

Justice Anthony Kennedy: His Jurisprudence and the Future of the Court

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On June 27, 2018, Justice Anthony M. Kennedy announced that, effective July 31, 2018, he would retire from active service as an Associate Justice on the Supreme Court of the United States. His decisive role on the Court, particularly since the Roberts Court era began in 2005, cannot be overstated. The Roberts Court era has witnessed the Court issue a number of landmark rulings, many of which have involved matters where the sitting Justices were closely divided. Justice Kennedy typically voted with the majority of the Court in such cases. Since the October 2005 term that marked the beginning of the Roberts Court, Justice Kennedy voted for the winning side in a case more often than any of his colleagues in 9 out of 12 terms.

Unlike several other Justices on the Court, Justice Kennedy did not necessarily subscribe to a particular judicial philosophy, such as originalism or textualism. Instead, Justice Kennedy's judicial approach seemed informed by a host of related principles. First, Justice Kennedy's views on the law were often grounded in concerns for personal liberty, particularly freedom from government interference with thought, belief, expression, and certain intimate conduct. His emphasis on liberty manifested itself in a range of opinions he wrote or joined during his tenure on the Court, including on issues related to free speech, religious freedom, and government policies concerning same-sex relationships. Second, the structural protections of the Constitution—i.e., restraints imposed on the federal government and its respective branches by the doctrines of federalism and separation of powers—also animated Justice Kennedy's jurisprudence. For Justice Kennedy, separation of powers was a “defense against tyranny,” and he authored or joined a number of Court opinions that invalidated on separation-of-powers grounds intrusions on the executive, legislative, or judicial functions. Likewise, during the Rehnquist Court and Roberts Court eras, Justice Kennedy joined several majority opinions that recognized federalism-based limitations on the enumerated power of the federal government, established external limitations on Congress's legislative powers over the states, and reaffirmed protections for state sovereignty. Third, Justice Kennedy's jurisprudence was undergirded by his view that the Court often has a robust role to play in resolving issues of national importance. With Justice Kennedy casting critical votes, over the last 30 years the Court has reasserted its role in a number of areas of law in which it was previously deferential to the judgment of the political branches.

Given Justice Kennedy's outsized role on the Roberts Court, whoever succeeds him could have an important influence on any number of areas of law. In particular, Justice Kennedy's votes were critical to the outcome of numerous Court decisions on matters relating to abortion, business law, civil rights, the death penalty, the regulation of elections, eminent domain, the environment, federalism, the First Amendment, gun rights, immigration, national security, oversight of the administrative state, and separation of powers. Accordingly, Justice Kennedy's jurisprudence in these areas—particularly in cases where he was the deciding vote—may be especially relevant to the Senate as it determines whether to approve the President's nominee to replace the soon-to-be-retired Justice.

On July 9, 2018, President Trump announced the nomination of Judge Brett M. Kavanaugh of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) to fill the impending vacancy on the Supreme Court caused by Justice Kennedy's scheduled retirement. CRS reports analyzing Judge Kavanaugh's jurisprudence on particular areas of the law, as well as a tabular listing of lower-court decisions in which he authored opinions, are in preparation.

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Andrew Nolan

Section Research Manager

Kevin M. Lewis

Legislative Attorney

Valerie C. Brannon

Legislative Attorney

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On June 27, 2018, Justice Anthony M. Kennedy announced that, effective July 31, 2018, he would retire from active service as an Associate Justice on the Supreme Court of the United States.¹ Nominated to replace Justice Lewis Powell in 1987,² Justice Kennedy has been one of the longest-serving Justices in the history of the Court.³ His decisive role on the Court, particularly during the Roberts Court era, cannot be overstated. While Justice Kennedy has been a critical vote on the Court for much of his 30-year tenure,⁴ since the October 2005 term that marked the beginning of the Roberts Court, Justice Kennedy has been the Court’s “median Justice,”⁵ voting for the winning side in a case more often than any of his colleagues in 9 out of 12 terms.⁶

During this era, the High Court issued a number of landmark rulings that spanned the ideological spectrum. For instance, during the Roberts Court era, the Court held that the Fourteenth Amendment to the Constitution requires states to recognize marriages between same-sex couples in the same circumstances as they recognize marriages between opposite-sex couples;⁷ invalidated state laws viewed to impose an “undue burden” on a woman’s right to terminate a pregnancy;⁸ afforded enemy belligerents detained at Guantanamo Bay certain procedural protections;⁹ and concluded that the Eighth Amendment prohibits the states from imposing the death penalty¹⁰ or a sentence of life without parole in certain circumstances.¹¹ At the same time, since 2005, the Court also struck down campaign finance laws banning corporate independent

¹ See Hon. Anthony M. Kennedy, *Letter to the President* (June 27, 2018), https://www.supremecourt.gov/publicinfo/press/Letter_to_the_President_June27.pdf. Justice Kennedy did not resign from the Court, but instead retired pursuant to 28 U.S.C. § 371(b), a provision that allows a Justice to maintain his salary and his eligibility to sit by designation on the lower courts.

