The Constitutional Jurisprudence of Justice Kennedy on Speech

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Table of Contents

I. Introduction

II. A Summary of Justice Kennedy’s Analysis of Free Speech Review

III. Public Versus Non-Public Forum Analysis

IV. Content-Based Regulations

V. Content-Neutral Regulations

VI. Conclusion

Abstract of Article

Justice Kennedy’s basic principles in free speech cases are supporting political freedom, supporting individual autonomy, and protecting freedom to teach, learn and innovate. Given these principles, his opinions in free speech cases protect free speech from government regulation unless the government can provide strong reasons for any restrictive action and show that the means it has chosen to carry out its purposes are closely tailored to its goals. At a minimum, judicial review is by strict scrutiny for content-based regulations, and intermediate review for content neutral time, place, and manner regulations. In some cases, Justice Kennedy has indicated a preference for a stronger, absolute rule of unconstitutionality for content-based regulations which do not fall into one of the traditional exceptions of free speech doctrine, such as obscenity, defamation, words tantamount to an act otherwise criminal, impairing some other constitutional right, an incitement to lawless action, or speech calculated to bring about imminent harm that the state has substantive power to regulate. Given his entire body of decisions regarding the freedom of speech over his quarter century on the Court, no Justice on the modern Court has been more consistently protective of the First Amendment freedom of speech than Justice Kennedy.
THE CONSTITUTIONAL JURISPRUDENCE OF JUSTICE KENNEDY ON SPEECH

Charles D. Kelso* & R. Randall Kelso**

I. Introduction

Anyone familiar with the Supreme Court’s work the last quarter century knows that Associate Justice Anthony M. Kennedy has cast the decisive vote more often than any other Justice.1 He has been in the middle of decision-making because he is not in the block of four conservative Justices (currently Roberts, Scalia, Thomas, and Alito), or a liberal block (recently Stevens (now Kagan), Souter (now Sotomayor), Ginsburg, and Breyer). For this reason, a number of scholars have analyzed his reasoning in various fields of law,2 and efforts have been made to find arguments that might attract his favor.3


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1 See generally Erwin Chemerinsky, The Kennedy Court, 9 Green Bag 335, 335 (2006) (“Justice Anthony Kennedy is clearly the swing vote and likely will determine the outcome of most high profile cases so long as these remain the nine Justices . . . .”); R. Randall Kelso & Charles D. Kelso, Swing Votes on the Supreme Court: The Joint Opinion in Casey and Its Progeny, 29 Pepp. L. Rev. 637 (2002). Justice Kennedy has been in the majority in most recent cases decided by a 5-4 vote. See, e.g., 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).


Justice Kennedy has been in a position to cast many decisive votes because his style of deciding avoids the extremes of styles used by 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 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 Justices Douglas, Marshall, and Stevens, and current Justices Ginsburg, Breyer, Sotomayor, and Kagan. They pay close attention to alternative social policy consequences of decisions.

In contrast, while Justice Kennedy bases his constitutional decisions on the traditional factors of judicial decisionmaking – including constitutional text, history, legislative and executive practice, precedent, and analysis of consequences – the foundation for his opinions is a set of basic principles he finds embodied in the Constitution. Under this view, Justices give great weight to these general principles underlying the law. This style may be called natural law,


5 Kelso & Kelso, Path, supra note 4, at Ch. 10; Kelso & Kelso, Judicial-Decisionmaking, supra note 4, at 355-56.

6 Kelso & Kelso, Path, supra note 4, at Ch. 11; Kelso & Kelso, Judicial-Decisionmaking, supra note 4, at 354-55.

based on the 18th century Enlightenment natural law belief that underlying general principles were a given part of the rule of law and the Constitution. This was the style of interpretation of early Justices on the Supreme Court, including Chief Justice Marshall and Justice Story. Modern Justices who have reasoned this way and who at one time or another have been regarded as a swing vote are Justices Powell, O’Connor, Souter, and Kennedy.

Since he has often been the controlling vote on the Court, these principles have led Justice Kennedy to have had particular impact on the Court’s development of constitutional doctrine in three areas of the law: aspects of personal liberty, freedom of speech, and structural issues of federalism and separation of powers. In a previous article, we have discussed Justice Kennedy’s opinions relating to liberty. A forthcoming article discusses Justice Kennedy opinions on structural issues. In this article, we discuss the constitutional jurisprudence of Justice Kennedy with respect to freedom of speech. This article identifies the basic principles

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which have led Justice Kennedy to take a very protective stance toward freedom of speech, as weighed against the various government interests put forward as justifications for regulating speech. We then discuss Justice Kennedy’s most significant majority, concurring, and dissenting opinions regarding the freedom of speech.

II. A Summary of Justice Kennedy’s Analysis of Free Speech Review

A. Basic Considerations: Three Basic Principles

By our count, Justice Kennedy has written 20 significant free speech opinions for the Court, 15 significant concurring opinions, and 7 significant dissents. From these opinions, three general principles emerge which explain why Justice Kennedy believes that freedom of speech was intended to, and deserves, much protection from action by all branches of state and federal government. Based on 18th century Enlightenment philosophy, these three principles are supporting political freedom, supporting individual autonomy, and protecting freedom to teach, learn and innovate.\(^{13}\)

Justice Kennedy’s most speech protective language appears in *Republican Party of Minnesota v. White*.\(^{14}\) In *White*, he said in a concurring opinion that content-based restrictions should be invalidated without inquiry into narrow tailoring or compelling interests, unless they fall into a traditional exception to free speech doctrine, such as obscenity, defamation, words tantamount to an act otherwise criminal, impairing some other constitutional right, an incitement to lawless action, or speech calculated to bring about imminent harm that the state has power to

\(^{13}\) See generally *ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* 92-95 (1985) (discussing 18th century liberalism and the freedom of speech in terms of “freedom of conscience,” which was used to support “personal liberty” and “intellectual progress,” as well as the “political function” of freedom of speech to expose the “mischief” of politicians).

\(^{14}\) 536 U.S. 765, 793 (2002).
The basis for this was identified as “the principle that unabridged speech is the foundation of political freedom.”

