentalists are weighing consequences and seek Justice Kennedy’s vote, as was given in *Romer* and *Lawrence*.

**Number 9: Government Control of Internet Speech**

possess depictions of sexually explicit conduct that appear to be by minors (persons under 18). There was no requirement that the material be obscene or have no social value. The government argued that the law protected children from the whetted appetites of pedophiles. Justice Kennedy replied for the Court that without a stronger connection the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct. With respect to whetting he said, “First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”

The Government said there was a need to eliminate the market for pornography produced by real children, which could be virtually indistinguishable from computer presentations. Kennedy replied that the Government may not ban protected speech as a means to ban unprotected speech. The Government said that virtual pornography enhanced the difficulty of prosecuting those who produce pornography using real children. Justice Kennedy replied that the overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.

The number of people affected by this case is hard to estimate, and there is disagreement in society about how important is the freedom to publish pornography. However, the role of the


24 535 U.S. at 254.
25 Id. at 254.
26 Id. at 254-55.
Court as champion of free speech in American society is dramatically confirmed by this opinion. Political speech may be at the heart of the protection accorded free speech, but Justice Kennedy, and a majority of the Supreme Court, are of the view that one role of the Court is vigorously to protect all speech other than the few socially worthless or dangerous categories, such as obscenity, fighting words, true threats, and advocacy of illegal actions likely to occur. Justice Kennedy’s opinion in this case is a clear statement of that fact.

**Number 8: Cruel and Unusual Punishment**

In *Roper v. Simmons*, Justice Kennedy wrote for a 5-4 Court in 2005 that it was cruel and unusual punishment to execute a person who was under 18 at the time of the crime. He relied on an emerging consensus among the American states, but also noted that on the international scene the United States stood alone in allowing such punishment, and was the only nation other than Somalia not to join the U.N. Convention on Rights of the Child.

parol for juvenile nonhomicide offenders. Kennedy explained that a state is not required to guarantee eventual freedom to such an offender, but must impose a sentence that provides some meaningful opportunity for release based on demonstrated maturity and rehabilitation.\(^{30}\)

In support of the holding, Justice Kennedy concluded that there is an emerging consensus against use of this sentencing practice.\(^{31}\) However, the ultimate factor, he said, is exercise of the Court’s own independent judgment on whether the punishment in question violates the Constitution, based on consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.\(^{32}\) In an unusual step for Justice Kennedy, he said that the situation calls for a categorical rule, rather than a case-by-case proportionality approach, because it does not follow that courts taking a case-by-case approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many who have the capacity for change. He added that the fact that such life sentences are barred the world over provides respected and significant confirmation to the Court’s own conclusions.\(^{33}\)

Chief Justice Roberts concurred in the judgment but, giving more deference to legislative judgment, would have applied a proportionality review, considering the particular defendant and particular crime at issue.\(^{34}\) Justice Stevens, concurring with Justices Ginsburg and Sotomayor,  

\(^{30}\) 130 S. Ct. at 2028-30.  
\(^{31}\) Id. at 2023-26.  
\(^{32}\) Id. at 2026-28.  
\(^{33}\) Id. at 2031-34.  
\(^{34}\) Id. at 2036-37 (Robert, C.J., concurring in the judgment).
defended use of the concept of searching for evolving standards of decency based on reason and experience with respect to what punishments seem cruel and unusual.35

Justice Thomas dissented, with Justices Scalia and Alito. Justice Thomas criticized the Court for using a categorical approach which previously had been reserved for death penalty cases alone. Justice Thomas said that there was not an emerging consensus as the Federal Government and 37 States and the District of Columbia authorized life without parole for certain nonhomicide offenses, and authorized the imposition of such a sentence on persons under 18.36

The principles that conflicted here were the hope for rehabilitation of juvenile offenders weighed against the many state laws authorizing life without parole for certain juvenile offenders. The weight of those laws as a factor was diminished by the infrequency of its use, said Justice Kennedy, and the fact that many jurisdictions do not expressly prohibit the practice should not be given great weight because it does not follow that the legislatures in those jurisdictions have deliberately concluded that such sentences would be appropriate.

Justice Kennedy’s opinion is not likely to affect a large number of persons although the interest it protects is vital where it applies. However, the impact of the decision on the development of constitutional law could be important for two reasons: (1) reference to law in other countries, and (2) the fact that Justice Kennedy stated frankly that individual judgment was the key factor in the decision. That is a different view on the role of the Court than has been traditionally expressed. The question is raised as to whether that view will be limited to cruel and inhuman cases or whether the individual judgment test will spread to other areas as well. If

35 Id. at 2036 (Stevens, J., joined by Ginsburg & Sotomayor, JJ., concurring).
it does, the Court will be moving into new territory and it will raise questions as to whether this is an appropriate use of judicial power.

**Number 7: Habeas Corpus**

Faced with a challenge to reconcile liberty and security, Justice Kennedy wrote for a 5-4 Court in *Boumediene v. Bush* that Congress had not constitutionally deprived federal courts of jurisdiction to consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba. The reason, held Kennedy, was that the Constitution’s Suspension Clause, Art. I, § 9(2), does not allow the writ to be suspended except in case of rebellion or invasion.

The Government contended that habeas corpus jurisdiction did not extend to Guantanamo, but in any event an adequate substitute for habeas corpus had been created in the Military Commissions Act of 2006 (MCA), 28 U.S.C.A. § 2241(e). Justice Kennedy rejected those arguments. Applying a functional analysis that included practicalities, he said that habeas jurisdiction extended to areas under the extensive control that the United States had over Guantanamo Bay, and the provisions of MCA did not provide detainees with adequate

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36 *Id.* at 2043 (Thomas, J., joined by Scalia, J., and Alito, J., as to Parts I and III, dissenting).

procedural protections. Justice Kennedy left determination of substantive criteria and procedures for habeas corpus review initially up to the lower courts. However, he added that at a minimum the detainee must have a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law, and a military commissions system would not be an adequate substitute unless at a minimum it permitted an applicant on appeal to present evidence discovered after commission proceedings. As for what proceedings would satisfy the Constitution, he said that lower courts should make rulings on what is a reasonable time for the Government to determine a detainee’s status before a petition is considered.

Chief Justice Roberts dissented and was joined by Justices Scalia, Thomas, and Alito. Deferring to Congress, Roberts said the MCA protected any rights held by aliens captured abroad and detained as enemy combatants. But in any event it was premature for the Court to invalidate the MCA without having heard a case that actually had moved through the MCA proceedings. Justice Scalia, whose support for originalism is well known, engaged in an investigation of

38 128 S. Ct. at 2252-62.
39 Id. at 2266-74.
40 Id. at 2274-77.
41 Id. at 2279-82 (Roberts, C. J., joined by Scalia, Thomas & Alito, JJ., dissenting).
42 See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (44 Princeton Univ. Press 1997) (emphasizing the “antievolutionary purpose of a constitution”). See also Justice Scalia says ‘originalism’ protects American liberty, U. Delaware Daily (Apr. 30, 2007) (www.udel.edu/PR/UDaily/2007/apr/scalia043007.html) (“The Constitution means what it says. You figure out what it was understood to mean when it was adopted and that’s the end of it. If you want more rights, create them by statute, if you want more constitutional rights, create them by amending the Constitution.”).
history and said it is clear that the original understanding of the Suspension Clause was that habeas corpus was not available to aliens abroad. For Justice Kennedy, the historical materials were not decisive, and there was no close historical parallel to the case before the Court so that general principles relating to habeas corpus carried the day.

The case leaves it largely open for the administration, Congress, or lower courts to decide how the detainees at Guantanamo Bay will be tried. The number of affected people is not large, although they have a strong interest in the possibility of release before or after trial in some authorized jurisdiction, and the situation has attracted international attention. The case involved the Court in foreign and military affairs to a greater extent that has been traditional. Even more important, however, it represented a strong stand by the Supreme Court regarding the importance of habeas corpus and the role of the Court in protecting people from arbitrary confinement by the Government.

**Number 6: Viewpoint Discrimination**

Congress funded the Legal Service Corporation but prohibited legal representations by funded recipients if they involved an effort to amend or otherwise challenge existing welfare law. Noting that the program was designed to facilitate private speech on behalf of clients, Justice Kennedy wrote on behalf of the Court in *Legal Services Corporation v. Velazquez* that the

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44 Id. at 2262.

condition distorted the usual functioning of the judiciary in order to suppress ideas thought inimical to the Government’s own interest, and this was an impermissible viewpoint-based discrimination in violation of the First Amendment.\textsuperscript{46}

The most important aspect of this holding is that the Court indicated an unwillingness to allow Congress to interfere with the functioning of federal courts. This potentially is a benefit to every person in the United States. Further, Justice Kennedy made it clear that when the government seeks to regulate speech or even to fund some speech by private speakers it must be neutral with respect to the subject of the speech.\textsuperscript{47} This tends to protect everyone from propaganda.

**Number 5: Freedom From Religion**


\textsuperscript{46} 531 U.S. at 542-46. Six years earlier, Justice Kennedy had found forbidden viewpoint discrimination when the University of Virginia funded the printing costs of a variety of student publications, but refused plaintiff’s request for funding its student paper, because the paper facilitated sensitivity to and tolerance of Christian viewpoints. \textit{Rosenberger v. Rector and Visitors of the University of Virginia}, 515 U.S. 819, 830-32 (1995).

\textsuperscript{47} 531 U.S. at 548-49.

\textsuperscript{48} 130 S. Ct. 1803 (2010).
would convey to a reasonable person an impression of governmental endorsement of religion. It ordered the Government to remove the cross or have it dismantled. A Court of Appeals affirmed, and the Government did not appeal, so the decision became final. Meanwhile, Congress designated the area as a national memorial commemorating American veterans of World War I, and subsequent to the Court of Appeals decision enacted a land-transfer statute directing the Secretary of the Interior to transfer to the VFW the government’s interest in the land, and to receive comparable land in return. In a new action brought by Buono, he contended that the land transfer was a sham aimed at keeping the cross in place. The District Court agreed, and enjoined the Government from implementing the land-transfer statute. The Court of Appeals affirmed, but the Supreme Court reversed.49

Justice Kennedy’s plurality opinion first held that Buono had standing to bring the latest suit because a person who obtains a judgment in his favor acquires a judicially cognizable interest in ensuring compliance with that judgment. Since Buono’s rights obtained in the earlier decree were against the same party, regarding the same cross and the same land, his interest in preventing the government from frustrating or evading that injunction were sufficiently personal and concrete to support his standing.50

Turning to the merits, Justice Kennedy said that the remedy ordered below may not fit the change in circumstances occasioned by congressional action. Justice Kennedy said the goal of avoiding government endorsement does not require eradication of all religious symbols in the public arena. The District Court should have considered whether the reasonable observer

49 Id. at 1811-14. For a general discussion, see Caroline Mala Corbin, Ceremonial Deism and the Reasonable Religious Outsider, 57 UCLA L. Rev. 1545 (2010).
standard continues to be the appropriate framework through which to consider Establishment Clause concerns, and if so, it should apply the test in light of the fact that the cross is a symbol often used to honor those who have done heroic acts. In addition, respect for a coordinate branch requires that the congressional command be given effect unless no legal alternative exists. Therefore, the District Court should consider less drastic relief than complete invalidation of the land-transfer statute, such as signs that indicate VFW’s ownership of the land. The District Court should also undertake an analysis in the first instance of whether there continues to be a necessity for injunctive relief.