² See SUPREME COURT NOMINATIONS, PRESENT-1789, U.S. SENATE, <https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited July 5, 2018) (indicating that President Ronald Reagan nominated Anthony M. Kennedy on November 30, 1987, and that the Senate provided its consent to the nomination on February 3, 1988).

³ By comparison to Justice Kennedy’s 30-year tenure on the Court, the Supreme Court website notes that the longest-serving Chief Justice, John Marshall, served more than 34 years, while the longest-serving Associate Justice, William O. Douglas, served more than 36 years. See SUPREME COURT OF THE UNITED STATES, *Frequently Asked Questions (FAQ)*, Version 2014.1 (last visited July 5, 2018), https://www.supremecourt.gov/about/members_text.aspx.

⁴ See Alicia Parlapiano & Jugal K. Patel, *With Kennedy’s Retirement, the Supreme Court Loses its Center*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/interactive/2018/06/27/us/politics/kennedy-retirement-supreme-court-median.html> (“For much of his tenure, Justice Kennedy has been the median justice, falling in the court’s ideological center, according to a measure based on voting patterns . . . From 1993 to 2005, Justice Kennedy shared the center of the Court with Justice Sandra Day O’Connor.”).

⁵ *Id.* (noting that after Justice O’Connor retired from the Court in 2005, Justice Kennedy was consistently the “median” Justice on the Court).

⁶ See CRS Legal Sidebar LSB10159, *Justice Kennedy Retires: Initial Considerations for Congress*, by Andrew Nolan and Michael John Garcia (noting that, save for the October 2017, 2014, and 2007 terms, Justice Kennedy was the most frequent Justice to be part of the deciding majority in cases decided each term by the Roberts Court).

⁷ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015) (Kennedy, J.) (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan).

⁸ See *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016) (Breyer, J.) (joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion by Kennedy, O’Connor, and Souter, JJ.).

⁹ See *Boumediene v. Bush*, 553 U.S. 723, 733 (2008) (Kennedy, J.) (joined by Justices Stevens, Souter, Ginsburg, and Breyer).

¹⁰ See *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (Kennedy, J.) (joined by Justices Stevens, Souter, Ginsburg, and Breyer).

¹¹ See *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (Kagan, J.) (joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor).

expenditures for electioneering communications;¹² invalidated Section 5 of the Voting Rights Act of 1965 on federalism grounds;¹³ recognized that the Second Amendment protects an individual's right to possess a firearm and to use that firearm for lawful purposes;¹⁴ upheld President Trump's proclamation placing entry restrictions on foreign nationals from specified countries;¹⁵ and invalidated on First Amendment grounds state laws that aimed to regulate certain commercial activities.¹⁶ In all of these cases, the sitting Justices were closely divided, and the composition of Justices in the deciding majority in such cases shifted dramatically from case to case with one exception: Justice Kennedy.¹⁷

Perhaps because of his pivotal role on the Court, like Justice Powell whom he succeeded,¹⁸ Justice Kennedy was viewed by many to be the Court's "swing" vote.¹⁹ The label of being a "swing vote" on the Court, however, may invite misleading conclusions about Justice Kennedy's approach to cases.²⁰ As several commentators have noted, Justice Kennedy's jurisprudence did not necessarily focus on compromise or balance in the Court's decisions,²¹ but was instead, at

¹² See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 319 (2010) (Kennedy, J.) (joined by Chief Justice Roberts and Justices Scalia and Alito and joined in part by Justice Thomas).

¹³ See *Shelby Cty. v. Holder*, 570 U.S. 529, 557 (2013) (Roberts, CJ) (joined by Justices Scalia, Kennedy, Thomas, and Alito).

¹⁴ See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (Scalia, J.) (joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito).

¹⁵ See *Trump v. Hawaii*, No. 17-965, 2018 WL 3116337, at *4 (June 26, 2018) (Roberts, CJ) (joined by Justices Kennedy, Thomas, Alito, and Gorsuch).

¹⁶ See, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011) (Kennedy, J.) (joined by Chief Justice Roberts and Justices Scalia, Thomas, Alito, and Sotomayor).