Justice Kennedy has echoed this support for effective democracy in a number of opinions. He has declared the following:

(1) The First Amendment guarantees our citizens the right to judge for themselves the most effective means for the expression of political views and to decide for themselves which entities to trust as reliable speakers. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.

(2) Political speech is ‘indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.’

(3) The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views.”

(4) Political parties advance a shared political belief and to do so they must speak through their candidates.

(5) “The right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs.”

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16 Id. at 794.


(6) The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.\textsuperscript{22}

In addition to supporting political freedom, free speech gives protection in various circumstances, according to Justice Kennedy, because of its relation to personal autonomy. The importance of autonomy to Justice Kennedy was made clear in the notable joint opinion in \textit{Planned Parenthood v. Casey},\textsuperscript{23} where he joined with Justices O’Connor and Souter, to emphasize that personal autonomy is an important constitutional value. The opinion said, “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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”\textsuperscript{24} Justice Kennedy elaborated on that idea in \textit{Turner Broadcasting System I v. FCC}.\textsuperscript{25} There, he said, “At the heart of the First Amendment is the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal.”\textsuperscript{26}

Justice Kennedy has stressed the importance of personal autonomy as a principle supporting the First Amendment in a number of passages. For example, he has written:

\textsuperscript{22} Nevada Comm’n on Ethics v. Carrigan, 131 S. Ct. 2343, 2353 (2011).


\textsuperscript{24} \textit{Id.} at 852.

\textsuperscript{25} 512 U.S. 622 (1994).

\textsuperscript{26} \textit{Id.} at 641.
Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.\footnote{Turner Broadcasting System II v. FCC, 512 U.S. 622, 641 (1994).}

Again, referring to attempts by the Government to control a person’s private thoughts, he wrote, “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.”\footnote{Ashcroft v. The Free Speech Coalition, 535 U.S. 234, 253 (2002).} As a result, he has affirmed, “As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear.”\footnote{Id. at 245.}

A third basic principle served by the First Amendment is the protection of freedom to teach, learn and innovate. Justice Kennedy has said:

The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.\footnote{Rosenberger v. Rectors of the University of Virginia, 515 U.S. 819, 835 (1995).}

\section*{B. Doctrinal Issues Raised in Free Speech Cases}

The impact of these three basic principles has been developed in Justice Kennedy’s opinions. For an introduction, it may be useful to provide a summary of the
analytic structure of free speech doctrine that emerges from considering his free speech opinions.

One doctrinal aspect of free speech cases is whether the speech being regulated occurs on private property or in a public forum, or occurs in a non-public forum owned by the government. Naturally, government attempts to regulate speech on individuals’ private property or on public forums are much more difficult to justify, and typically trigger a heightened standard of scrutiny, than government regulations on property owned by the government that is not generally open to the public. The leading case on what standard of review to apply in non-public forums is *Perry Education Association v. Perry Local Educators’ Association*.\(^3^1\) Decided in 1983, *Perry* held that a school could reserve access to an interschool mail system and to teacher mailboxes for the union certified as the exclusive representative of the teachers.\(^3^2\) Summarizing and organizing precedents, Justice White first pointed out that strict scrutiny applied to content-based exclusions from a public forum, from public property which the state has opened for use by the public as a place for expressive activity, or for government attempts to regulate individual speech on an individual’s own “non-public” private property.\(^3^3\) However, with regard to non-public forum property owned by the government, the state can impose time, place, or manner restrictions, and also may reserve the forum for its intended purposes, as long as the regulation on speech is reasonable and not an effort to suppress expression merely


\(^{32}\) *Id.* at 47-54.

\(^{33}\) *Id.* at 45-46.
because public officials oppose the speaker’s views.\textsuperscript{34} As discussed in Part III of this article,\textsuperscript{35} Justice Kennedy’s approach to whether a forum is public or non-public is more protective of free speech than that of many conservatives.

A second doctrinal issue is whether a regulation is content-based or content-neutral. If a law is content-based and does not deal with one of the exceptional situations where a reduced standard of review applies, such as advocacy of illegal action likely to occur, true threats, fighting words, obscenity, child pornography, or defamation,\textsuperscript{36} Justice Kennedy has called for automatic invalidation, or at least for strict scrutiny. For example, in \textit{Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board},\textsuperscript{37} the Court adopted a strict scrutiny approach to content-based regulations of speech. Concurring in the case, Justice Kennedy noted that this adoption of the Equal Protection strict scrutiny approach in a First Amendment case was not required by prior precedents, and that while “the compelling interest inquiry has found its way into our First Amendment jurisprudence of late . . . the Court appears to have adopted this formulation in First Amendment cases by accident rather than as the result of a considered judgment.”\textsuperscript{38} In contrast to the Court’s strict scrutiny approach, Justice Kennedy preferred an absolutist approach, which would prevent the state from any

\textsuperscript{34} \textit{Id.} at 46.

\textsuperscript{35} \textit{See infra} text accompanying notes 47 - 68.

\textsuperscript{36} On these exceptions, see generally G. Stone, L. Seidman, C. Sunstein, M. Tushnet & P. Karlan, \textit{The First Amendment} Ch. 2, 4 (3d ed. 2009).