Once again, Justice Kennedy was in the middle of a variety of views. The closest was that of Chief Justice Roberts, whose concurrence noted that Buono’s counsel stated at oral argument that it likely would be consistent with the injunction for the Government to tear down the cross, sell the land to the VFW, and return the cross to them, with the VFW immediately raising the cross. If so, it should make no difference to do what Congress said: sell the land with the cross on it.

Justice Alito concurred in the judgment and with Justice Kennedy’s opinion in all respects except one. Alito said that the factual record had been sufficiently developed that the Court should go ahead and decide that implementation of the land-transfer statute would not violate the first injunction or violate the Establishment Clause. The obvious meaning of the

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50 130 S.Ct. at 1814-15.
51 Id. at 1819-20.
52 Id. at 1820-21.
53 Id. at 1821 (Roberts, C.J., concurring).
injunction was simply that the Government could not allow the cross to remain on federal
ground. As for the Establishment Clause, a reasonable observer, familiar with the origin and
history of the monument, would know both that the land on which the monument is located is
now private land and that the new owner is under no obligation to preserve the monument’s
present design. Thus, a well-informed observer would appreciate that the transfer represents an
effort by Congress to address a unique situation to find the best accommodation of conflicting
concerns, including a desire by Congress to commemorate our Nation’s war dead and avoid the
disturbing symbolism that would have been created by destruction of the monument.\textsuperscript{54}

Justice Scalia, with whom Justice Thomas joined, would have held that Buono lacked
Article III standing. Buono had complained only about being offended by the display of a Latin
cross on government land. But the land-transfer makes clear that the original injunction is in no
need of protection from Government frustration or evasion, which was the original concern of
Buono, and he has not suffered any concrete harm from the land-transfer statute.\textsuperscript{55}

Justice Stevens dissented with Justices Ginsburg and Sotomayor. Stevens first said that
Buono had standing to seek enforcement of a decree in his favor in order to see that it
accomplished its intended result, which was not only to prevent the display of a Latin cross on
government property, but also to prevent him from having to avoid the general area of the cross
because of the Government’s unconstitutional endorsement of the cross.\textsuperscript{56} On the merits, the
transfer would violate the terms of the District Court’s original injunction against the

\textsuperscript{54} \textit{Id.} at 1821-24 (Alito, J., concurring in the judgment).
\textsuperscript{55} \textit{Id.} at 1824-27 (Scalia, J., joined by Thomas, J., concurring in the judgment).
\textsuperscript{56} \textit{Id.} at 1831-32 (Stevens, J., joined by Ginsburg & Sotomayor, JJ., dissenting).
Government permitting display of the cross in the area of Sunrise Park in the Mojave National Preserve. The transfer would not eliminate government endorsement of religion, said Stevens, because the transfer of land was to an organization that had announced its intention to maintain the cross on Sunrise Rock. Postulating an observer very sensitive to Establishment Clause concerns, Justice Stevens said that it would appear to any reasonable observer that the Government has endorsed the cross, particularly because the Government has designated the cross in a remote location as a national memorial, in a provision buried in a defense appropriations bill.57

Justice Breyer also dissented. He noted that the original injunction said that Government must not permit the display of the Latin cross in the areas of Sunrise Rock in the Mojave National Preserve. That decision having become final, the question was simply whether the District Court is permitted to hold that the land transfer falls within the scope of its original injunctive order. An issuing judge has considerable discretion in interpreting and or applying its own injunctive decrees. Here, the transfer statute will permit the public display of the cross and calls for the VFW to maintain the conveyed property as a memorial. Thus the apparent endorsement of religion, as held in the original opinion, will continue. All this follows from the law of injunctions, and since there is no federal question of general significance the Court should dismiss the writ as improvidently granted. The Court not having done this, it should simply affirm the Ninth Circuit’s judgment.58

57 Id. at 1834-37.

58 Id. at 1842-45 (Breyer, J., dissenting).
The combination of opinions seems to leave lower courts in a quandary since there were two votes for reversing and ordering an analysis; two votes simply to reverse the lower courts, two votes for denial of standing, and four votes for affirmance. Probably the safest course of action would be to find standing and engage in the analysis suggested by Justice Kennedy.

Even though the next step in this litigation may be puzzling, the case is important because the Kennedy opinion, which had the most support, signaled a willingness to allow Government to acknowledge the existence of the Christian religion in the history of this country. Potentially that could affect millions of people, and the interest is quite important to many. Establishment Clause doctrine will not be completely abandoned, and the Lemon case, as modified by Justice O’Connor to call for an inquiry into endorsement, may remain on the books. However, Salazar suggests that applications of Lemon are increasingly likely to permit some Government recognition of an accommodation to religious interests.

**Number 4: Abortion: D & E and Partial-Birth**

Some background is needed to evaluate the importance of Justice Kennedy’s latest contribution to the realm of legislative restrictions on abortion, where there is a clash between a woman’s right to autonomy and the Government’s interest in potential life. In Planned

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59 On O’Connor’s endorsement test, see McCreary County, Kentucky v. American Civil Liberties Union of Kentucky, 545 U.S. 844, 882-84 (O’Connor, J., concurring); County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 627-32 (1989) (O’Connor, J., joined by Brennan & Stevens, JJ., concurring in part).

60 Such accommodation, of course, would have limits. See, e.g., American Atheists v. Duncan, ___ F.3d ___, 2010 WL 3239486 (10th Cir. 2010) (a sequence of crosses erected on Utah highways to memorialize fallen Utah Highway Patrol state troopers violates the Establishment Clause as they would convey to a reasonable observer the message that the state prefers or otherwise endorses a certain religion).
Parenthood of Southeastern Pennsylvania v. Casey, Justice Kennedy joined a three-Justice opinion with Justices O’Connor and Souter, to hold that the right to chose an abortion, recognized in Roe v. Wade, was not so fundamental that regulation must always trigger strict scrutiny. Instead, the interest of the Government in protecting unborn life was sufficiently strong throughout pregnancy that it could prevail unless the regulation imposed an undue burden on exercise of the right to an abortion (i.e., the law’s purpose or effect placed a substantial obstacle in the path of a woman seeking an abortion). The opinion went ahead to approve banning post viability abortions and imposing requirements of providing information before obtaining consent, a 24-hour waiting period, parental consent for minors (with a judicial bypass), and certain record-keeping requirements. It struck down a spousal notification requirement as likely to prevent a significant number of women from obtaining an abortion.

In Stenberg v. Carhart, Justice Kennedy dissented from a 5-4 opinion by Justice Breyer that invalidated Nebraska’s ban on partial-birth abortion on the ground that it lacked an exception for preserving the health of the mother and thus imposed an undue burden. Kennedy said that Nebraska was entitled to find a moral difference between the D & E procedure, normally used, and the D & X, on the ground that D & X more closely resembled infanticide.
Further, Nebraska was entitled to find that the ban did not deprive any woman of a safe abortion.\textsuperscript{65}

By 2007, Justice Alito had replaced Justice O’Connor, who had been part of the majority in \textit{Stenberg v. Carhart}. The result was that in \textit{Gonzales v. Carhart},\textsuperscript{66} Justice Kennedy, for a 5-4 Court, was able to uphold against a facial attack the Partial-Birth Abortion Ban Act of 2003, 28 U.S.C. § 1531. The Act banned the intact D and E (known as D & X in \textit{Carhart}), a procedure in which the doctor extracts the fetus and then kills it, often by evacuating the contents of the skull. Congress had found that a moral, medical, and ethical consensus exists that this practice is never medically necessary and should be prohibited. Justice Kennedy said that the failure to provide a medical exception for the health of the mother would make the law an invalid undue burden under existing precedents unless there was, in fact, no medical emergency in which this procedure had to be used.\textsuperscript{67} He said there was conflicting evidence before Congress on this point, and the Court should give state and federal legislatures wide discretion to pass legislation

\textsuperscript{65} Id. at 956-58, 964 (Kennedy, J., joined by Rehnquist, C.J., dissenting).


in areas where there is medical and scientific uncertainty. Further, alternatives are available to the prohibited procedure, such as D & E, where the fetus is torn apart before being delivered.68

Justice Kennedy distinguished the federal statute from the Nebraska statute that had been declared unconstitutional in Stenberg v. Carhart. He said the federal statute defined intact D & E in a way that did not include the frequently used D & E by inserting clarifying anatomical benchmarks, e.g., that its prohibition applies only if the fetus is delivered partially outside the body of the mother.69 Kennedy closed by saying that the proper place to test the lack of a health exception was an as-applied challenge where the nature of the medical risks might better be quantified and balanced than in a facial attack, such as in the cases before the Court. In summary, Justice Kennedy attempted to weigh the right to an abortion and the government’s interest in potential life in such a way that no woman is deprived of a safe abortion before viability or, in emergencies, after viability.70

Justice Ginsburg’s dissent in Gonzales was joined by Justices Stevens, Souter, and Breyer.71 Justice Ginsburg said the record before Congress shows that a number of physicians and medical associations supplied evidence that intact D & E carries meaningful safety advantages over other methods and that a pregnant woman’s health would be jeopardized under the statute. She pointed out that there was a full presentation of evidence in several district courts

68 Id. at 162-67.
69 Id. at 150-54.
70 Id. at 167-68. In Gonzales, Justice Thomas wrote a concurring opinion to say that Casey and Roe have no basis in the Constitution. Id. at 168-69 (Thomas, J., joined by Scalia, J., concurring).
71 Id. at 171-80, 190-91(Ginsburg, J., joined by Stevens, Breyer & Sotomayor, JJ., dissenting).
that had rejected Congress’ findings as unreasonable and not supported by the evidence. In Ginsburg’s opinion, the absence of the health exception burdens all women to whom it is an actual restriction. She closed by saying that the Court’s defense of the Act can only be understood as an effort to chip away at the right to chose an abortion.

The importance of any opinion changing law on abortion is evident. And it is true that the Gonzales opinions evidence a considerable movement by the Court from the strict scrutiny steps of Roe v. Wade. However, Justice Kennedy’s opinion seems more concerned with finding an appropriate level of deference to Congress instead of chipping away at the right to chose an abortion. Kennedy’s opinion is more closely related to principles on the separation of powers than to law affecting fundamental rights.

**Number 3: Corporations Cannot be Banned from Independent Political Expenditures**

In Citizens United v. Federal Election Commission, a 2010 case, there was a clash between the interest of corporations in free speech related to elections and the Government’s interest in avoiding the distorting influence of wealth, preventing corruption, and protecting shareholders. A federal statute barred corporations from making independent expenditures which referred to a clearly identified candidate within 30s days of a primary election or within 60

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See generally Matthew Lambert, Beyond Corporate Speech: Corporate Powers in a Federalist System, 37 Rutgers L. Rec. 20 (2010) (the Court has rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment); Stephan Stohler, Comment, One Person, One Vote, One Dollar? Campaign Finance, Elections, and Elite Democratic Theory, 12 U. Pa. J. Const. L. 1257 (2010) (resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas).
days of a general election for public office.\textsuperscript{73} In his opinion for a 5–4 Court, Justice Kennedy said that the proper standard of review was strict scrutiny, which required the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest. At this level of review, deference is not given to legislative judgments on the existence of facts, and here the Government had not identified a compelling interest, said Kennedy, because First Amendment protection does not depend on the speaker’s financial ability to engage in public discourse; independent expenditures do not give rise to corruption or the appearance of corruption; and if the shareholder protection theory were adopted it would give the Government power to restrict the political speech of media corporations and, furthermore, there is little evidence of abuse that cannot be protected by shareholders through the processes of corporation democracy.\textsuperscript{74}

The background of principles for Justice Kennedy’s choice of strict scrutiny and his rejection of the Government’s theories on compelling interests appears in several of Kennedy’s general observations in the case. With respect to judgments on the accuracy and implementations of the proposed corporately-supported distribution of a video about Hillary Clinton which had given rise to the case, Justice Kennedy said, “The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it.”\textsuperscript{75}

\textsuperscript{73} 2 U.S.C. § 441(b).