¹⁷ Underscoring Justice Kennedy's critical role on the Roberts Court, in several cases, because of sharp disagreements between the remaining eight Justices, Justice Kennedy authored separate concurring opinions that functionally controlled the outcome of the case. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in judgment) (while agreeing with the plurality that the policy being challenged was unconstitutional, concluding that race-conscious strategies aimed at promoting diversity in education could be devised that would satisfy strict scrutiny). *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 417-19 (2006) (Kennedy, J.) (stating that while the goal of policing partisan gerrymandering is a "salutary" one, the test proposed by the plaintiffs was "not convincing"); *Rapanos v. United States*, 547 U.S. 715, 759 (2006) (Kennedy, J., concurring in judgment) (maintaining that wetlands that possess a "significant nexus" to traditionally navigable waters may be regulated under the Clean Water Act). *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in judgment) ("While agreeing with the plurality that the complaint the appellants filed in the District Court must be dismissed, and while understanding that great caution is necessary when approaching this subject, I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.").

¹⁸ See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY xi (1994) (describing Justice Powell as the "most powerful man in America" because of his position at the "ideological center of a divided Court").

¹⁹ See, e.g., Massimo Calabresi & David Von Drehle, *What Will Justice Kennedy Do?*, TIME, June 18, 2012, at 28; James C. Phillips & Edward L. Carter, *Oral Argument in the Early Roberts Court: A Qualitative and Quantitative Analysis of Individual Justice Behavior*, 11 J. APP. PRAC. & PROCESS 325, 361-62 (2010) ("As the Roberts Court's swing or median justice, Justice Kennedy likely wields a disproportionately large influence compared to the other justices who tend to be more consistently liberal or conservative."); JEFFREY ROSEN, THE SUPREME COURT 236 (2007) (describing Justice Anthony Kennedy as the "swing justice" who has the "unique opportunity to determine the outcome of the most controversial cases on his own").

²⁰ See, e.g., Kristin M. McGaver, *Getting Back to Basics: Recognizing and Understanding the Swing Voter on the Supreme Court of the United States*, 101 MINN. L. REV. 1247, 1248 (2017) ("There is an extensive history and tradition of labeling Supreme Court Justices as 'swing' Justices. And yet the content of this label remains unclear.").

²¹ See, e.g., Ashutosh Bhagwat, *Liberty or Equality?*, 20 LEWIS & CLARK L. REV. 381, 382 (2016) ("But Justice Kennedy's widely recognized position as the swing Justice . . . obscures another and unusual reality about his role on the Court. Historically, swing Justices have tended to share certain characteristics: they have been pragmatists, lacking a strong jurisprudential philosophy, but instead valuing effective problem solving. . . . Justice Kennedy is just not a

times, informed by principles that resulted in votes that could not be categorized uniformly by a conservative or liberal ideology.²² For his part, Justice Kennedy resisted the “swing vote” moniker, declaring in a 2015 interview that “[t]he cases swing, I don’t.”²³ As a result, an examination of the underlying cases in which Justice Kennedy cast critical votes during the Roberts Court era may be necessary to fully gauge his jurisprudence and the significance of his retirement.

This report provides a broad overview of Justice Kennedy’s approach to the law, with a particular emphasis on how he interpreted the Constitution. The report then discusses what his retirement may mean for the future of the Court in various areas of the law, broadly noting key legal decisions during the Roberts Court era in which Justice Kennedy cast a decisive vote. The report does not, however, purport to discuss fully every area of law that Justice Kennedy considered during his more than three decades of service on the Court. Nonetheless, guided by several tables in the **Appendix** noting the opinions in which Justice Kennedy cast decisive votes during the Roberts Court era, the report highlights key aspects of Justice Kennedy’s jurisprudence and the key legal issues where his absence from the Court could result in a shift in the Court’s jurisprudence.

On July 9, 2018, President Trump announced the nomination of Judge Brett M. Kavanaugh of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) to fill the impending vacancy on the Supreme Court caused by Justice Kennedy’s scheduled retirement. CRS reports analyzing Judge Kavanaugh’s jurisprudence on particular areas of the law, as well as a tabular listing of lower-court decisions in which he authored opinions, are in preparation.

centrist pragmatist, lacking a strong judicial philosophy.”); Jan Crawford Greenburg, *The Roberts Court*, LEGALITIES (May 15, 2007 11:56 AM), <https://web.archive.org/web/20070521025813/http://blogs.abcnews.com/legalities> (“Kennedy is not O’Connor. Kennedy doesn’t instinctively seek the middle or try to provide balance. He is perfectly willing to vote with conservatives nine times in a row—then vote with them a tenth—if that’s how he sees the case. He wants to be consistent. And when he decides on his position, he’s pretty comfortable there.”); Jeffrey Rosen, *The Arrogance of Justice Anthony Kennedy*, THE NEW REPUBLIC (June 18, 2007), <https://newrepublic.com/article/60925/supreme-leader-the-arrogance-anthony-kennedy> (“[T]he contrast between Kennedy and O’Connor is stark. . . . Kennedy instinctively prefers opinions that are broad and deep. He attempts to identify a sweeping principle of justice and then tries to impose his abstractions on society.”).