\textsuperscript{38} \textit{Id.} at 124-25 (Kennedy, J., concurring).
content-based regulation of fully-protected speech, without regard to a compelling governmental interest analysis.\footnote{Id. at 126-27.}

This perspective has led to his support for invalidating many laws or their application, or requiring the government to supply more justification in terms of a substantial or compelling objective or closer tailoring considering available alternatives. The possibility of satisfying strict scrutiny depends on the identification of compelling government interests to support the government regulation, whether the government regulation is directly related to advancing that end, and whether the government has used the least restrictive, or as it is sometimes phrased least burdensome, effective alternative to regulate the speech.\footnote{As the Court stated in \textit{Simon \& Schuster}, to justify its “content-based” regulation of speech “the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.” 502 U.S. at 117-18.} These cases are discussed in Part IV of this article.\footnote{See infra text accompanying notes 69 - 146.}

In other cases, the Court has noted that the regulations are content-neutral. In these cases, the Court applies intermediate review. The use of intermediate scrutiny for content-neutral regulations of speech or reasonable time, place, or manner regulations of speech is best illustrated in the 1989 case of \textit{Ward v. Rock Against Racism}.\footnote{491 U.S. 781 (1989).} The Court held in \textit{Ward} that New York City did not deprive musicians of First Amendment rights by insisting that band shell performers in Central Park use sound-amplification equipment and a sound technician provided by the city.\footnote{Id. at 789-90.} For the Court, Justice Kennedy...
first held that the regulation was content-neutral because two of its justifications (controlling noise in the park and avoiding undue intrusion into residential areas) had nothing to do with content.\footnote{Id. at 791-92.} Regarding the third, \textit{i.e.}, the city's interest in ensuring the quality of sound at park events, the challengers argued that the city was seeking to assert artistic control. Justice Kennedy replied that the city requires its technician to defer to the wishes of event sponsors concerning sound mix, and the record indicates that the city's equipment and sound technician could meet all of the standards requested by the performers.\footnote{Id. at 792-93.} In most cases of content neutrality, the issue discussed by Justice Kennedy was the way in which the intermediate standard of review applied to the facts, in most cases upholding the regulation. These cases are discussed in Part V of this article.\footnote{See infra text accompanying notes 147 - 64.}

There follows a close look at cases in which Justice Kennedy’s opinions support the above summary analysis. Many of the cases deal with legislative efforts to regulate the content of what goes on in a political campaign. Next in terms of quantity are cases reviewing content regulations aimed at protecting children from sexual matters. There are also a number of cases involving content-based regulations which do not involve politics and which bring into play concerns about lawyer behavior, business activity, or compelled speech.

Most of Justices Kennedy’s ideas have been embodied in majority opinions. His concurring opinions tend to protect free speech by stating limits or qualifications on what
he believes the Court has held. His dissenting opinions in free speech cases typically are objections to the Court upholding a regulation of speech.

III. Public Versus Non-Public Forum Analysis

In *International Society for Krishna Consciousness v. Lee*, Justice Kennedy concurred with a judgment allowing an airport to bar solicitation for the immediate payment of money on its premises. However, he disagreed with the majority’s view that the airport was not a public forum simply because the airport authority considered the purpose of its terminals to be the facilitation of air travel. As discussed below, because of changes in Court membership since the *Lee* case was decided, Justice Kennedy’s approach to determining a public versus non-public forum is likely the majority approach on the Court today.

In *Lee*, Chief Justice Rehnquist wrote for a majority that a public airport terminal was not a public forum and reasonably could ban the repetitive solicitation of money within its terminals. With respect to the nature of the forum, Rehnquist said that the decision to create a public forum is made by intentionally opening a non-traditional forum for public discourse. The tradition of airport activity does not demonstrate that airports have historically been opened for speech activity, and the operators have frequently objected in litigation to such activity. It is not persuasive that speech activity

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48 *Id.* at 693 (Kennedy, J., joined in Part I by Blackmun, Stevens & Souter, JJ., concurring in the judgment).

49 *Id.* at 684-85.

50 *Id.* at 679-81.
has occurred at various "transportation nodes," such as rail stations, because they traditionally have had private ownership and here the relevant unit is the airport, not "nodes" generally. Airports are commercial enterprises, whose management considers their purpose to be the facilitation of passenger air travel. Therefore, only a reasonableness standard, applicable to non-public fora, need be applied.51 Viewing the case against a background of substantial congestion, Chief Justice Rehnquist, with Justices White, Scalia, and Thomas, upheld both a ban on solicitation and a ban on literature distribution, including leafleting. Rehnquist noted that allowing solicitation on outside sidewalks, as provided by the airport managers, gives sufficient access to an area universally traveled.52

Justice O'Connor agreed that the airport was not a public forum because no intent had been expressed to open airports to the types of expression here involved.53 She said, however, that the reasonableness inquiry is whether the restrictions are consistent with the multipurpose environment deliberately created. Solicitation of money impedes the normal flow of travel and risks confrontation with a person asking for money. Thus that ban was reasonable.54 However, the ban on leafleting was not reasonable given the minimal disruption caused by a person giving out information.55

51 Id. at 681-83.
52 Id. at 683-85 (Rehnquist, J., opinion for the Court in part).
53 Id. at 686-87 (O'Connor, J., concurring in part and concurring in the judgment).
54 Id. at 687-90.
55 Id. at 690-92.
Justice Kennedy, joined by Justices Blackmun, Stevens, and Souter, said that an airport is a public forum.\textsuperscript{56} Focusing more on the objective characteristics of the property, Justice Kennedy concluded that public forum status should be given to property if its physical characteristics and actual public uses permitted by the government indicate that expressive activity would be appropriate and compatible with those uses. Under this test, airport terminals are a public forum because their public spaces are broad, they have public thoroughfares full of people, and they are lined with stores and other commercial activities. Further, there had been no showing that any real impediments could not be cured with reasonable time, place, or manner regulations.\textsuperscript{57} Given the current membership on the Court, this approach would likely be adopted by a majority of Justices, composed of Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan.\textsuperscript{58}

Applying intermediate scrutiny appropriate for content-neutral regulations in a public forum, Justice Kennedy concluded that the ban on solicitation for the receipt of money was valid as a time, place or manner restriction. This behavior creates a risk of fraud and duress, and there are ample alternatives because the solicitor can give a pre-addressed envelope.\textsuperscript{59} However, the ban on distributing or selling literature was invalid.

\textsuperscript{56} \textit{Id.} at 693 (Kennedy, J., joined in Part I by Blackmun, Stevens & Souter, JJ., concurring in the judgment).

\textsuperscript{57} \textit{Id.} at 693-98.

\textsuperscript{58} This prediction is based on the fact that liberal Justices had tended to adopt the broader view of public forum doctrine, as Justices Stevens, Blackmun, and Souter did in \textit{Lee}, see text \textit{supra} accompanying notes 56-57, and that Justices Ginsburg, Breyer, Sotomayor, and Kagan would likely adopt a similar liberal view.