\textsuperscript{74} 130 S. Ct. at 903-10.

\textsuperscript{75} Id. at 917.
With respect to making it a crime for corporations to engage in political speech shortly before an election, Justice Kennedy said:

Modern day movies, television comedies, or skits on Youtube might portray public officials or public policies in unflattering ways. Yet if a covered transmission during the blackout period creates the background for candidate endorsement or opposition, a felony occurs solely because a corporation, other than an exempt media corporation, has made the “purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value” in order to engage in political speech. 2 U .S.C. § 431(9)(A)(i).” Speech would be suppressed in the realm where its necessity is most evident: in the public dialogue preceding a real election. Governments are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute’s purpose and design.76

In addition to striking down 2 U.S.C. §441(b), Justice Kennedy overruled Austin v. Michigan Chamber of Commerce 77 and McConnell v. Federal Election Commission.78 Those cases had upheld limits on electioneering communications because of the speaker’s corporate identity. In each of them Justice Kennedy had penned a dissent. He said that stare decisis did not require their continued acceptance as the cases were not well reasoned in abandoning free speech principles, had been undermined by various circumventions, and no serious reliance interests were at stake.79

76 Id. at 917.
79 130 S. Ct. at 911-13. Stare decisis did not require the continued acceptance of Austin, said Kennedy, as the case was not well reasoned because it abandoned First Amendment principles, had been undermined by various circumventions since its announcement, and no serious reliance interests are a stake from its prevention of corporation. Id. at 911-12. Kennedy explained that McConnell had to be overruled because the particular communication involved in Citizens United, a documentary that criticized Senator Hillary Clinton as a presidential candidate, was clearly a publically distributed electioneering communication within the meaning of the statute that had been upheld in McConnell. Id. at 890, 913.
The statute also included in 2 U.S.C. § 441(d) a disclaimer requirement to indicate who is responsible for the content of any advertisement, and in 2 U.S.C. § 444(f), a disclosure requirement for any person spending more than $10,000 on electioneering communications within a calendar year. Justice Kennedy found no constitutional impediment to the application of those requirements to a movie broadcast via video-on-demand as there had been no showing that these requirements would impose a chill on speech or expression.\(^{80}\)

As so frequently occurs, Justice Kennedy’s view was in the middle of extremes. Justice Thomas joined all but the final part of Justice Kennedy’s opinion, where the Court upheld disclosure, disclaimer and reporting requirements. Thomas pointed to a number of examples wherein persons whose names and addresses were disclosed, as required by law, were subjected to attacks and were left subject to retaliation from elected officials. He said that persons should have a right to anonymous speech. The possibility of bringing an as-applied action would require substantial litigation over an extended time during which there would be a risk of chilling speech. And the need for prompt judicial action is increasing with the ability of the Internet to give wide publicity to revealed individuals. He added, “I cannot endorse a view of the First Amendment that subjects citizens of the Nation to death threats, ruined careers, damage or defaced property, or pre-emptive and threatening warning letters as the price for engaging in ‘core political speech’, the primary object of First Amendment protection.”\(^{81}\)

Justice Stevens, joined by Justices Ginsburg, Breyer, and Sotomayor, dissented from the Court’s conclusion regarding 2 U.S.C. 441(b). Justice Stevens claimed that \textit{stare decisis} had

\(^{80}\) \textit{Id.} at 913-14.  
\(^{81}\) \textit{Id.} at 980-82.
been inappropriately departed from because *Austin* has long been relied upon by state legislatures, and the case had not been proved unworkable.\(^82\) Regarding consequences, Stevens insisted that there was plenty of evidence supporting the reasonableness of Congress’s concern to deal with corruption, distortion, and shareholder protection. As to the danger of corruption from corporate participation in an election, Congress conducted much investigation and the Court should defer to its judgment. Stevens said the fact that corporations have no consciences, no beliefs, no feelings, and no thoughts or desires is a reminder that they themselves are not “We the People” by whom and for whom our Constitution was established.\(^83\) He concluded that the majority view is contrary to the long recognition by the people of the need to prevent corporations from undermining self-government.\(^84\) These four Justices did agree with Kennedy that the disclaimer and disclosure requirements were constitutional.\(^85\)

This case certainly affects many speakers and listeners, and the interest in speaking about political matters is often intense. The holding may bring more money into efforts by corporations (and unions) to affect independent voters, something that most incumbents do not prefer. Congress may try to blunt the decision by enacting onerous reporting requirements or making it more difficult to be an independent source. Indeed, the case is a focal point for efforts by the current administration to prompt Congress into passing some laws that impose restrictions

\(^82\) *Id.* at 929, 938-40 (Stevens, J., joined by Ginsburg, Breyer & Sotomayor, JJ., dissenting).

\(^83\) *Id.* at 960-79.

\(^84\) *Id.* at 948-60.

\(^85\) *Id.* at 913-14, 917 (Kennedy, J., announcing the judgment of the Court); *id.* at 979 (Stevens, J., joined by Ginsburg, Breyer & Sotomayor, JJ., dissenting).
on corporate (and union) expenditures on elections. Congress certainly has some leeway with respect to imposing onerous reporting requirements, and there may be some ingenious pathways around the case. However, regardless of what Congress does, the role of the Court has been expanded by this decision since it withdraws from Congress an important matter of policy with respect to concerns about corporations having an excessive impact on elections.

**Number 2: Congressional Power to Enforce the Fourteenth Amendment**

In *City v. Boerne v. Flores*, Justice Kennedy wrote for the Court that when Congress attempts to enforce the 14th Amendment under its § 5 enforcement power, there must be a congruence between the means used and the end of responding to or preventing unconstitutional state behavior. Applying that concept, the Court held that the Religious Freedom Restoration Act of 1993 (RFRA), which required strict scrutiny of any law that burdened religious exercise (directly or incidentally), was not based on any findings of widespread religious discrimination by the States. Thus it could not be considered an enforcing remedy and, instead, was an attempt to change the 14th Amendment which contradicts vital principles necessary to maintain separation of powers and the federal balance. The background of *Flores* included *Employment Division v. Smith*. There, the Court had held that neutral, generally applicable laws may be

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87. *Id.* at 519-20, 535-36.

applied to religious practices even when not supported by a compelling government interest. To overrule *Smith*, Congress passed the Religious Freedom Restoration Act of 1993, which provided that laws which placed a substantial burden on religious practices could be upheld only if they served a compelling state interest and were narrowly tailored to achieve that end. Even though this was a boost to religious liberty, Justice Kennedy wrote for a 6-3 Court in *City of Boerne*, that the Act must be invalidated as an attempt to exercise power under § 5 of the Fourteenth Amendment by the enactment of a remedy which was not congruent and proportional to any pattern of state violations of the Amendment. Kennedy explained that to hold otherwise would violate the separation of powers since Congress would in effect be enacting substantive legislation at odds with the Court’s interpretation of the Fourteenth Amendment. Further, Congress was considerably intruding into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens, and thus it intruded on the federal balance enshrined in the doctrine of federalism.

The *Boerne* opinion has had a significant impact on the ability of Congress to enact certain forms of civil rights law. The opinion will have to be considered each time Congress attempts to enforce the Fourteenth Amendment. Congress will need to make a record showing

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90 521 U.S. at 519-20, 529-30.

91 *Id.* at 535-36. In the interest of federalism and the separation of powers, Justice Kennedy’s *Flores* opinion trimmed the power of Congress to protect religion and other forms of freedom from state action. However, a later case held that it is not a facial violation of the Establishment Clause for Congress to prevent any government from imposing a substantial burden on the religious exercise of a person residing in an institution unless that burden furthers a compelling interest and does so by the least restrictive means – provided, however, that the religious accommodation does not completely override other government interests, such as the need for security in prisons. *Cutter v. Wilkinson*, 544 U.S. 709 (2005).
that a number of States have violated the Constitution, and will need to make an effort reasonably to link the enforcing legislation to remedying or prevent such violations. The role of the Court here intruded into the political process, and any step by the Court in that direction makes it more difficult in the future to change directions.

**Number One: Protecting Rights of Gays and Lesbians**

Justice Kennedy defines liberty very broadly, and finds that it is protected by a wide variety of means. For example, he said in *Boumediene v. Bush*, “The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.”

However, liberty extends far beyond physical restraint, as Justice Kennedy pointed out in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. In that case, the joint opinion authored by Justices Kennedy, O’Connor, and Souter, said that “our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child reading and education.” And the joint opinion added that “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”

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92 128 S. Ct. 2229, 2244 (2008) (writ of habeas corpus was held available to non-citizens held as enemy combatants in Guantanamo Bay.)


94 *Id.* at 851.

95 *Id.* at 851.
Justice Kennedy cited and reaffirmed these ideas in his majority opinion in *Lawrence v. Texas*. In that case the Court invalidated a Texas statute which criminalized homosexual sodomy. Justice Kennedy said for the Court that the law furthered no legitimate state interest which could justify its intrusion into the personal and private life of the individual. Kennedy did not define the personal interest as a fundamental right, which would have triggered strict scrutiny, but he did explain that the statute sought to control a personal relationship that is within the liberty of persons to choose without being punished as criminals. As to the full scope of that liberty, Justice Kennedy said that the Framers could not have foreseen the components of liberty in all of its manifold possibilities. However, “They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”

Justice Kennedy continued in *Lawrence*, “Liberty protects the person from unwarranted government intrusion into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the

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97 539 U.S. at 579.
home, where the State should not be a dominant presence. Freedom extends beyond spacial bonds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”

Regarding the scope of issues specifically resolved in *Lawrence*, Justice Kennedy provided a complete inventory of what the case did not involve, and what it did involve. Kennedy said, “The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.”

In terms of principles pertaining to substantive due process, Justice Kennedy placed great weight in *Lawrence* on the liberty represented by personal dignity and autonomy. Regarding what state interests might not be legitimate so as to outweigh personal dignity in rational basis review, he quoted from Justice Stevens’ dissent in *Bowers v. Hardwick* that “the fact that the governing majority in a State had traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.” Justice Kennedy did not consider whether the state had invaded a fundamental right, or whether homosexuality was a suspect category which would trigger strict scrutiny – probably because if the law could not pass

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98 *Id.* at 562.

99 *Id.* at 578.

100 *Id.* at 578.
rational basis scrutiny it clearly could not pass any higher level. But the question remains open as to whether the right involved is fundamental under the Due Process Clause or the group designation is suspect under the Equal Protection Clause, in which case strict scrutiny would be triggered.

*Lawrence* carried forward some protections for the freedom of gays and lesbians that had been established in the earlier case of *Romer v. Evans*.\(^{101}\) There, an opinion for the Court by Justice Kennedy struck down Amendment 2 to the Constitution of Colorado. That Amendment invalidated any state laws which protected homosexuals from discrimination, and prohibited such measures in the future except by an amendment to the state constitution. The state sought to justify the Amendment as respecting other citizen’s freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. The breadth of the Amendment, said Kennedy, is so far removed from the state’s proffered interests that the Court found it impossible to credit them. Kennedy said that the law appears to be a classification undertaken for its own sake to make a class of persons unequal to everyone else.