²² See FRANK J. COLUCCI, JUSTICE KENNEDY’S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY 1, 5 (2009) (“Kennedy, properly understood is neither a profile in caprice nor a judicial minimalist . . . his opinions exhibit consistent, distinctive assumptions about how judges should interpret the Constitution and about the substantive values of liberty and human dignity its provisions protect.”); Jack Goldsmith, *Justice Kennedy’s Retirement Leaves the Future of U.S. Constitutional Law Entirely Up for Grabs*, WASH. POST (June 27, 2018), https://www.washingtonpost.com/opinions/justice-kennedys-retirement-is-the-biggest-event-in-us-jurisprudence-in-at-least-15-years/2018/06/27/746db704-585d-11e7-b38e-35fd8e0c288f_story.html (“While Kennedy lacked an overarching jurisprudential commitment, some combination of three principles informed most of his landmark rulings.”).

²³ See Marcia Coyle, *Justice Anthony Kennedy Loathes the Term ‘Swing Vote,’* NAT’L L.J. (Oct. 27, 2015), <http://www.nationallawjournal.com/id=1202740827841/Justice-Anthony-Kennedy-Loathes-the-Term-Swing-Vote?slreturn=20160129233646> (“And if you want to get on the wrong side of Kennedy, call him the high [C]ourt’s ‘swing vote.’ ‘I hate that term,’ he said. ‘I get this visual image of spatial gyrations. The cases swing; I don’t.’”).

An Overview of Justice Kennedy's Jurisprudence

As one legal scholar has observed, “identifying Justice Kennedy’s judicial philosophy is no easy task.”²⁴ Unlike Justice Antonin Scalia,²⁵ his colleague for nearly 28 years on the High Court, Justice Kennedy did not subscribe to a particular judicial philosophy, such as originalism or textualism.²⁶ In his 1987 confirmation hearings, Justice Kennedy eschewed committing himself to a “single, overarching theory” of legal interpretation.²⁷ For instance, in response to a question posed by Senator Robert Byrd concerning the role of history when interpreting the Constitution, the nominee opined that a judge cannot rely only on “history in order to make the meaning of the Constitution more clear,” and that “new generations” can also “yield new insights and new perspectives” that change “our understandings” of the Constitution.²⁸ These and similar statements made during his confirmation hearing²⁹ appear to have presaged the approach taken by Justice Kennedy on the Court, wherein he often synthesized several approaches to judging to guide his decision as to the appropriate result in a given case.³⁰ Justice Kennedy’s approach to judging appeared informed by certain guiding principles,³¹ three of the most determinative of which are discussed below.

Individual Liberty

Justice Kennedy’s jurisprudence was often grounded in concerns for personal liberty,³² that is, freedom from government interference with “thought, belief, expression, and certain intimate conduct.”³³ The Justice’s concerns for liberty manifested themselves in several free speech cases, wherein Justice Kennedy took the view that the First Amendment prohibited government actions

²⁴ A.E. Dick Howard, *Ten Things the 2012-13 Term Tells Us About the Roberts Court*, 99 VA. L. REV. ONLINE 48, 59 (2013); see also Goldsmith, *supra* note 22 (maintaining that Justice Kennedy “lacked an overarching jurisprudential commitment”); Ilya Shapiro, *Justice Kennedy: the Once and Future Swing Vote*, CATO COMMENTARY (Nov. 13, 2016), <https://www.cato.org/publications/commentary/justice-kennedy-once-future-swing-vote> (“Kennedy is a *sui generis* enigma at the heart of the modern Supreme Court.”).

²⁵ See Lyle Denniston, *Book Review: Justice Kennedy’s Law*, SCOTUSblog (Dec. 29, 2009, 1:33 p.m.), <http://www.scotusblog.com/2009/12/book-review-justice-kennedys-law/> (“Few understand [Justice Kennedy] in the way that virtually everyone can, and does, understand the more accessible philosophy of, say, his colleague, Justice Antonin Scalia.”). For more on Justice Scalia’s approach to the law, see CRS Report R44419, *Justice Antonin Scalia: His Jurisprudence and His Impact on the Court*, coordinated by Andrew Nolan and Brandon J. Murrill.