\textsuperscript{59} \textit{Id.} at 705-08.
The government has less interest and the danger of fraud is more limited.\textsuperscript{60} Justices Souter, Blackmun, and Stevens thought that both bans were invalid. The claim for duress was weak and there was no evidence of coercive conduct. There was almost no evidence of fraud.\textsuperscript{61} Ample alternative channels for solicitation did not exist because the distribution of pre-addressed envelopes was unlikely to be much of an alternative.\textsuperscript{62}

Reflecting more the “objective” characteristics of the property approach of the Kennedy concurrence in\textit{Lee}, lower federal courts since\textit{Lee} have held that a private sidewalk encircling a privately owned sports arena complex which appears like any public sidewalk and is used as a public thoroughfare, is a public forum,\textsuperscript{63} and that a mass transit agency’s acceptance of advertisements on a wide range of topics under contracts for display in its stations and vehicles, for the purpose of raising revenue, made such areas designated public fora, triggering public forum review.\textsuperscript{64}

Justice Kennedy elaborated on public/non-public forum analysis in\textit{Arkansas Educational Television Commission v. Forbes}.\textsuperscript{65} In\textit{Forbes}, Justice Kennedy noted in his majority opinion that the Court had recognized three types of fora: the traditional public forum; the public forum created by government designation, which may be for the

\begin{itemize}
  \item \textit{Id.} at 708-09 (Kennedy, J., concurring in the judgment).
  \item \textit{Id.} at 712-15 (Souter, J., joined by Stevens & Blackmun, JJ., concurring in the judgment in part and dissenting in part).
  \item \textit{Id.} at 715-16.
  \item 523 U.S. 666 (1998).
\end{itemize}
general public or for a particular class of speakers; and the nonpublic forum.\textsuperscript{66} He pointed out that a public forum is not created where the government does nothing more than reserve eligibility for access to the forum to a particular class of speakers. Thus, a candidate debate sponsored by a state-owned public television station was a nonpublic forum where the station had extended invitations only to candidates who had substantial support.\textsuperscript{67} For this reason, there was no violation of the First Amendment in limiting the debate to such candidates where that was a reasonable viewpoint-neutral exercise of journalistic judgment.\textsuperscript{68}

\section*{IV. Content-Based Regulations}

\subsection*{A. Opinions in Which Justice Kennedy Voted to Invalidate a Regulation}

Justice Kennedy’s most significant free speech opinions involving content-based regulations involve four kinds of free speech cases: (1) political speech; (2) regulation of sexually oriented materials; (3) viewpoint discrimination cases; and (4) business and commercial speech cases.

\subsection*{1. Political Speech}

Justice Kennedy has written more opinions on political speech than in any other free speech area. He has voted to invalidate the law and/or its application in all but two of these cases. The cases on political speech in which Justice Kennedy has written a majority or concurring opinion in opposition to a government regulation deal with campaign financing; election procedures and limits on access to the ballot or what can be

\textsuperscript{66} Id. at 677-78.

\textsuperscript{67} Id. at 678-80.

\textsuperscript{68} Id. at 680-83.
said by candidates; political protesters, such as burning flags as a form of political speech; and political affiliations of government employees.

a. Campaign Financing: In *Austin v. Michigan Chamber of Commerce*, a 6-3 majority held that Congress could regulate corporate contributions to political campaigns. Justice Kennedy dissented, saying that limits on electioneering because of the speaker’s corporate identity should not be upheld. Twenty years later he was able to write for the Court, in *Citizens United v. Federal Election Commission*, that *Austin* was overruled. In *Citizens United*, the most important case in which Justice Kennedy has penned a First Amendment opinion for the Court, there was a clash between the interests 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 30 days of a primary election or within 60 days of a general election for public office. 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 furthered a compelling interest and was narrowly tailored to achieve that interest. At this level of review, deference is not given to legislative judgments on the existence of facts. Here the Government had not identified a compelling interest, said Kennedy, because First Amendment protection does not depend

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70 Id. at 695-96 (Kennedy, J., joined by Scalia & O’Connor, JJ., dissenting).

71 130 S. Ct. 876 (2010).

72 2 U.S.C. § 441(b).
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 a shareholder protection theory were adopted it would give the Government power to restrict the political speech of media corporations. Further, there was little evidence of abuse that cannot be protected by shareholders through the processes of corporate democracy.\textsuperscript{73}

The background of principles for Justice Kennedy’s 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 cases, 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{74}

With respect to making it a crime for corporations to engage in political speech shortly before an election, Justice Kennedy said:

\textsuperscript{73} 130 S. Ct. at 903-10. \textit{See generally} Matthew Lambert, \textit{Beyond Corporate Speech: Corporate Powers in a Federalist}, 37 Rutgers L. Rev. 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, \textit{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.).

\textsuperscript{74} \textit{Id.} at 917.
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.\textsuperscript{75}

In addition, Justice Kennedy overruled \textit{Austin v. Michigan Chamber of Commerce},\textsuperscript{76} and \textit{McConnell v. Federal Election Commission}.\textsuperscript{77} 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 in \textit{Citizens United} that \textit{stare decisis} did not require continued acceptance of the earlier cases as they were not well reasoned in abandoning free speech principles, had been undermined by various circumventions, and no serious reliance interests were at stake.\textsuperscript{78}

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} 494 U.S. 652 (1990).

\textsuperscript{77} 540 U.S. 93 (2003).