To date, *Lawrence* probably has had a direct impact on relatively few people. Not many states have laws that were invalidated by the case. Justice Kennedy noted that by 2003 legislative practice had changed, with only 9 states banning sodomy generally, and 4 states, including Texas, banning only homosexual sodomy.\(^{102}\) And there is no indication that the laws are being enforced. However, the case seems likely to become the principal background for


\(^{102}\) 539 U.S. at 573.
invalidating laws prohibiting same-sex marriage, and that will affect many thousands or millions of people today and in the future. Further, its repudiation of morality as a legitimate interest for regulating relationships between people is likely to have a significant impact on constitutional law relating to regulations that relate to the family.  

In light of *Lawrence*, there is no reason to believe that Justice Kennedy will ever narrow his understanding of the nature and importance of liberty in the pantheon of materials available to the Court to protect people from Government action. Indeed, in recent years he has turned to an additional source for inspiration that may contain the seeds of a further enlargement in his views on liberty; namely, international law and legal developments in other nations. For example, in *Lawrence*, Justice Kennedy drew on international developments as one factor in determining that there is an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their privates lives in matters pertaining to sex. In reaching that conclusion on a fundamental principle, Justice Kennedy relied in part upon broader arguments of

103 Justice Scalia’s dissent contended that overruling *Bowers* on this ground called into question all state laws on bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality and obscenity. *Id.* at 590 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting). Justice Kennedy’s statement of what the case did not involve, cited at text *supra* note 94, contained criteria such as possible injury or coercion, that might apply to incest or prostitution, and there may be other justifications for laws on obscenity and bestiality, but the criteria do suggest the Court would invalidate laws on masturbation, adultery, or fornication.

104 Natural law Justices should be willing to consider social and judicial practice from other countries to the extent that practice helps illuminate a reasoned elaboration of a universal natural law concept placed into the Constitution, something judges did during the original natural law era. See David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. Rev. 539 UCLA L. Rev. 539, 575-83 (2001) (discussing judicial practice from 1789 through the Civil War).

105 539 U.S. at 570.
social practice, including the “values we share with a wider civilization,” and opinions of “the European Court of Human Rights.”

III. Concurring Opinions of Justice Kennedy

Justice Kennedy’s concurring opinions often contain a suggested interpretation of the majority opinion that opens the door to more moderate steps that might be taken in reacting to what the Court has done or to arguments that might be made in future litigation. Several of his most important concurring opinions have supported a later trimming of the majority opinion. So, as in the case for the majority opinions of Justice Kennedy, there are a number of his concurring opinions that satisfy our criteria for importance.

To recall, those criteria are: (1) how many people are likely to be affected over time; (2) how important are the prevailing interests to individuals, society, or government; (3) how much impact is the opinion likely to have on the development of constitutional law; and (4) how much impact is the opinion likely to have on the role of the Court in American legal history.

As before, with respect to majority opinions, it may be of interest to provide a preview of our choices for Justice Kennedy’s top ten concurring opinions. They are as follows:


106 *Id.*
**Number 10: The First Amendment Protects Communication by Burning a Flag**

In *Texas v. Johnson*, a 5-4 Court refused to allow Texas to convict a political protester for desecrating a flag by burning it, causing serious offense to others, and interfering with the flag as a symbol of national unity. Chief Justice Rehnquist dissented, joined by Justices White and O’Connor. The Chief said the unique position that the flag holds as a symbol of our nation justifies the conviction in this case. Justice Stevens also dissented, saying that the conviction had nothing to do with the content of what was said but, rather, was for desecrating a symbol, a symbol that was “a symbol of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations.”

Justice Kennedy was in his usual position, able to make the case go one way or another. He chose to concur, saying that the defendant must go free. But he made clear that the decision was not easy for him. He said, “It is poignant but fundamental that the flag protects those who hold it in contempt . . . the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution.”

The significance of this early Kennedy opinion is that it placed him firmly in the camp of those who believe in a vigorous application of the First Amendment to protect all forms of speech. In view of his position on the Court, it was a harbinger of the Court’s increasing protection of free speech, an important role for the Court in American legal history. Introducing

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108 *Id.* at 421-22 (Rehnquist, C.J., joined by White & O’Connor, JJ., dissenting).
109 *Id.* at 437 (Stevens, J., dissenting).
110 *Id.* at 421 (Kennedy, J., concurring).
his concurring opinion, Kennedy made clear his respect for basic principles when he said, “The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.”

**Number 9: Zoning that Affects Speech: When Less Than Strict Scrutiny Can be Used**

Regarding freedom of speech, Justice Kennedy concurred in the holding of *City of Los Angeles v. Alameda Books, Inc.* that a city’s ordinance which barred more than one adult entertainment business in the same building survived a motion for summary judgment filed by the challengers. Justice Kennedy insisted that the Court should apply a rule that such a zoning ordinance law will get intermediate and not strict scrutiny only if the government can advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact.

Kennedy’s approach would require zoning authorities to be quite precise in their planning. It would not be enough to find that a zoning law probably would have reasonable effects on surrounding properties, and city planners would have to preserve appropriate alternative opportunities for displaced speech. No subsequent case indicates support for

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111 *Id.* at 420-421.


113 *Id.* at 448-49 (Kennedy, J., concurring in the judgment).

114 *Id.* at 450-51.
Justice Kennedy’s insistence that zoning laws must leave the quantity and accessibility of speech substantially intact. But neither has it been authoritatively rejected. And recent changes in personnel may have made it possible for Kennedy to pick up the support needed for this additional protection of free speech.

**Number 8: Strict Scrutiny for Regulation of Political Speech Even in Schools**

The Court held in *Morse v. Frederick*,¹¹⁵ that a school could suspend a student for displaying a banner during a school event which reasonably could be interpreted as promoting illegal drug use (“BONG HITS 4 JESUS”). Justice Kennedy joined a concurring opinion by Justice Alito to emphasize that they joined the opinion of the Court only on the assumption that it provided no support for any restriction on speech that could plausibly be interpreted as commenting on any political or social issue, including speech on issues such as the wisdom of the war on drugs or to legalizing marijuana for medicinal use.¹¹⁶

The concurrence in this case, suggesting a limited interpretation of the majority opinion, should exert a restraining influence on Court deference to school authorities when a free speech issue is presented. That could be important for many students and administrators alike.

**Number 7: Defining a Public Forum**

In a public forum, content regulations get strict scrutiny. Justice Kennedy would find that an area is a public forum by a compatibility test, rather than whether the Government has intentionally opened the area for general use by the public. In *International Society for Krishna* ¹¹⁶

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¹¹⁶ *Id.* at 422 (Alito, J., joined by Kennedy, J., concurring).
Consciousness, Inc. v. Lee,\textsuperscript{117} Chief Justice Rehnquist wrote for the majority that a publicly-owned airport was not a public forum (and so its speech regulation baring solicitation was tested by reasonableness) because the airport authority considered the purpose of the terminals to be the facilitation of air travel. Justice Kennedy, concurring only in the judgment, would test by whether speech was compatible with the use of major airports. The majority’s view was contrary to the underlying purpose of the public forum doctrine, he said, because public places are of necessity the locus for discussion of public issues, as well as protest against arbitrary government action.\textsuperscript{118} Applying his test, Kennedy concluded that the regulation could validly ban personal solicitations for immediate payment of money, where there is a risk of fraud and duress. On the other hand, a ban on the sale of literature was invalid as the Government’s interest was not as powerful and the plan left open fewer alternatives.\textsuperscript{119}

If Justice Kennedy’s test gains a few adherents, as seems entirely possible, it would result in the Court taking a closer look at speech restrictions in places where the public has access. It would create more pressure on public authorities to avoid subject-matter restraints and to formulate other restrictions in ways that would satisfy the mid-level test for content-neutral time, place, and manner regulations.

**Number 6: The Takings Clause**

The taking of private property by the government is of course an interference with the owner’s liberty to do what he or she wants with regard to the property. A majority of the Court

\textsuperscript{117} 505 U.S. 672 (1992).

\textsuperscript{118} Id. at 694-700 (Kennedy, J., joined by Stevens, Blackmun & Souter, JJ., concurring in part and dissenting in part).

\textsuperscript{119} Id. at 703-09.
held in *Kelo v. City of New London*\(^{120}\) that the government power under the Takings Clause to take property for a “public use” included taking for a “public purpose,” such as encouraging private development of an urban neighborhood. Justice Kennedy’s concurring opinion emphasized that a presumption of invalidity should be applied if there was a clear showing that the government’s action was intended to favor a particular private party, with only incidental or pretextual public benefit.\(^{121}\)

Following this case, a number of states and localities enacted laws which declared that they would not take property from one private owner and make it available to other private owners.\(^{122}\) Justice Kennedy was in no position to advocate that action, but his approach might have the effect of making cities ensure that their actions with respect to eminent domain could not be interpreted as favoring a particular private party.

**Number 5: Race as a Factor in High School Admission Decisions**

Justice Kennedy has insisted on race not being the decisive factor in the admission of students in a public high school. In *Parents Involved in Community Schools v. Seattle School District No. 1*,\(^{123}\) by 5-4 vote in 2007, the Court invalidated assignment plans in several school districts that used race to allocate students. In portions of an opinion for the Court, Chief Justice Roberts pointed out that distributing burdens or benefits on the basis of individual race

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\(^{120}\) 545 U.S. 469, 488-90 (2005).

\(^{121}\) *Id.* at 490-91 (Kennedy, J., concurring).

\(^{122}\) *See, e.g., Castle Coal., 50 State Report Card: Tracking Eminent Domain Reform Legislation Since Kelo* (2008) (available at http://www.castlecoalition.org/index.php (follow “Resources” hyperlink; then follow “Publications” hyperlink; then follow “50 State Report Card” hyperlink)).

\(^{123}\) 551 U.S. 701 (2007).
classifications triggers strict scrutiny, which means that the districts must demonstrate than the plans are narrowly tailored to achieve a compelling government interest. He said that only two interests have been recognized as compelling for a school district: (1) remedying the effects of past intentional discrimination; and (2) diversity in the student body. The involved school systems had never been segregated by law, and race was here not part of a broader effort to achieve exposure to widely diverse people, culture, ideas, and viewpoints. Their plans were devoted to racial balance, an objective the Court has condemned as illegitimate. The Chief Justice concluded by saying, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”

Justice Kennedy, concurring in the judgment, said that diversity is a compelling goal and school authorities are free to devise race-conscious measures for a system that otherwise is not offering an equal educational opportunity to all students, provided the system does not treat each student in a different fashion solely on the basis of typing by race. The authorities can, for example, make strategic decisions in site selection for new schools, draw attendance zones with attention to neighborhood characteristics, allocate resources for special programs, recruit students and faculty in a targeted fashion, and track enrollments by race.