²⁶ See COLUCCI, *supra* note 22, at 5, 8; see also THOMAS R. HENSLEY ET AL., *THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES* 75 (1997) (stating that Justice “Kennedy does not appear to have a consistent judicial philosophy to guide his decision making”).

²⁷ See TINSLEY E. YARBROUGH, *THE REHNQUIST COURT AND THE CONSTITUTION* 17 (2000) (describing Justice Kennedy’s views of the law at his confirmation hearing).

²⁸ *Confirmation Hearings on the Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 100th Cong. 88, 164, 231-32 (1987).

²⁹ See YARBROUGH, *supra* note 27, at 17.

³⁰ See Akhil Reed Amar, *Justice Kennedy and the Ideal of Equality*, 28 PAC. L.J. 515, 520 (1997) (describing Justice Kennedy’s approach to legal interpretation as a “beautiful synthesis of principled legalism and honest realism”).

³¹ See Goldsmith, *supra* note 22.

³² See Bhagwat, *supra* note 21, at 383 (“[W]hat then is the content of Justice Kennedy’s underlying philosophy? The answer there is I think quite clear: a driving dedication to individual liberty, in all of its manifestations.”); see also Goldsmith, *supra* note 22 (describing Justice Kennedy’s jurisprudence as being “informed” by the related principles of dignity and liberty).

³³ See *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (Kennedy, J.).

that told individuals what they could say or what they could hear.³⁴ For instance, on the day before he announced his retirement, Justice Kennedy authored a concurring opinion to explain how government paternalism with respect to speech could “imperil[]” liberty:

It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. . . . Freedom of speech secures freedom of thought and belief.³⁵

In this vein, Justice Kennedy, on behalf of the Court in *Citizens United v. FEC*, struck down a federal campaign finance law banning corporate independent expenditures for electioneering communications, rejecting arguments that the government needed to police corporate political speech.³⁶ For Justice Kennedy, when the “[g]overnment seeks to use its full power . . . to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought” in violation of the First Amendment.³⁷ This rationale undergirded several other cases in which Justice Kennedy viewed the First Amendment to impose clear limits on the government’s ability to regulate speech within the commercial sphere.³⁸

Justice Kennedy’s emphasis on liberty also manifested itself in a number of decisions he authored or joined on issues implicating religion. For instance, in *Church of Lukumi Babalu Aye v. City of Hialeah*, Justice Kennedy, on behalf of the Court, struck down a set of ordinances enacted by a Florida city prohibiting animal sacrifice,³⁹ viewing the challenged laws as designed to “persecute or oppress” adherents to the Santeria religion.⁴⁰ In so doing, Justice Kennedy cautioned against “state intervention stem[ming] from animosity to religion or distrust of its practices,” and identified what he viewed to be the “high duty” imposed on government officials by the First Amendment: to “commit[] government to religious tolerance.”⁴¹ Quoting *Lukumi* 25 years later in his opinion for the Court in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, Justice Kennedy concluded that a state civil rights commission violated its “duty” to not treat a party before it with hostility because of that party’s religious beliefs.⁴² Likewise, expressing concern

³⁴ See HELEN J. KNOWLES, *THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY* 60-62 (2009); see also Bhagwat, *supra* note 21, at 384 (“The hallmark of Justice Kennedy’s free speech jurisprudence is a hatred of paternalism.”).

³⁵ Nat’l Inst. of Family & Life Advocates v. Becerra, No. 16-1140, 2018 WL 3116336, at *16 (U.S. June 26, 2018) (Kennedy, J., concurring).

³⁶ See *Citizens United v. FEC*, 558 U.S. 310, 319 (2010) (Kennedy, J.).

³⁷ *Id.* at 356.

³⁸ See, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-79 (2011) (Kennedy, J.) (declaring that “[t]he State may not burden the speech of others in order to tilt public debate in a preferred direction,” even in the “commercial marketplace” which, “like other spheres of our social and cultural life, provides a forum where ideas and information flourish.”) (internal citations omitted); *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (Kennedy, J.) (“Even under the First Amendment’s somewhat more forgiving standards for restrictions on commercial speech, a State may not curb protected expression without advancing a substantial governmental interest.”); see also *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571-72 (2001) (Kennedy, J., concurring) (noting his “continuing concerns” that the Court’s commercial speech jurisprudence gives “insufficient protection to truthful, nonmisleading commercial speech.”).

³⁹ 508 U.S. 520, 524 (1993).

⁴⁰ *Id.* at 547.