\textsuperscript{78} 130 S. Ct. at 911-13. For Justice Kennedy, factors counseling overruling a case include: (1) the precedent is unworkable in practice; (2) the precedent creates an inconsistency or incoherence in the law; (3) a changed understanding of facts has undermined the factual basis of the precedent; (4) the precedent represents a substantially wrong or substantially unjust interpretation of the Constitution, often because the opinion represents unsound reasoning; or (5) the precedent raises concerns about a commitment to the "rule of law"). \textit{See Planned Parenthood v. Casey}, 505 U.S. 833, 855-69 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.); \textit{Arizona v. Gant}, 129 S. Ct. 1710, 1726-30 (2009) (Alito, J., joined by Roberts, C.J., and Kennedy, J., dissenting) (same). Factors counseling following a precedent include whether the precedent is “settled law” or whether there has been “substantial reliance” on the precedent. \textit{See Adarand Constructors, Inc. v. Pena}, 515 U.S. 200, 233-34 (1995) (O'Connor, for the Court, joined by Kennedy, J.) ( “It is worth pointing out the difference between the application of stare decisis in this case and in \textit{Planned Parenthood of Southeastern Pa. v. Casey}. \textit{Casey
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 content-neutral requirements even 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.\(^7^9\)

As frequently occurs, Justice Kennedy’s view was in the middle of extremes. Justice Thomas joined all but Part IV of Justice Kennedy’s opinion, where the Court upheld disclosure, disclaimer, and reporting requirements.\(^8^0\) 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.\(^8^1\) He said that persons should have a right to anonymous speech, and 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

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\(^7^9\) 130 S. Ct. at 913-14.

\(^8^0\) Id. at 979 (Thomas, J., concurring in part and dissenting in part).

\(^8^1\) Id. at 980-81.
individuals. Justice Thomas 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.”

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 stare decisis had been inappropriately departed from because Austin has long been relied upon by state legislatures, and the case had not been proved unworkable. 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. Justice 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. He also noted that the majority view was contrary to long recognition by the people of the need to prevent corporations from undermining self-government. These four dissenting Justices

82 Id. at 982.
84 Id. at 929, 938-40 (Stevens, J., joined by Ginsburg, Breyer & Sotomayor, JJ., dissenting).
85 Id. at 960-79.
86 Id. at 972.
87 Id. at 948-53.
did agree with Kennedy that the disclaimer and disclosure requirements were constitutional.\(^8\)

In *Colorado Republican Federal Campaign Committee v. Federal Election Commission*,\(^8\) the Court held that the First Amendment prohibited application of the FECA campaign contribution limit to expenditures a political party makes independently, without coordination with any candidate. Justice Kennedy added that a political party's spending in cooperation with a candidate was indistinguishable in substance from expenditures by the candidate or the candidate's campaign committee, and for that reason should be protected by the First Amendment.\(^9\)

In *Randall v. Sorrell*,\(^9\) a plurality opinion said that Vermont’s expenditure limits for state office candidates were illegal under *Buckley*. Justice Kennedy, concurring in the judgment, said that the primary justifications for the expenditure limits were not significantly different from Congress' rationale for the *Buckley* limits, and reiterated his own “skepticism regarding that system and its operation.”\(^9\)

b. Elections: The Court held in *California Democratic Party v. Jones*,\(^9\) 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. Concurring, Justice

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88 *Id.* at 886, 913-16.


90 *Id.* at 828-30 (Kennedy, J., joined by Rehnquist, C.J. & Scalia, J., concurring in the judgment and dissenting in part).


92 *Id.* at 264-65 (Kennedy, J., concurring in the judgment).

Kennedy added that political parties advance a shared political belief and to do so they must speak through their candidates.\textsuperscript{94}

In \textit{Cook v. Cralike},\textsuperscript{95} 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 themselves and the states may not act as intermediates between the people and the federal government.\textsuperscript{96}

In \textit{Republican Party of Minnesota v. White},\textsuperscript{97} the Court held that a law which barred candidates for judicial office from announcing their views on disputed legal and political issues did not pass strict scrutiny, and thus violated the First Amendment. Justice Kennedy agreed but added in a concurrence, that content-based speech restrictions which do not fall within any traditional exception should be invalidated without even inquiring into narrow tailoring or compelling government interests.\textsuperscript{98} It is not clear whether he intended this statement to be limited to election cases or whether, as it literally appears, he was announcing a general principle for all content-based speech restrictions.

\begin{flushright}
\textsuperscript{94} \textit{Id.} at 587 (Kennedy, J., concurring).
\textsuperscript{95} 531 U.S. 510 (2001).
\textsuperscript{96} \textit{Id.} at 528-29 (Kennedy, J., concurring).
\textsuperscript{97} 536 U.S. 765 (2002).
\textsuperscript{98} \textit{Id.} at 793-94 (Kennedy, J., concurring).
\end{flushright}
In two election cases, where the majority upheld a state election regulation, Justice Kennedy did not find himself in the majority. In *Burdick v. Takushi*, the Court upheld Hawaii’s ban on write-in voting. Justice Kennedy, dissenting, said this imposed a significant burden on the right of voters to vote for the candidate of their choice.

In *Nixon v. Shrink Missouri Government PAC*, 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.

c. Political Protest by Flag Burning: In *Texas v. Johnson*, Justice Kennedy concurred in a 5-4 refusal to allow Texas to convict a political protester for desecrating a United States flag by burning it. Justice Kennedy said that the decision was not easy for him in view of the sacrifices made in the name of the flag but “the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution.” Justice Kennedy added, “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. . . . Though symbols often

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100 *Id.* at 442 (Kennedy, J., joined by Blackmun & Stevens, JJ., dissenting).
102 *Id.* at 405-06 (Kennedy, J., dissenting).
104 *Id.* at 421 (Kennedy, J., concurring).
are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt.”

Congress reacted to *Texas v. Johnson* by enacting a statute that provided criminal penalties for “Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground or tramples upon any flag of the United States.” This law was struck down on its face in *United States v. Eichman*, by the same 5-4 vote that was recorded in *Texas v. Johnson*. The Court again concluded that the new federal law, although wider in scope than the Texas law, still “suppresses expression out of concern for its likely communicative impact.”

d. Political Views of Independent Contractors: In *O’Hare Truck Service v. City of Northlake*, the Court held, per Justice Kennedy, that 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.