Justice Breyer, dissenting with Justice Stevens, Souter, and Ginsburg, said that the schools were trying to have a prescribed ratio of African-American to white students in each school that reflected the proportion for the district as a whole, and that the Court had upheld this

\[124\] Id. at 729-30.
\[125\] Id. at 748.
\[126\] Id. at 788-90 (Kennedy, J., concurring in part and concurring in the judgment).
goal. Regarding the means, the school systems had revised their plans after several studies with the result that family burdens were eased and race-conscious criteria were limited and gradually diminishing.\textsuperscript{127}

Justice Thomas, concurring, said that racial imbalance is not segregation. The dissent cannot plausibly maintain that an educational element supports the integration interest or makes it compelling. He favored a color-blind interpretation of the Constitution.\textsuperscript{128}

Justice Stevens, in a dissenting opinion for himself, said that it should make a great difference that these plans do not impose burdens on one race alone or stigmatize or exclude.\textsuperscript{129}

Once again, Justice Kennedy was in the middle. His concurring opinion is important because it was needed to provide five votes for striking down the plans of the school systems. In the future, those who make affirmative action plans will need to keep his qualifications in mind and be sure to set up a plan that does not make race a defining criterion at any step of the way.

**Number 4: Strict Scrutiny of Race Classifications, by Congress as well as States**

In *City of Richmond v. J.A. Croson Co.*,\textsuperscript{130} a 6-3 Court held that a city’s 30% minority set-aside in its construction contracts was not supported by the factual findings that are necessary to show close tailoring toward the compelling goal of remedying past discrimination by the city or private firms within the city. In Part II of her opinion for the Court, Justice O’Connor suggested that Congress, because of its enforcement power under the 14\textsuperscript{th} Amendment, might

\textsuperscript{127} Id. at 846-55 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting).

\textsuperscript{128} Id. at 761-73 (Thomas, J., concurring).

\textsuperscript{129} Id. at 799-803 (Stevens, J., dissenting).

\textsuperscript{130} 488 U.S. 469, 486 (1989).
have more discretion than the states in dealing with threats to equality. However, Justice Kennedy said he joined in all of Justice O’Connor’s opinion except Part II. Kennedy said the difference in power between the States and Congress was a difficult question but was not involved in the case before the Court. He went on to say that the driving principle behind the Equal Protection Clause is racial neutrality. He accepted the less-than-automatic strict scrutiny test applied by Justice O’Connor, even though he would have preferred an absolute rule, because the strict scrutiny test did call for findings to assure that legislation was a remedy rather than merely a race preference that would cause corrosive animosities. No such findings had here been made by the city.

Justice Kennedy made clear in this concurrence how solidly he supported the need for strict scrutiny of race-based affirmative action and, by inference, all forms of legislation that did not evidence racial neutrality. He also held open the possibility that the Court would hold that the Equal Protection Clause applies to Congress with the same vigor that it applies to the states. Thus, all affirmative action programs, even those created by the federal Government, would need to be narrowly tailored to a compelling interest. Six years later, he was able to join an opinion by Justice O’Connor in which a majority of the Court held that federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.

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131 Id. at 490-92.
132 Id. at 518-20 (Kennedy, J., concurring in part and concurring in the judgment).
Number 3: Federal Judicial Power

Over the years, a number of cases have arisen on the question of what factual situations present a case or controversy that could be decided by federal courts under their Article III powers. In cases where Congress has not acted on the matter, the Court has called for the plaintiff to have “standing”, that is, to have suffered a personal injury caused by the challenged conduct and redressable by the court. But there was a question of what power Congress had to enlarge the situations in which standing could be recognized. That question came before the Court in *Lujan v. National Wildlife Federation*.

As so often has occurred, Justice Kennedy found himself in the middle of differing views.

In *Lujan*, the Court dealt with the clash between the limited role of the federal judicial system and the power of Congress under the Necessary and Proper Clause to create justiciable actions. In the Endangered Species Act, at 16 U.S.C. § 1540(g), Congress had authorized any person to seek an injunction against any government instrumentality alleged to be in violation of any provision of the Act. The Court held that this provision could not constitutionally confer standing on any plaintiff who was not seeking relief that more directly and tangibly benefited him than it did the public at large. Justice Scalia wrote for the Court that to convert the public’s undifferentiated interest into an individual right vindicable in the courts would violate the separation of powers by transferring from the President to the courts his duty to take care that the

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laws be faithfully executed. It would also enable courts to assume a position of authority over the governmental acts of a co-equal department.136

Justice Blackmun, dissenting, said that courts do not violate the separation of powers when they carry out commands of Congress to enforce a right conferred upon all persons to have the Executive carry out the procedures required by law. Such a law is not a delegation to the courts of executive power but only is a strengthening of provisions Congress has legislatively mandated.137

Justice Kennedy concurred with a suggestion falling between the majority and the dissent. He suggested a congressional power that might not be inferred from the majority opinion, and he described a limit on that power not mentioned by the dissent that would allow the Court to preserve its traditional role. Kennedy said that in his view, Congress has power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before so long as Congress identifies the injury it seeks to vindicate and relates that injury to the class of persons entitled to bring suit.138 He explained that the party bringing a suit must show that the action injures him in a concrete and personal way. The reason for this is to preserve the adversarial process which allows a realistic appreciation of the consequences of judicial action and confines the Judicial Branch to its proper, limited role in the constitutional framework of government. Describing that role, Justice Kennedy said that the independent judiciary is held to account through its open proceedings and its reasoned judgments. This

136 Id. at 576-78.
137 Id. at 589-90 (Blackmun, J., joined by O’Connor, J., dissenting).
138 Id. at 580 (Kennedy, J., joined by Souter, J., concurring in part and concurring in the judgment).
enables the public to know who is invoking the judicial power, their reasons, and the result. The concrete injury requirement helps assure that these questions can be answered.\textsuperscript{139}

Justice Kennedy’s concurrence is important because it acknowledges a power in Congress to enlarge standing, but in a way that accommodates the Court’s requirements for standing.

\textbf{Number 2: Congressionally Imposed Limits on Presidential Power}

Justice Kennedy has written that where the Constitution expressly grants the President a power, such as the power to appoint federal officials, Congress may not interfere with that power by imposing limitations. In \textit{Public Citizens v. United States Department of Justice},\textsuperscript{140} the Court considered The Federal Advisory Committee Act (FACA), which imposed certain reporting requirements on federal advisory committees, and made their meetings open to the public. A committee of the American Bar Association, which had routinely been consulted by the President when making nominations for appointment of federal judges, refused a request by a public interest group for information about potential judicial nominees. The group brought suit to enjoin the Justice Department from utilizing the ABA committee’s reports until the ABA complied with FACA. The District Court dismissed the suit and Supreme Court affirmed. The Court held the ABA did not constitute an advisory committee within the meaning of FACA.\textsuperscript{141}

Justice Kennedy, joined by Chief Justice Rehnquist and Justice O’Connor, concurred in the judgment, on the grounds that FACA did apply, but that application of FACA to the Federal Government’s use of the ABA’s committee was unconstitutional as a violation of the President’s

\textsuperscript{139} \textit{Id.} at 580-81.


\textsuperscript{141} \textit{Id.} at 463-67.
power under the Appointments Clause, Art. II, § 2, cl. 2, to nominate, and with the Advice and Consent of the Senate, appoint “judges of the Supreme Court, and all other Officers of the United States.”

In support of that view, Justice Kennedy turned to Alexander Hamilton for an explanation of why the President was given the sole prerogative of nominating principal officers:

The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under strong obligations, and more interested to investigate with care the qualities required for the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretension to them. The Federalist No. 76.

Kennedy admitted that some recent cases had employed a balancing approach, asking whether the statute at issue prevents the President from accomplishing his constitutionally assigned functions. However, in these cases the power at issue was not explicitly assigned by the text of the Constitution, but rather was thought to be within the general grant of executive power to the President. Justice Kennedy explained, “Where a power has been committed to a particular Branch of the Government in the text of the Constitution, the balance already has been struck by the Constitution itself.”

Kennedy opened his opinion in Public Citizen by providing an explanation of why he thought the separation of powers such an important principle. He said:

The Framers of our Government knew that the most precious of liberties could remain secure only if they created a structure of government based on a permanent separation of powers. See, e.g., The Federalist Nos. 47-41 (J. Madison). Indeed the Framers devoted

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142 Id. at 468-69 (Kennedy, J., joined by Rehnquist, C.J., and O’Connor, J., concurring).
143 Id. at 484.
144 Id. at 486.
almost the whole of their attention at the Constitutional Convention to the creation of a secure and enduring structure of the new Government. It remains one of the most vital functions of the Court to police with care the separation of the government powers. That is so even, as in the case here, no immediate threat to liberty is apparent. When structure fails, liberty is always in peril. As Justice Frankfurter stated:

The accretion of dangerous power does not come in a day. It does come however slowly, from the generative force of unchecked disregard of the restrictions that fence even the most disinterested assertion of authority. *Youngstown Sheet & Tube Co. v. Sawyer*, 143 U.S. 579, 594 (1952) (concurring opinion).

Justice Kennedy elaborated on this theory when concurring in *Clinton v. City of New York*. There he wrote that Liberty is always at stake when one or more of the branches seek to transgress the separation of powers. He explained that separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty.

Justice Kennedy continued in *Clinton* by noting:

In recent years, perhaps, we have come to think of liberty as defined by that word in the Fifth and Fourteenth Amendments and as illuminated by the other provisions of the Bill of Rights. The conception of liberty embraced by the Framers was not so confined. They used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts. The idea and the promise were that when the people delegate some degree of control to a remote central authority, one branch of government ought not possess the power to shape their destiny without a sufficient check from the other two. In this vision, liberty demands limits on the ability of any one branch to influence basic political decisions.

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145 *Id.* at 400.

146 524 U.S. 417 (1998). In *Clinton* it was held unconstitutional for Congress to give the President discretionary power to cancel some provisions in laws relating to discretionary spending, new direct spending, or limited tax benefits because the Constitution does not give the President power to repeal or amend parts of duly enacted statutes. *Id.* at 420-21, 447-49.

147 *Id.* at 450 (Kennedy, J., concurring).

148 *Id.* at 450-51.
Once again Justice Kennedy, so often the swing vote on the Court, has made his perceptions on separation of powers quite clear. And though the case at hand was not of vital interest to the country, his point of view may tip the scales in some important case in the future.

**Number 1: Federalism as a Limit on Congressional Power**

A number of recent cases arising under Article I on the Legislative Power have involved relations between Congress and the States. In *United States v. Comstock*, there was a clash between congressional power under the Necessary and Proper Clause and the 10th Amendment reservation of power to the States. Justice Kennedy’s view was expressed in a concurring opinion that found a middle ground.

Justice Breyer wrote the opinion in *Comstock* for a 6-3 Court, upholding as properly authorized by the Necessary and Proper Clause a federal civil-commitment statute, 18 U.S.C. § 4248. That statute allowed the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released. Justice Breyer wrote that to follow Chief Justice Marshall’s words in *McCulloch v. Maryland* the Court should look to see whether the statute constitutes a means rationally related to implementation of a constitutionally enumerated power. Breyer said that Congress has a large discretion in making that determination, and there is a presumption of constitutionality when the Court examines the scope of congressional power. He continued that this principle, taken together with four other considerations, justified a holding that the Constitution grants Congress sufficient legislative

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150 *Id.* at 1956-57, *citing* 4 U.S. (Wheat.) 316, 4 L. Ed. 579 (1819).