⁴¹ *Id.*

⁴² See 138 S. Ct. 1719, 1731 (2018).

over the “danger[s] to liberty” that “lie” when the state excludes religious groups from a public forum or exhibits viewpoints based on hostility toward religion,⁴³ Justice Kennedy wrote or joined several opinions that resulted in public spaces being opened for use by religious entities.⁴⁴ Nonetheless, the soon-to-be-retired Justice viewed the constitutional requirement of tolerance to apply to how religious adherents treated the nonreligious, as well. Writing for the Court in *Lee v. Weisman*, Justice Kennedy held that the First Amendment’s Establishment Clause prohibited a sectarian invocation and benediction at a public school graduation ceremony, maintaining that “prayer exercises in public schools carry a particular risk of indirect coercion” for objecting students, who may feel embarrassed or pressured by the state’s action.⁴⁵

Beyond the realm of the First Amendment, Justice Kennedy’s liberty jurisprudence animated a number of decisions in which the Court struck down several federal and state laws on either equal protection or substantive due process grounds.⁴⁶ In particular, his substantive due process cases seemed informed by a particular consideration related to liberty—the belief that the government must treat individuals with “dignity”⁴⁷—when concluding that a government measure either infringed upon an individual’s right to privacy or involved sanctioned animus toward a particular group.⁴⁸ For instance, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a plurality opinion of the Court authored by Justice Kennedy, along with Justice Sandra Day O’Connor and Justice David Souter,⁴⁹ declared that the Constitution prohibits the government from interfering with certain life decisions “central to personal dignity and autonomy” because 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.”⁵⁰ For the *Casey* plurality, “there is a realm of personal liberty which the government may not enter.”⁵¹ And Justice Kennedy echoed the themes of *Casey* in his opinion for the Court in *Lawrence v. Texas*, where the Court struck down a law that criminalized homosexual sodomy⁵² on the grounds that the Due Process Clause gives all people the “full right to engage in private [sexual] conduct without government intervention.”⁵³

⁴³ See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835(1995) (Kennedy, J.).

⁴⁴ See, e.g., *id.* at 830-31; see also *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397 (1993); cf. *Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 669 (2010).

⁴⁵ *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

⁴⁶ The Court has interpreted the Fifth and Fourteenth Amendments’ Due Process Clauses to contain a substantive component, wherein the Constitution protects certain fundamental liberty interests from deprivation by the government, unless the infringement is narrowly tailored to serve a compelling state interest. See *Washington v. Glucksberg*, 521 U.S. 702, 719-21 (1997).

⁴⁷ See Bhagwat, *supra* note 21, at 384 (“The other noteworthy aspect of Justice Kennedy’s commitment to liberty is that it is not abstract, it is instead tied to a very specific value: human dignity.”).

⁴⁸ While the concept of dignity in constitutional law is not self-explanatory, dignity has been recognized to encompass two related principles: (1) a principle stating that the government may not govern with animus toward long-persecuted, unpopular societal groups; and (2) an autonomy principle stating that there are certain spheres of a person’s life that the government simply cannot enter. See Andrew Nolan, *The Concept of “Dignity” as an Individual Right in Recent Rulings from the Roberts Court*, CRS Congressional Distribution Memorandum, at 4-8 (Sept. 1, 2014) (available upon request).

⁴⁹ 505 U.S. 833, 849 (1992) (plurality opinion by Kennedy, O’Connor, and Souter, JJ.).

⁵⁰ *Id.* at 851.

⁵¹ *Id.* at 847.

⁵² See 539 U.S. 558, 578 (2003) (Kennedy, J.).

⁵³ *Id.* at 578.

Lawrence was one of four opinions Justice Kennedy authored that, relying on a broad view of the concepts of liberty and dignity, invalidated laws on the grounds they interfered with the rights of persons who engage in same-sex relationships. First, in *Romer v. Evans*, the Supreme Court struck down an amendment to the Colorado Constitution prohibiting “all legislative, executive, or judicial action at any level of state or local government” designed to protect persons based on their gay, lesbian, or bisexual status.⁵⁴ Writing for the Court, Justice Kennedy declared that an “inevitable inference” must be made that the Colorado law was “born of animosity toward the class of persons affected” and concluded that the law was enacted out of a “bare . . . desire to harm a politically unpopular group” in violation of the Equal Protection Clause of the Fourteenth Amendment.⁵⁵ Building on the themes of *Romer* seven years later in *Lawrence v. Texas*, Justice Kennedy emphasized the “stigma” created by the Texas antisodomy statute and its implications for the “dignity of the persons charged,” including the potential humiliation of having a charge appear on an individual’s criminal record and having to register as a sex offender in several states.⁵⁶