2. Sexually Oriented Materials

Justice Kennedy has written several opinions limiting government power to suppress speech by content-based prohibitions of sexually oriented material, often finding

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105 *Id.* at 420-21.
108 *Id.* at 317.
that the government could advance its regulation by less burdensome means, and thus the government was not using the least burdensome effective alternative as required by strict scrutiny review.

a. **Pornography**: Pornography produced by using persons under 18 has long been restricted. But what of pornography that simply appears to be using minors? In *Ashcroft v. The Free Speech Coalition*, a majority opinion by Justice Kennedy held that the Child Pornography Prevention Act of 1996 (CPPA) was invalid under the First Amendment because its punishment for dealing in any way with depictions of sexually explicit conduct that appears to be by persons under 18 was not supported by a sufficient connection with discouraging pedophiles from engaging in illegal conduct. Justice Kennedy wrote, “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.”

In *United States v. American Library Association*, the Court upheld on its face the Children's Internet Protection Act (CIPA). The Act 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 purpose. Justice Kennedy added that there might be an as-

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111 *Id.* at 253.
applied challenge if a library could not disable the filter or burdened adult users’ choice to view constitutionally protected material.\textsuperscript{113}

In\textit{ Reno v. American Civil Liberties Union},\textsuperscript{114} the Court held that a congressional bar on placing sexually explicit materials on the Internet to protect minors violated the First Amendment because it had not been shown that Congress had no adequate alternatives to this content-based regulation. Thus, the law was invalid as not being the least burdensome effective alternative, as is required under strict scrutiny review.\textsuperscript{115}

\textbf{b. Cable Television:} In\textit{ United States v. Playboy Entertainment Group},\textsuperscript{116} Justice Kennedy wrote for a 5-4 Court that the First Amendment was violated by requiring cable television operators, whose channels were 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, said Justice Kennedy, who explained, “When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government’s obligation to prove that the alternative will be ineffective to achieve its goals. The Government has not met that burden here.”\textsuperscript{117}

\begin{footnotesize}
\begin{enumerate}
\item[113] Id. at 215 (Kennedy, J., concurring in the judgment).
\item[114] 521 U.S. 844 (1997).
\item[115] Id. at 874-79.
\item[116] 529 U.S. 803 (2000).
\item[117] Id. at 816.
\end{enumerate}
\end{footnotesize}
In *Denver Area Educational Telecommunications Consortium v. FCC*,\(^{118}\) the Court upheld against a First Amendment challenge an FCC rule that permitted cable system operators to prohibit indecent programming transmitted over leased access channels. On this point, Justice Kennedy dissented, arguing that strict scrutiny should have been applied, but was not.\(^{119}\)

### 3. Viewpoint Discrimination

A third area whether Justice Kennedy’s approach has been significant involves determining whether a particular government regulation involves viewpoint discrimination. In two important viewpoint discrimination cases, Justice Kennedy was the only Justice in the majority in both cases, providing protection for free speech in each case. In *Rosenberger v. Rectors and Visitors of the University of Virginia*,\(^{120}\) Justice Kennedy wrote for the majority that a university which was paying the printing costs of student publications violated the First Amendment when it refused to fund a student magazine because it had a religious editorial viewpoint. Justice Kennedy said that the university had created a limited public forum, even though it existed more in a metaphysical way than in a spatial or geographic sense.\(^ {121}\) Content discrimination may be permissible to preserve the purposes of a limited public forum, said Justice Kennedy. However, viewpoint discrimination is presumed impermissible, triggering strict scrutiny review. Here the university did not exclude religion as a subject matter but, instead,

\(^{118}\) 518 U.S. 727 (1996).

\(^{119}\) *Id.* at 803-07 (Kennedy, J., joined by Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

\(^{120}\) 515 U.S. 819 (1995).

\(^{121}\) *Id.* at 830-31.
selected for disfavored treatment those student journalistic efforts with religious editorial viewpoints, and these were publications otherwise within the approved category of publications. Nor could the refusal to fund be considered university speech or merely a delimitation of its program since the University was spending funds to encourage a diversity of views from private speakers. Justice Kennedy explained:

Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. 

Justice Kennedy also wrote the majority opinion in *Legal Services Corporation v. Velasquez*. In *Velasquez*, the Court held in an opinion by Justice Kennedy that where the government funds lawyers who are to speak on behalf of their clients, the government may not foreclose advice or legal assistance to question the validity of statutes under the Constitution. Justice Kennedy explained that a restriction operating to insulate current welfare laws from constitutional scrutiny implicates central First Amendment concerns and distorts the legal system. The government could not defend this as a mere definition of its funding program.

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122 *Id.* at 831-34.

123 *Id.* at 835. Justices Stevens, Souter, Ginsburg, and Breyer dissented, viewing the university’s action as required in order to avoid creating an Establishment Clause problem with the government providing financial support for religion. *Id.* at 863-64 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).


125 *Id.* at 540-49. Chief Justice Rehnquist, and Justices Scalia, O’Connor, and Thomas dissented, viewing the government’s action as involving government spending of
4. **Laws Involving Professional and Business Speech**

In cases involving professional or business speech, Justice Kennedy has consistently supported freedom of speech concerns. For example, in *Gentile v. State Bar of Nevada*, Justice Kennedy announced the judgment of the Court and wrote that although states may restrict attorney speech which has a likelihood of prejudicing pending legal proceedings, Rule 117 of Nevada was void for vagueness in tending to mislead attorneys into believing that a general discussion of a criminal defense would not subject them to discipline.

In *Simon and Schuster v. Crime Victims Review Board*, the Court applied strict scrutiny to the Son of Sam law, which required a turn-over of profits from books written under contract with an accused or convicted person. The Court struck down the law as not narrowly tailored to ensuring crime victims were compensated from fruits of the crime. Justice Kennedy, concurring, said the fact the law was content-based was a sufficient reason to find it invalid.

Justice Kennedy wrote for the Court in *Edenfield v. Fane*, that Florida’s ban on solicitation by CPAs was unsupported by evidence that such solicitations were likely to lead to oppressive conduct or the false or misleading claims that the State was pursuing.

its own funds, not regulating other person’s speech, and thus subject only to minimum rationality review. *Id.* at 549-50 (Scalia, J., joined by Rehnquist, C.J., and O’Connor & Thomas, JJ., dissenting).