151 *Id.* at 1957.
power to enact the statute. The four other considerations were: (1) the law was a modest addition to long standing federal prison-related mental health statutes, (2) the affected persons were already in federal custody, (3) the law properly accounts for state interests by requiring the Attorney General to inform the State in which the federal prisoner is domiciled or was tried that he is detaining someone in whom the State may be interested and the State is encouraged to assume custody, and (4) legislation sought to be justified by reference to the Necessary and Proper Clause can be more than one step away from enumerated powers.\textsuperscript{152} Justice Breyer added that in the end it makes no difference whether the issue is viewed as ascertaining the limits of federal power under the affirmative provisions of the Constitution or discerning the core of sovereignty retained by the states under the Tenth Amendment.\textsuperscript{153}

Justice Kennedy began his concurrence by noting that certain kinds of power were traditionally exercised by the states, and the Tenth Amendment was intended to call for consideration of those powers in determining whether Congress has overstepped its boundaries. Thus, Congress could not demand that a state use its own government system to implement federal commands. Nor may the National Government relieve states of their own primary responsibility to enact laws and policies for the safety and well being of their citizens.\textsuperscript{154} Also relevant as a factor is whether the exercise of national power intrudes upon functions and duties traditionally committed to the States.\textsuperscript{155} Kennedy agreed that the general test of congressional

\textsuperscript{152} Id. at 1958-64.

\textsuperscript{153} Id. at 1964-65.

\textsuperscript{154} Id. at 1967-68 (Kennedy, J., concurring in the judgment).

\textsuperscript{155} Id. at 1968.
power under the Necessary and Proper Clause is whether a statute, considered as a means, is rationally related to implementation of a constitutionally enumerated power. However, if federalism is to be given its proper due, that rational relationship should not be as deferential as the formula used by the majority for reviewing state legislation under the Due Process Clause. It should be at least as exacting as the Court uses in Commerce Clause cases.\textsuperscript{156}

Justice Kennedy also criticized the majority opinion for reasoning solely in terms of whether a power is within the National Government’s reach, without express attention to the limitations on federal power stemming from federalism principles. These limitations must be recognized by the Court as a factor in deciding whether the assertion of federal power compromises the essential attributes of state sovereignty.\textsuperscript{157} Applying the version of rational basis that he had described, Justice Kennedy said that Congress could enact a statute authorizing continued detention of mentally ill, sexually dangerous persons beyond the time they would otherwise be released. Since this law applies only to persons already in federal custody, it involves little intrusion upon the ordinary processes and powers of the states, and ensures that an abrupt end to the federal detention of prisoners does not endanger third parties.\textsuperscript{158}

As usual, Justice Kennedy was in the middle of a disagreement between instrumentalists and formalists. Dissenting Justice Thomas, joined by Justice Scalia, said that the Federal Government’s powers are enumerated and hence limited. The states, in turn, are free to exercise

\textsuperscript{156} Id. at 1966-67. In Commerce Clause cases the government’s power depends on a substantial relation between the regulated event and interstate commerce. The relation must be a demonstrated link in fact and not too attenuated. See United States v. Lopez, 514 U.S. 549 (1995) and United States v. Morrison, 529 U.S. 598 (2000).

\textsuperscript{157} Id. at 1967.

\textsuperscript{158} Id. at 1968.
all powers that the Constitution does not withheld from them. The purpose of this design is to preserve the balance of power between the States and the Federal Government that protects our fundamental liberties. Thus, Congress lacks authority to legislate if the objective is anything other than carrying into execution one or more of the Federal Government’s enumerated powers.\textsuperscript{159} Here, the Federal Government does not have power to authorize the detention of persons without a basis for federal criminal jurisdiction. Absent congressional action that is in accordance with, or necessary and proper to an enumerated power, the duty to protect citizens from violent crime, including acts of sexual violence, belongs solely to the States. Regrettably, said Justice Thomas, the Court here has come perilously close to transforming the Necessary and Proper Clause into a basis for the federal police power that the Court always has rejected.\textsuperscript{160}

Justice Alito, concurring in the judgment, expressed concern about the breadth of the Court’s language, as did Justice Kennedy, and about the ambiguity of the standard applied by the Court, as did Justice Thomas. Further, he agreed with Justice Thomas that the Necessary and Proper Clause empowers Congress to enact only those laws that carry into execution one or more of the federal powers enumerated in the Constitution.\textsuperscript{161} However, § 4248 is a necessary and proper means for the operation of a federal criminal justice system and a federal prison system. Just as it was necessary and proper for Congress to provide for the apprehension of escaped federal prisoners, it is necessary and proper for Congress to provide for the civil commitment of dangerous federal prisoners who would otherwise escape civil commitment as a result of federal

\textsuperscript{159} \textit{Id.} at 1973-78 (Thomas, J., joined by Scalia, J., dissenting).

\textsuperscript{160} \textit{Id.} at 1983.

\textsuperscript{161} \textit{Id.} at 1968-69 (Alito, J., concurring).
imprisonment. Thus, he concluded, this is not a case in which it is merely possible for a court to think of a rational basis on which Congress might have perceived an attenuated link between the powers underlying the federal criminal statutes and the challenged civil commitment provision. Here, there is a substantial link to Congress’ constitutional powers. ¹⁶²

Summarizing, all of the Justices agreed that the extent of congressional power under the Necessary and Proper Clause depends on whether a law constitutes a means rationally related to implementation of a constitutionally enumerated power. The Breyer opinion emphasized deference to Congress in making that determination. Apart from civil rights issues, this is a customary approach for instrumentalists and for Holmesians such as Chief Justice Roberts. However, Breyer went on to discuss other considerations in concluding that the federal civil-commitment statute may call for confinement of a sexually dangerous prisoner beyond the date the prisoner would otherwise be released. Justice Thomas, dissenting, criticized ambiguity in the standard used by the Court and said that the law did not have an appropriate relation to an enumerated power because protecting citizens from violent crime is a power belonging exclusively to the States. Justice Alito agreed that the standard was ambiguous, but concluded that § 4248 was a proper means for operating the federal criminal justice system and its prison system. Justice Kennedy also criticized the ambiguity in the standard used by the Court, said that rational review here should be as least as vigorous as in Commerce Clause cases, and called for the decision on whether congressional power has been properly exercised to include consideration of the function and province of the States in our constitutional structure. If essential attributes of state sovereignty are compromised by the assertion of federal power under

¹⁶² Id. at 1969-70.
the Necessary and Proper Clause, that is a factor suggesting that the statute is not one properly within the reach of federal power.

It would take but little change on the Court for Justice Kennedy’s analysis of the relationship between the 10th Amendment and the Necessary and Proper Clause to command a majority in this important area of the relationship between Congress and the states, and the role of the Court in reviewing that relationship.

**IV. Dissenting Opinions of Justice Kennedy**

In attempting to create the jurisprudential profile of a Justice, it is also important to consider his or her dissenting opinions because they are not tempered by the need to hold at least four other votes. The Justice can say what he or she really believes, knowing that many times a dissenting view has ultimately been adopted by a majority. Justice Holmes comes to mind.

Justice Kennedy has so often been with the majority that he has not had to write many dissenting opinions. Four of them, however, satisfy our criteria. They are as follows:


**Number 4: Protecting Freedom of Speech by Finding the True Intent of Regulation**

Freedom of speech is of course a fundamental right. Government regulation of the content of speech presumptively triggers strict scrutiny, that is, it must be necessary and the least restrictive means for a compelling state interest. On the other hand, a content-neutral restriction it is given a lower level of scrutiny, that is, it must be narrowly tailored to advance a significant state interest, leaving open ample alternative means of communication.
As applied by Justice Kennedy, strict scrutiny is very protective of speech because for him it almost always leads to a conclusion that the law is invalid on its face or as applied. And more readily than most of his colleagues, he has found that a regulation is content-based. For example, in *Hill v. Colorado*, the majority held content neutral a Colorado statute which provided that within 100 feet of the entrance to any health care facility it was unlawful to knowingly approach within eight feet of another person without that person’s consent for the purpose of passing a leaflet, displaying a sign, or engaging in oral protect, education, or counseling. Justice Stevens wrote that although the statute may have been motivated by concern over the behavior of abortion protesters and a desire to protect persons with vulnerable physical and emotional conditions, it applied without regard to the subject matter of the speech. The statute passed the test for content neutrality because the state has a substantial interest in protecting persons who are attempting to enter health facilities, and the law was narrowly tailored and did not eliminate adequate means of communication.

Justice Kennedy, dissenting, concluded that the statute’s purpose and design was to restrict speakers on one side of a debate about abortion. He said the precedents do not permit content censoring to be cured by taking even more protected speech within a statute’s reach. If there was a concern about incidents of disorder, there were alternatives to restricting speech, such

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164 530 U.S. at 723-25.
as dealing directly with pushing or touching. But the Court has not said before than citizens have a right to avoid unpopular speech in a public forum.

Justice Kennedy thus reasoned that it is appropriate for the Court to break through the form of a speech regulation to the reality that a particular content is being regulated. This speech protective view has a reasonable chance of becoming a majority view, at least in the context of abortion, because Justices Scalia, joined by Justice Thomas in dissent, agreed with Justice Kennedy that the Colorado law was targeted on abortion and, thus, was content-based. Justice Kennedy’s exploration of the motivation behind this statute was not entirely an innovation in this case. In *Heller v. Doe*, he said that the Court should find, even in rational basis scrutiny, “some footing in the realities of the subject addressed by the legislature.”

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**Number 3: Strict Scrutiny in Affirmative Action**

In *Grutter v. Bollinger*, Justice Kennedy insisted that racial neutrality be preserved to the extent possible in a university law school’s admissions program. In *Grutter*, the Court

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165 *Id.* at 765-75 (Kennedy, J., dissenting).

166 509 U.S. 312 (1993).

167 *Id.* at 321.

reaffirmed that all racial classifications imposed by government must be analyzed under strict scrutiny, that is, they must be narrowly tailored to further compelling governmental interests. A 5-4 majority, with Justice O’Connor writing for the Court, found compelling the University of Michigan Law School’s desire to admit a critical mass of underrepresented minority students to achieve diversity that would enhance unique contributions to the school. The law school met the tailoring requirement in that it did not have a quota but, instead, considered race as a “plus factor” during an individualized review of each individual applicant, while seeking to retain its reputation for excellence.\textsuperscript{169}

Justice Kennedy, dissenting, said that individual assessment was not protected by the law school during an admissions process where admissions officers were supplied with daily reports relating to critical mass, but were not told how to reconcile individual assessment with the directive to admit a critical mass of minority students, especially near the end of the process where race becomes more likely outcome determinative.\textsuperscript{170} The evidence suggested that individual consideration was not preserved because the percent of enrolled minority students and the number to whom offers were extended varied only slightly in recent years. Kennedy said that if universities are given too much latitude in administering programs that are tantamount to quotas, they will have few incentives to make existing programs transparent and protective of individual review.\textsuperscript{171}

\textit{Supreme Court’s Decision Upholding Affirmative Action Admission Programs is Detrimental to the Cause}, 27 Pace L. Rev. 15 (2006).

\textsuperscript{169} 539 U.S. at 325-35.

\textsuperscript{170} Id. at 387-92 (Kennedy, J., dissenting).

\textsuperscript{171} Id. at 392-95.
Justice Kennedy’s dissent is important because even though he was unable to persuade a majority to adopt his perspective on the facts of this case, universities with affirmative action programs will surely pay heed to Justice Kennedy, especially since Justice Alito has replaced Justice O’Connor. Kennedy’s view in practical effect may today be the law of the land.