A decade after *Lawrence*, the Court in *United States v. Windsor* struck down the federal Defense of Marriage Act (DOMA), which mandated that the federal government not recognize same-sex marriages. Justice Kennedy’s majority opinion declared that the “avowed purpose and practical effect of” DOMA was to interfere “with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power,” by denying a host of federal benefits to those same-sex couples who were married under the laws of their respective states.⁵⁷ As a consequence, the Court viewed DOMA as an attempt by Congress to stigmatize a particular group, because the “differentiation” of how same-sex marriage was treated under federal law “demean[ed] the [same-sex] couple” and “humilate[d] the tens of thousands of children now being raised by same-sex couples.”⁵⁸

Two years after *Windsor*, Justice Kennedy authored the Court’s landmark ruling in *Obergefell v. Hodges*, deciding that the “right to marry” applies with “equal force” to same-sex couples as it does to opposite-sex couples.⁵⁹ Specifically, the *Obergefell* Court held that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state.⁶⁰ In so holding, the Court concluded that a denial of marital recognition to same-sex couples ultimately “demean[ed]” and “stigma[tized]” those couples and any children resulting from such partnerships.⁶¹ Given this conclusion, the Court held that, while limiting marriage to opposite-sex couples may have once seemed “natural,” such a limitation was inconsistent with the right to marriage inherent in the “liberty” of the person as protected by the Fourteenth Amendment.⁶²

⁵⁴ See 517 U.S. 620, 624 (1996) (Kennedy, J.).

⁵⁵ *Id.* at 634.

⁵⁶ 539 U.S. at 575 (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.”).

⁵⁷ *Id.* at 770.

⁵⁸ *Id.* at 772.

⁵⁹ 135 S. Ct. 2584, 2599 (2015) (Kennedy, J.).

⁶⁰ *Id.* at 2608.

⁶¹ *Id.* at 2602.

⁶² *Id.* While the decision in *Obergefell* primarily rested on substantive due process grounds, the Court noted that the

While liberty concerns informed Justice Kennedy's assessment of government activities addressing certain facets of life, it should be noted that these concerns were not overtly determinative in all instances. Justice Kennedy, for example, tended to have a more restricted view of the Fourth Amendment, as exemplified in his 2013 opinion in *Maryland v. King*, where, writing on behalf of the Court, the Justice concluded that taking a cheek swab of a criminal arrestee's DNA was a reasonable search that did not require a warrant.⁶³ Moreover, on matters concerning government interference with personal property rights, Justice Kennedy joined several opinions declining to limit the scope of the government's power.⁶⁴ Nonetheless, as discussed, Justice Kennedy's "capacious notion" of liberty and dignity and his skepticism toward governmental efforts that could be viewed to interfere with those values underscore much of his constitutional jurisprudence.⁶⁵

Structural Protections of the Constitution

The structural protections of the Constitution—i.e., restraints imposed on the federal government by the doctrines of separation of powers and federalism—also influenced Justice Kennedy's jurisprudence. With respect to separation of powers, even before Justice Kennedy joined the Court, he authored as a federal appellate judge an opinion, eventually affirmed by the Supreme Court,⁶⁶ that invalidated the legislative veto, a mechanism by which one or both houses of Congress could, without enacting new legislation, override executive action.⁶⁷ Writing for the U.S. Court of Appeals for the Ninth Circuit, he identified two "principal purposes" of the separation of powers: "preventing concentrations of power dangerous to liberty and . . . promoting governmental efficiency."⁶⁸ As a Justice on the Supreme Court, Justice Kennedy tended to emphasize the former principle in his decisions on separation of powers. Concurring in *Clinton v. New York*, which struck down the Line Item Veto Act of 1996, Justice Kennedy described the Constitution's separation of powers as "designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty."⁶⁹ Accordingly, for Justice Kennedy, separation

"right of same sex couples to marry" is "derived, too," from the Fourteenth Amendment's Equal Protection Clause. *Id.* at 2602-03. In so holding, the Court recognized a general "synergy" between the Due Process Clause and the Equal Protection Clause, noting that just as evolving societal norms inform the liberty rights of same-sex couples, so too do "new insights and societal understandings" about homosexuality reveal "unjustified inequality" with respect to traditional concepts about the institution of marriage. *Id.* at 2603. In this sense, the Court viewed marriage laws prohibiting the licensing and recognition of same-sex marriages as working a grave and continuing harm to same-sex couples, serving to "disrespect and subordinate them." *Id.* at 2604. As a result, the Court ruled that the Equal Protection Clause prevents states from excluding same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. *Id.* at 2604-05.

⁶³ See 569 U.S. 435, 440-41 (2013) (Kennedy, J.).