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128 *Id.* at 124 (Kennedy, J., concurring).
Thus, the content-based regulation did not satisfy the *Central Hudson Gas* text applicable to commercial speech regulation.\(^{130}\) Similarly, in *Lorillard Tobacco v. Reilly*,\(^ {131}\) the Court held that a state bar on tobacco advertising outdoors and at the point of sale failed the *Central Hudson Gas* analysis. Justice Kennedy, concurring, said that in his view the *Central Hudson Gas* test gives insufficient protection to truthful, nonmisleading commercial speech, and that strict scrutiny should be applied in these cases, not the intermediate *Central Hudson Gas* test.\(^ {132}\) In *Sorrell v. IMS Health, Inc.*,\(^ {133}\) Justice Kennedy nonetheless applied *Central Hudson Gas* to hold unconstitutional a state statute which barred the sale of pharmacy records that revealed the prescribing practices of individual doctors. Justice Kennedy said that the state has a substantial goal of improving health of individuals seeking health care, but that this goal could not be regarded as being directly advanced by placing limits on the ability of interested parties to gain information that would enable them to communicate more effectively with doctors.\(^ {134}\)

In *United States Department of Agriculture v. United Foods*,\(^ {135}\) Justice Kennedy wrote for the Court that fundamental First Amendment rights of mushroom growers were violated by federal assessments for general ads about mushrooms where the ads were not

\(^{130}\) *Id.* at 768-73.

\(^{131}\) 533 U.S. 525 (2001).

\(^{132}\) *Id.* at 571-72 (Kennedy, J., joined by Scalia, J., concurring in part and concurring in the judgment).

\(^{133}\) 131 S. Ct. 2653, 2659 (2011).

\(^{134}\) *Id.* at 2670-72.

\(^{135}\) 533 U.S. 405, 410-17 (2001).
part of some broader regulatory scheme. Instead, the ads had the effect of coercing individuals to join in messages with which they might not agree.

In *Johanns v. Livestock Marketing Association*, 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 its use to fund speech unless the government puts that speech forward as its own.  

B. **Opinions in Which Justice Kennedy Voted to Uphold a Regulation**

1. **Elections**

   In *Burson v. Freeman*, the Court held that 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 because “voting is one of the most fundamental and cherished liberties in our democratic system” and in this case the state is not trying to “suppress legitimate expression.”  

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137 *Id.* at 570 (Kennedy, J., dissenting).
139 *Id.* at 214 (Kennedy, J., concurring).
2. **Retaliation for Speech by a Government Employee**

   In *Garcetti v. Caballos*,\(^\text{140}\) Justice Kennedy wrote a majority opinion which refused to give First Amendment protection from retaliatory employment action for what a government employee said in a memorandum prepared as part of his duties. Justice Kennedy explained that so long as government employees are speaking as citizens on matters of public interest, they face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. But they give up some First Amendment protection when they agree to be employed by the government, and they are not speaking as citizens on matters of public interest when they are carrying out their job duties.\(^\text{141}\) In *Borough of Duryea, Pa. v. Guarnieri*,\(^\text{142}\) Justice Kennedy wrote for the Court that the same standard of First Amendment review applies to a grievance filed by a government worker under the Petition Clause of the First Amendment as in a standard First Amendment free speech case.

3. **Libel**

   In *Masson v. New Yorker Magazine*,\(^\text{143}\) Justice Kennedy wrote for the Court that an author, who was the plaintiff in a libel action, was not entitled to a summary judgment in his action against a magazine. Justice Kennedy said there was an issue of whether the defendant’s publication was false for the purpose of proving the actual malice needed to overcome the protection given writers by the First Amendment. Here, although plaintiff

\(^{140}\) 547 U.S. 410 (2006).

\(^{141}\) *Id.* at 417-23.

\(^{142}\) 131 S. Ct. 2488, 2495 (2011).

was not entitled to a summary judgment, a reasonable jury could find that there was evidence of deliberate or reckless falsification since the quotations attributed to plaintiff differed materially from plaintiff’s tape-recorded statements.\textsuperscript{144}

4. \textbf{Zoning of Adult Establishments}

In \textit{City of Los Angeles v. Alameda Books Inc.},\textsuperscript{145} the Court held that an ordinance which barred more than one adult entertainment business in the same building could survive a motion for summary judgment filed by challengers. Concurring in the judgment, Justice Kennedy reacted to an indication that the Court might apply less than strict scrutiny in reviewing the ordinance. He insisted that the Court should use intermediate scrutiny only if the government could advance some basis to show that its regulation had the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact.\textsuperscript{146}

V. \textbf{Content-Neutral Regulations}

A. \textbf{Opinions in Which Justice Kennedy Voted to Uphold the Regulation}

In the vast majority of cases, Justice Kennedy has written an opinion indicating support for upholding a content-neutral regulation of speech. He has tested such regulations by intermediate scrutiny, and has typically found that the government had satisfactorily shown that the law and its application substantially served a substantial government interest unrelated to speech, and had left ample alternative channels of communication, and thus was not substantially overbroad.

\textsuperscript{144} \textit{Id.} at 520-25.

\textsuperscript{145} 535 U.S. 425 (2002).

\textsuperscript{146} \textit{Id.} at 448-53 (Kennedy, J., concurring in the judgment).
These cases indicate that where content-based regulations are not involved, Justice Kennedy is willing to let the government regulate for non-content-based reasons. However, his concern for free speech values are indicated in a number of these cases where Justice Kennedy has written to limit the Court’s holding.

1. **Elections**

   In *New York State Board of Elections v. Lopez Torres*, Justice Kennedy, concurring, said it was important that New York had a second mechanism for placement on the final election ballot, which involved qualifying by a reasonable petition process.

2. **Student Regulations**

   In *Board of Regents of University of Wisconsin v. Southworth*, Justice Kennedy wrote for the Court that the First Amendment permits a public university to charge students an activity fee to be used for funding extracurricular student speech, but only because the program was viewpoint neutral in its allocations.