**Number 2: Partial-Birth Abortion**

Justice Kennedy dissented in the *Stenberg v. Carhart*\(^{172}\) where the Court struck down Nebraska’s ban on partial-birth abortion, largely because it did not include an exception for the health of the mother. The dissent was importance because a few years later, when the personnel on the Court had changed, Justice Kennedy was able to write for a majority in *Gonzales v. Carhart*\(^{173}\) that upheld Congress’ ban on partial-birth, even though it did not contain an exception for the health of the mother. In the face of conflicting medical opinion, Justice Kennedy deferred to a finding by Congress that there was no situation in which the partial-birth procedure was needed to save the life or health of the mother. Much of the reasoning in Kennedy’s *Gonzales* opinion for the Court came from his earlier dissent.\(^{174}\)

**Number 1: Free Speech for Corporations Regarding Elections**


\(^{174}\) *See Gonzales*, 550 U.S. at 150-60.
In addition to striking down 2 U.S.C. §441(b) in *Citizens United v. Federal Election Commission*, Justice Kennedy overruled *Austin v. Michigan Chamber of Commerce* and *McConnell v. Federal Election Commission*. Those cases had upheld limits on electioneering communications because of the speaker’s corporate identity. In each of them Justice Kennedy had penned a dissent. In *Citizens United*, his dissenting views became law.

V. Conclusion

Adding all of Justice Kennedy’s opinions together, they form an enviable body of work. In addition to its importance for individuals, government officials, and society, his work is memorable for its thoroughness, its reasonable treatment of precedents, and its reliance on basic principles. Those attributes also appear in other Kennedy opinions not discussed in this article.

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176 494 U.S. 652 (1990). *Stare decisis* did not require the continued acceptance of *Austin*, said Kennedy, as the case was not well reasoned because it abandoned First Amendment principles, had been undermined by various circumventions since its announcement, and no series reliance interests are a stake from its prevention of corporation. *Citizens United*, 130 S Ct. at 911.

177 540 U.S. 93 (2003). Kennedy explained that the constitutional issue had to be faced because the particular communication involved in the case, a documentary that criticized Senator Hillary Clinton as a presidential candidate, was clearly a publically distributed electioneering communication within the meaning of the statute. *Citizens United*, 130 S. Ct. at 888-90.

178 *Austin*, 494 U.S. at 695 (Kennedy, J., joined by O’Connor & Scalia, JJ., dissenting); *McConnell*, 540 U.S. at 742 (Kennedy, J., concurring in the judgment in part and dissenting in part with respect to BCRA Titles I and II).
To provide the source material for those cases, an Appendix is attached to this article listing 38 other majority opinions, 25 concurrences, and 13 dissents written by Justice Kennedy which are also noteworthy Kennedy opinions.

It is too early to say for what Justice Kennedy will be most remembered. Of course it is clear throughout his judicial career that he has respect approaching reverence for the rule of law and the Constitution. Beyond that, our best guess is his vigorous protection of free speech rights, his refusal to let morality be the sole justification for a law that interferes with personal autonomy, and his insistence on the importance of preserving the basic structures created by the framers, that is, the separation of powers and federalism.

**APPENDIX: OTHER NOTEWORTHY JUSTICE KENNEDY OPINIONS ON THE CONSTITUTION**

**Writing for the Court**

Federalism Cases

Delmuth v. Muth, 491 U.S. 223 (1989) (The Education of the Handicapped Act did not contain an unmistakably clear congressional intent to abrogate immunity from suits against a state for failure to comply with procedural requirements of the Act).
Hilton v. South Carolina Public Railways Commission, 502 U.S. 197 (1991) (the Court reaffirmed an earlier decision holding that the FELA authorized suit for damages against state-owned railroads because states waived their immunity by operating a railroad).

Idaho v. Coure d’Alene Tribe, 521 U.S. 261 (1997) (sovereign immunity protected a state against a suit by a tribe for declaratory and injunctive relief with respect to submerged lands which the tribe claimed to own).

Alden v. Maine, 527 U.S. 706 (1999) (Congress lacks power under Article 1 to abrogate state sovereign immunity by authorizing private suits against a state, but under § 5 of the 14th Amendment may provide congruent and proportionate remedies for constitutional violations by a state).

First Amendment: Establishment Clause

Lee v. Weisman, 505 U.S. 577 (1992) (prayer at graduation ceremonies of a public school violated the Establishment Clause of the First Amendment especially because attendance by the students in a sense is obligatory).

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (ordinances prohibiting animal sacrifice were narrowly aimed at a faith which engaged in chicken sacrifice, and since the ordinances were not neutral or of general application they triggered, but could not pass, strict scrutiny).

First Amendment: Freedom of Speech

Masson v. New Yorker Magazine, 501 U.S. 496 (1991) (an author was not entitled to a summary judgment in a libel action against the magazine, because a reasonable jury could find that the published quotations differed materially from plaintiff’s tape-recorded statements).

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) (although states may restrict attorney speech which has a likelihood of prejudicing pending legal proceedings, Rule 117 of Nevada is void for vagueness in tending to mislead attorneys into believing that a general discussion of the criminal defense would not subject them to discipline).

Edenfield v. Fane, 507 U.S. 761 (1993) (Florida’s ban on solicitation by CPAs was unsupported by evidence that they were likely to lead to false or misleading claims or oppressive conduct, and thus the content-based regulation violated the First Amendment).

Turner Broadcasting System I v. FCC, 512 U.S. 622 (1994) (must-carry provisions regarding cable television were ruled content-neutral and thus were to be judged by intermediate review, with the government required to show that they were substantially related to protecting local broadcasting).
Rosenberger v. University of Virginia, 515 U.S. 819 (1995) (a university which paid the printing costs of student publications violated the First Amendment when it refused to fund a student magazine that had a religious editorial viewpoint).

O'Hare Truck Service v. City of Northlake, 518 U.S. 712 (1996) (under the First Amendment, an independent contractor, as well as a government employee, cannot be discriminated against by a government official or agency because of the contractor’s failure to hold certain political views).

Turner Broadcasting System II v. FCC, 520 U.S. 189 (1997) (Congress drew reasonable inferences from the substantial evidence before it to conclude that in absence of the must-carry rules significant numbers of broadcast stations would be refused carriage, and the must-carry provisions did not burden substantially more speech than necessary to further a substantial government interest).

Board of Regents of University of Wisconsin v. Southworth, 529 U.S. 217 (2000) (the First Amendment permits a public university to charge students an activity fee to be used for funding extracurricular student speech if the program is viewpoint neutral in its allocation).

United States v. Playboy Entertainment Group, 528 U.S. 803 (2000) (First Amendment violated by requiring cable television operators who provided channels primarily dedicated to sexually oriented programming to fully scramble or otherwise fully block those channels, or limit transmission to hours when children were unlikely to be viewing, which is what most operators did. Strict scrutiny applied to this content-based rule and the government had not met its requirements).

United States Department of Agriculture v. United Foods, Inc., 533 U.S. 405 (2001) (mushroom growers First Amendment rights were violated by federal assessments for general ads about mushrooms where the ads were not part of some broader regulatory scheme).

Ashcroft v. ACLU, 535 U.S. 564 (2002) (a congressional bar on placing sexually explicit materials on the Internet in order to protect minors violated the First Amendment because it had not been shown that there were no adequate alternatives to this content-based regulation).

Ward v. Rock Against Racism, 541 U.S. 267 (2004) (requiring concert performers in Central Park to use government-supplied sound technicians was content-neutral and needed only intermediate scrutiny, so the city did not have to prove that its regulation was the least intrusive means of furthering its goal of protecting citizens from unwelcome noise).

Fifth Amendment: Due Process Clause

Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009) (the Due Process Clause was violated by the failure of a judge to recuse himself from a case that overturned a $50-million verdict against a company headed by a man who contributed $3 million to the judge’s election campaign).
Fifth Amendment: Privilege Against Self-Incrimination

Berguis v. Thompkins, 130 S. Ct. 2250 (2010) (a suspect who has received and understood the Miranda warning, and who had not expressly invoked his Miranda rights, waives the right to remain silent by making an uncoerced statement to the police).

Eighth Amendment: Cruel and Unusual Punishment Clause

Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (the death penalty can be administered only for crimes that involve the taking of the life of the victim; thus, unconstitutional to impose the death penalty for the crime of rape of a child).

Graham v. Florida, 130 S. Ct. 2011 (2010) (the Eighth Amendment bars life sentences without parole for juveniles for nonhomicide crimes; such juveniles must be given some opportunity to reform).

Fourteenth Amendment: Equal Protection Generally

Freeman v. Pitts, 503 U.S. 467 (1992) (the Court held that a district court had the authority to relinquish supervision and control of school districts in incremental stages, before full compliance in every area of school operations, where racial imbalance was due to demographic changes in the county not caused by the school system but rather due to independent factors).

Presley v. Etowah County, 502 U.S. 491 (1992) (the preclearance requirements of the Voting Rights Act do not apply to changes which affect only the distribution of power among officials).

Nguyen v. INS, 533 U.S. 53 (2001) (a child born abroad and out of wedlock acquires at birth the nationality status of a citizen mother but it does not violate equal protection if a citizen father must take one of three affirmative steps that assure that a biological parent-child relationship exists and that the child and citizen parent have real ties to each other and the United States).

Ricci v. DeStefano, 128 S. Ct. 2658 (2009) (fear of litigation cannot alone justify an employer’s reliance on race in promotions to the detriment of individuals who qualified for promotions and who passed a test not shown to be deficient or discriminatory).

Fourteenth Amendment: Equal Protection Cases Involving Race Discrimination

Powers v. Ohio, 499 U.S. 400 (1991) (a criminal defendant may object under the Equal Protection Clause to the race-based exclusion of jurors effected through peremptory challenges, regardless of whether the defendant and the excluded juror share the same race).

Abrams v. Johnson, 521 U.S. 24 (1995) (a congressional district was illegally drawn in violation of the Constitution in that race was used as a predominant factor).

Miller v. Johnson, 575 U.S. 900 (1995) (the district court had adequate evidence to find that race was the predominant factor in a congressional redistricting plan, and the plan did not pass strict scrutiny because it was not required by the Voting Rights Act and not otherwise supported by a compelling interest since a state may not assume that all members of a racial group think alike).

Campbell v. Louisiana, 523 U.S. 392 (1998) (a white criminal defendant has standing to object to discrimination against black persons in the selection of grand jurors, and may raise equal protection and due process claims).

Rice v. Cateyano, 528 U.S. 495 (2000) (a statute which limits voting rights for officials in the Office of Hawaiian Affairs which granted the right exclusively to persons of a defined racial ancestry abridged the right to vote on account of race in violation of the Fifteenth Amendment).

Miscellaneous Cases

Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888 (1988) (the dormant commerce clause was violated by a state statute that tolled the running of limitations for entities not within the state unless they designated an agent for service of process).

Allied-Signal, Inc. v. New Jersey, 504 U.S. 768 (1992) (a state could not tax profits made by sale of an investment in another state merely because a corporation did some business in the taxing state).

Barnard v. Thornstenn, 489 U.S. 546 (1989) (a state that limits bar membership to residents violates the Privileges and Immunities Clause of Article IV, § 2 since that requirement lacks a substantial relation to a substantial objective because less restrictive means of regulation are available).


Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (military commission convened by the President to try a detainee held unconstitutional as its structure and procedures violated the Uniform Code of Military Justice).

Concurring Opinions

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Principles Justifying the Majority Opinion

J.E.B. v. Alabama, 511 U.S. 127 (1994) (the Court held that the Equal Protection Clause bars discrimination in jury section on the basis of gender. Justice Kennedy added that the clause and our constitutional tradition are based on the theory that individuals, and not groups, possess rights protected against lawless action by the Government).

United States v. Lopez, 414 U.S. 549 (1995) (the Court struck down as a violation of the Commerce Clause an Act of Congress making it illegal to possess a gun in a schoolyard. Concurring, Justice Kennedy traced the precedents and concluded that broader interpretations of the Commerce Clause had superseded earlier ones, but the criterion is still a question of degree).

U.S. Term Limits v. Thornton, 514 U.S. 779 (1995) (Arkansas limited persons seeking office in the House of Representatives to three terms and in the Senate to two terms. The Court ruled that states have no authority to change, add to, or diminish the requirements of the Qualifications Clause. Kennedy, concurring, said there was a federal right of citizenship with which states could not interfere, and the Arkansas law intruded on this federal domain).

Bush v. Vera, 517 U.S. 952 (1996) (the Court held that the drawing of districts exhibited a level of racial manipulation that exceeded what is allowed by § 2 of the Voting Rights Act. Kennedy added that if the bizarre shape of a district is attributable to race-based districting unjustified by a compelling interest it causes constitutional harm by carrying the message that drawing political districts is or should be predominantly racial).

Clinton v. City of New York, 524 U.S. 417 (1998) (The Line Item Veto Act which allows the President to cancel provisions in an enacted law violates the Constitution by failing to satisfy the procedures set out in Article I, § 7. Kennedy said that the Act compromised the liberty of the nation’s citizens which the separation of powers sought to secure).

California Democratic Party v. Jones, 530 U.S. 567 (2000) (the Court held that creating a blanket primary violated the freedom of speech and association by depriving members of a political party the right to choose their nominees. Kennedy added that parties advance a shared political belief and to do they must speak through their candidates).

Cook v. Cralike, 531 US. 510 (2001) (the Court struck down a state law which sought to establish in ballots for federal offices whether voters opposed a candidate because of his or her views on term limits. Justice Kennedy added that the basic principle was that the Constitution was established by the people and the states may not act as intermediates between people and the federal government).

Facts that Explain or Limit the Majority Opinion
United States v. Kokinda, 497 U.S. 720 (1990) (the Court held that a sidewalk near a post office was not a public forum, and a ban on solicitation there did not violate the First Amendment because it was not unreasonable to prohibit solicitation where it was disruptive of postal business. Justice Kennedy emphasized that the regulation was narrowly drawn to bar only personal solicitations for immediate payment of money).

Burson v. Freeman, 504 U.S. 191 (1992) (on election day, a state could prohibit the solicitation of votes and the display or distribution of campaign materials within 100-feet of the entrance to a polling place. Concurring, Justice Kennedy said that this was one of the narrow areas where a content-based proscription of speech in a public forum could be justified).

Sacramento v. Lewis, 523 U.S. 833 (1998) (the Court held that high-speed chases with no intent to harm suspects or worsen their legal plight do not create liability under the 14th Amendment. Justice Kennedy explained that history and tradition are the starting point for analysis, but there is also room for objective assessment of the needs of law enforcement to which deference should be given).

Alabama v. Garrett, 531 U.S. 356 (2001) (the Court held that federal law did not require states to make accommodations for disabled persons. Justice Kennedy, concurring, added that Congress did not have sufficient evidence of state violations of the 14th Amendment to provide a remedy under Section 5 for discriminating against disabled persons).

United States v. American Library Association, Inc., 539 U.S. 194 (2003) (the Court upheld on its face the Children's Internet Protection Act (CIPA), which required public libraries receiving federal funds to block obscene or pornographic computer images and to prevent minors from accessing such material, although libraries might disable the filter for bona fide research or other lawful purposes. Justice Kennedy said there might be an as-applied challenge if a library could not disable the filter or burdened adult users’ choice to view constitutionally protected material).

Rasul v. Bush, 542 U.S. 466 (2005) (the statute regarding habeas corpus, 28 U.S.C. § 1350, confers jurisdiction to hear habeas corpus challenges brought by aliens detained in Guantanamo Bay. Justice Kennedy, concurring, said this is so because the United States exerts complete control over Guantanamo Bay, and the detainees are being held indefinitely).

Randall v. Sorrell, 548 U.S. 230 (2006) (a plurality opinion said that Vermont’s expenditure limits for state office candidates were illegal under Buckley. Justice Kennedy, concurring, said that the primary justifications for the expenditure limits were not significantly different from Congress' rationale for the Buckley limits, i.e., preventing corruption and its appearance).

New York State Board of Elections v. Lopez Torres, 552 U.S. 196 (2008) (the Court upheld New York’s convention system for nominating supreme court justices, saying it gave potential candidates a “fair shot.” Justice Kennedy, concurring, said it was important that New York has a second mechanism for placement on the election ballot, i.e, qualifying by a reasonable petition process).
Facts that Would Allow Related Law or Facts to be Upheld

Bowen v. Kendrick, 487 U.S. 589 (1988) (the Court upheld a federal grant program relating to adolescent sexuality and pregnancy against an Establishment Clause challenge even though grants could be made to religiously affiliated institutions. Kennedy added that a grant could be made even to a pervasively religious organization if it spends the money for purposes of the grant).

Holland v. Illinois, 493 U.S. 474 (1990) (the Court rejected a claim by a white defendant that peremptory challenges to strike only black jurors violated his right to be tried by a fair cross-section under the Sixth Amendment’s Impartial Jury Clause. Kennedy added that there would be a claim under the Equal Protection Claim).

Board of Education of Kiryas Joel v. Grumet, 512 U.S. 687 (1994) (a statute creating a school district known to contain only members of the Satmar religion violated the Establishment Clause for lack of assurance that the government had been or would be neutral regarding religion. Justice Kennedy added that but for drawing political lines on the basis of religion it would have been valid to attempt to accommodate the special needs of handicapped Satmar children).

Vieth v. Jubliver, 541 U.S. 267 (2004) (a plurality of the Court held that the existence of political gerrymandering in drawing federal districts was a political question which precluded judicial intervention. Kennedy agreed because there was a lack of comprehensive and neutral principles for drawing electoral boundaries, but noted that a limited and precise rationale might yet be found).

Recommended Changes in Rules or Their Application

Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (a city’s requirement of subcontracting at least 30 percent of city construction contracts to one or more Minority Business Enterprises was held not supported by a compelling interest nor narrowly tailored. Justice Kennedy agreed but added that he did not join in language suggesting the same strict scrutiny standard should apply to Congress).

Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105 (1991) (applying strict scrutiny to the Son of Sam law, which required a turn over of profits from books written under contract with accused or convicted persons, the Court struck it down as not narrowly tailored to ensuring that crime victims were compensated from fruits of the crime. Justice Kennedy said the fact that the law was content-based was a sufficient reason to find it invalid).

Colorado Republican Federal Campaign Committee v. Federal Election Commission, 518 U.S. 604 (1996) (the Court held that the First Amendment prohibited application of the FECA campaign contribution limit to expenditures of political parties made independently without
coordination with any candidate. Justice Kennedy added that a political party's spending in cooperation a candidate was indistinguishable in substance from expenditures by the candidate or the candidate's campaign committee, and thus should be protected).

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (the Court held that a state bar on tobacco ads outdoors and at the point of sale failed *Central Hudson* analysis. Justice Kennedy, concurring, said *Central Hudson* gives insufficient protection to truthful, nonmisleading commercial speech).

Republican Party of Minnesota v. White, 536 U.S. 765 (2002) (the majority opinion held that a law which barred candidates for judicial office from announcing their view on disputed legal and political issues did not pass strict scrutiny and violated the First Amendment. Justice Kennedy added that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests).

**Error in Majority Opinion**

Missouri v. Jenkins, 495 U.S. 33 (1990) (the Court held that a city tax ordered by a district court for use in desegregating schools violated principles of comity because its equity powers were limited by petitioner's readiness to solve the desegregation problem itself. However, a federal court could disestablish local government institutions that interfere with its commands. Justice Kennedy, concurring, said that this latter statement was dictum without constitutional justification).

**Dissenting Opinions**

Disagreement on the Applicable Rule

County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989) (Establishment Clause violated by placing a creche on the staircase of a court. Dissenting, Justice Kennedy said that communities may make a reasonable acknowledgement of holidays by displaying a symbol of the holiday’s religious origins).

Hirsh v. City of Atlanta, 495 U.S. 927 (1990) (Justice Kennedy dissented from the refusal of the Court to grant certiorari and reverse the refusal of higher state courts to grant a stay of a trial court’s injunction that in part was content-based).

Denver Area Educational Telecommunications Consortium v. FCC, 518 U.S. 727 (1996) (FCC rule upheld that permitted cable system operators to prohibit indecent programming transmitted over leased access channels. Kennedy dissented, arguing that strict scrutiny should have been applied).

Nixon v. Shrink Missouri PAC, 528 U.S. 377 (2000) (the Court held that the approval in *Buckley* of contribution limits respecting candidates for federal office should extend to such limits on
candidates for state offices. Justice Kennedy, dissenting, said that respect for the First Amendment, plus unfortunate results following Buckley, should bar this extension).

Disagreement on the Facts or How Law Applies to the Facts

Hodgson v. Minnesota, 497 U.S. 417 (1990) (the Court held that a two-parent notice requirement for an abortion on a girl under 18 was invalid. Dissenting, Justice Kennedy said the two-parent requirement was a reasonable attempt to preserve the parental role without imposing an absolute barrier).

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (the Court used less than strict scrutiny to uphold a racial preference in awarding broadcast licenses. Dissenting, Justice Kennedy said he could not agree that the Constitution permits the Government to discriminate on the basis of race in order to serve interests so trivial as broadcast diversity).

Burdick v. Takushi, 504 U.S. 428 (1992) (the Court upheld Hawaii’s ban on write-in voting. Kennedy said this imposed a significant burden on the right of voters to vote for the candidate of their choice).

Morse v. Republican Party of Virginia, 517 U.S. 186 (1996) (the Court struck down a registration fee imposed by the Republican Party to participate in nominations for the office of United States Senator. The Court said this weakened opportunities to vote in the general election. Justice Kennedy, dissenting, said that a political party is not a State or political subdivision, and thus is not a unit of Government covered by the Fourteenth Amendment).

Davis v. Monroe County, 526 U.S. 629 (1999) (Justice Kennedy dissented from a holding that states accepting Title IX grants for schools thereby agreed to private actions for peer sexual harassment. He said the law contained no clear and unambiguous notice that such liability would exist).

Troxel v. Granville, 530 U.S. 57 (2000) (the Court held that a state had infringed fundamental rights of a mother by ordering grandparent visitation without giving adequate weight to the fit mother’s objections. Kennedy, dissenting, would remand for further hearings in light of an error below that the best-interest-of-the-child was never appropriate in third-party visitation cases).

Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003) (dissenting from upholding a requirement that interest from IOLTA not be paid to depositors, Kennedy said that the state had taken property and violated the Takings Clause by mandating that the interest from IOLTA accounts serve causes favored by justices of the state supreme court approve).

Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003) (the Court held that a state employee could recover damages from the state for a breach of the Family and Medical Leave Act. Justice Kennedy, dissenting, said Congress had not documented a pattern of
unconstitutional acts by the states and, thus, Congress was merely creating a new entitlement of leave from employment, which it had no power to do).

Johanns v. Livestock Marketing Association, 544 U.S. 550 (2005) (the Court held that a beef promotion ad was government speech, and beef producers whose assessments were used to finance the ad had no First Amendment protection. Justice Kennedy, dissenting, said the speech was not clearly identified as by the government, and a compelled subsidy should not be justifiable by speech unless the government puts that speech forward as its own, which was not true here).