   In *Morse v. Frederick*, the Supreme Court indicated that minimum rationality review would be applied to student speech made in the context of the non-public forum of a “school-sanctioned and school-supervised” event, and the school had a legitimate interest in *Morse* in regulating speech that could rationally be viewed as promoting illegal

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147 552 U.S. 196 (2008)

148 *Id.* at 210-11 (Kennedy, J., concurring).


150 551 U.S. 393, 408-10 (2007).
drug use. A concurrence by Justices Kennedy and Alito, whose votes were critical to make up the majority, indicated that where the speech is not connected to the school curriculum, and the speech is student generated, even if in conflict with the “educational mission” of the school, however broadly defined, then the Tinker v. Des Moines Independent Community School District test would apply. Tinker reflects an intermediate standard of review for content neutral regulations in a public forum.

3. Cable Television

Must-carry provisions regarding cable television were ruled content-neutral in Turner Broadcasting System I v. FCC, in an opinion by Justice Kennedy. Since they were content-neutral and aimed only to protect access to free television programming for the 40% of Americans without cable, the law was reviewed by the intermediate level of scrutiny. The government was required to show only that they were genuinely needed to protect local broadcasting. Since the government had not made even that showing, the case was remanded for the district court to determine what harms local broadcasters would suffer without must-carry, and the harms cable would suffer with it.

In Turner Broadcasting System II v. FCC, Justice Kennedy delivered the opinion of the Court, which upheld a district court opinion requiring cable television

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151 Id. at 422-25, citing Tinker, 393 U.S. 503, 508-09 (1969) (Alito, J., joined by Kennedy, J., concurring).

152 Id. at 425 (noting that under Tinker the school must show a concern with “substantial disruption” of the school environment, which reflects the intermediate review requirement of a substantial government interest to regulate).


154 Id. at 661-68.

155 520 U.S. 180 (1997)
stations to carry the programs of local commercial television stations. Kennedy agreed with the district court that Congress had drawn reasonable inferences from the substantial evidence before it to conclude that in the absence of must-carry rules, significant numbers of broadcast stations would be refused carriage. Thus, the must-carry provisions did not burden substantially more speech than necessary to further a substantial government interest.\footnote{Id. at 196-224.}

### 4. Other Cases

Justice Kennedy wrote for the Court in \textit{Ward v. Rock Against Racism},\footnote{491 U.S. 781 (1989).} that requiring concert performers in Central Park to use government-supplied sound technicians was content-neutral and needed only intermediate scrutiny. 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. It was sufficient that the city’s goal to control sound volume to protect residential privacy and noise pollution was not substantially broader than necessary to achieve the city’s ends. Critical to this conclusion, however, was the fact that the city’s regulation did not interfere with the performer’s desired sound mix, and thus was not content-based.\footnote{Id. at 800-02.}

In \textit{Hastings Christian Fellowship v. Martinez},\footnote{130 S. Ct. 2971 (2010).} a 5-4 majority upheld as reasonable and viewpoint neutral a university’s policy of supporting student organizations only if they accepted all students. Justice Kennedy said that if the
challenging student organization could enforce its membership policy of requiring members to uphold certain religious beliefs that would conflict with the university’s legitimate purpose in creating a limited forum to encourage vibrant dialogue between students. Given this educational purpose, and Kennedy’s general support for the teaching and learning aspect of free speech doctrine, the university’s limitation on free speech was constitutional in this narrow setting.\textsuperscript{160}

**B. Opinions in Which Justice Kennedy Voted to Void the Regulation**

Despite Justice Kennedy’s usual support for content-neutral regulations of speech, sometimes the government regulation cannot survive intermediate review. For example, as discussed earlier,\textsuperscript{161} in *International Society for Krishna Consciousness v. Lee*, Justice Kennedy concurred with a judgment invalidating an airport regulation preventing a group from handing out leaflets in an airport. The ban on distributing leaflets was invalid because any danger with disrupting free flow of movement of persons in the airport terminal was not substantial enough to satisfy intermediate review. In addition, ample alternative channels for solicitation did not exist.\textsuperscript{162}

In some cases, where the Court had concluded that the regulation was content-neutral, Justice Kennedy disagreed and concluded the regulation was in fact content-based. For example, in *Hill v. Colorado*,\textsuperscript{163} the Court found that an injunction which affected abortion protesters was content neutral. In contrast, Justice Kennedy said that

\textsuperscript{160} *Id.* at 2998-3000 (Ginsburg, J., joined by Kennedy, J., concurring).

\textsuperscript{161} *See supra* text accompanying notes 56-60.

\textsuperscript{162} 505 U.S. 672, 703-04 (1992) (Kennedy, J., concurring in the judgment).

\textsuperscript{163} 530 U.S. 703 (2000).
the Court should break through the form of a speech regulation to the reality, present here, that only one side of the abortion debate was being regulated. Thus, the law was actually content-based and should be given strict scrutiny.\textsuperscript{164}

\textbf{VI. Conclusion}

Justice Kennedy’s basic principles in free speech cases are supporting political freedom, supporting individual autonomy, and protecting freedom to teach, learn and innovate. Given these principles, his opinions in free speech cases protect free speech from government regulation unless the government can provide strong reasons for any restrictive action and show that the means it has chosen to carry out its purposes are closely tailored to its goals. At a minimum, judicial review is by strict scrutiny for content-based regulations, and intermediate review for content neutral time, place, and manner regulations. In some cases, Justice Kennedy has indicated a preference for a stronger, absolute rule of unconstitutionality for content-based regulations which do not fall into one of the traditional exceptions of free speech doctrine, such as obscenity, defamation, words tantamount to an act otherwise criminal, impairing some other constitutional right, an incitement to lawless action, or speech calculated to bring about imminent harm that the state has substantive power to regulate. Given his entire body of decisions regarding the freedom of speech over his quarter century on the Court, no Justice on the modern Court has been more consistently protective of the First Amendment freedom of speech than Justice Kennedy.

\textsuperscript{164} \textit{Id.} at 768-70 (Kennedy, J., dissenting).