⁶⁴ See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (concluding that the federal government had the power to criminalize the local cultivation of marijuana for medicinal purposes); *Kelo v. City of New London*, 545 U.S. 469, 488-89 (2005) (applying a deferential standard of review to determine whether a "taking" of property was for a "public use" within the meaning of the Fifth Amendment's Takings Clause).

⁶⁵ See Goldsmith, *supra* note 22.

⁶⁶ See *INS v. Chadha*, 462 U.S. 919, 959 (1983).

⁶⁷ *Chadha v. INS*, 634 F.2d 408, 435-36 (9th Cir. 1980) (Kennedy, J.).

⁶⁸ *Id.* at 425.

⁶⁹ *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); see also *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in judgment) ("It remains one of the most vital functions of this Court to police with care the separation of the governing powers. That is so even when, as is the case here, no immediate threat to liberty is apparent.").

of powers was a “defense against tyranny,”⁷⁰ and, in this vein, the Roberts Court era witnessed Justice Kennedy authoring or joining a number of majority opinions that invalidated on separation-of-powers grounds intrusions on the executive,⁷¹ legislative,⁷² or judicial functions.⁷³

Beyond emphasizing the importance of “horizontal” structural protections imposed by the Constitution upon the three branches of the federal government, Justice Kennedy’s jurisprudence also placed significant importance on the “vertical” structure created by the nation’s founding legal document respecting the sovereign roles of federal and state governments. During the Rehnquist and Roberts Courts, Justice Kennedy often found himself joining majority opinions that recognized federalism-based limitations on the power of the federal government, establishing limitations on Congress’s legislative powers⁷⁴ and reaffirming protections for state sovereignty grounded in part in the Tenth⁷⁵ and Eleventh Amendments.⁷⁶ At the same time, Justice Kennedy frequently concluded that when Congress acted within its enumerated powers and did not contravene any other federalism-based constraints on its power, Congress’s power was supreme and therefore preempted conflicting state laws.⁷⁷

⁷⁰ See *Loving v. United States*, 517 U.S. 748, 756 (1996) (Kennedy, J.).

⁷¹ See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2557 (2014) (concluding that the President lacked the power to make appointments under the Recess Appointments Clause when the appointments occurred during a three-day recess of the Senate); *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring) (concurring with judgment of the Court that presidentially created military commissions conflicted with the Uniform Code of Military Justice and provisions of the Geneva Conventions incorporated into the code, and contending that “[t]rial by military commission raises separation-of-powers concerns of the highest order”).

⁷² See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010) (holding that dual for-cause limitations on the removal of Board members contravene the Constitution’s separation of powers). While not relying on a liberty-based rationale in his opinion, Justice Kennedy notably authored the majority opinion in *Zivotofsky ex rel. Zivotofsky v. Kerry*, which struck down on separation-of-powers grounds a federal law directing the Secretary of State, upon request, to designate “Israel” as the place of birth on the passport of a U.S. citizen who is born in Jerusalem. See 135 S. Ct. 2076 (2015) (Kennedy, J.).

⁷³ See, e.g., *Stern v. Marshall*, 564 U.S. 462 (2011) (holding that bankruptcy courts lack the constitutional authority to adjudicate certain claims).

⁷⁴ See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 558 (2012) (Roberts, C.J.) & *id.* at 649-50 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (collectively limiting the scope of the Commerce Clause to prevent Congress from regulating inactivity); *United States v. Morrison*, 529 U.S. 598, 617 (2000) (holding that Congress lacks the authority under the Commerce Clause to regulate noneconomic intrastate activity); *United States v. Lopez*, 514 U.S. 549, 558 (1995) (same); see also *Shelby Cty. v. Holder*, 570 U.S. 529, 557 (2013) (holding that Congress cannot use its enforcement power under the Fifteenth Amendment to impede on the equal sovereignty of the states without justifying its actions based on current conditions); *Coleman v. Court of Appeals*, 566 U.S. 30, 33 (2012) (Kennedy, J.) (limiting the scope of the Enforcement Clause of the Fourteenth Amendment such that Congress cannot enact legislation that lacks congruence and proportionality between the injury being prevented and the means adopted to that end); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) (same); *Morrison*, 529 U.S. at 626 (same); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82-83 (2000) (same); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639 (1999) (same); *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) (Kennedy, J.) (same).

⁷⁵ See, e.g., *New York v. United States*, 505 U.S. 144, 183 (1992) (recognizing the anticommandeering doctrine, which prohibits Congress from issuing orders directly to the states); see also *Printz v. United States*, 521 U.S. 898, 935 (1997) (extending the anticommandeering doctrine to state executive officers).

⁷⁶ See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (concluding that Congress lacks power under Article I of the Constitution to abrogate state sovereign immunity with respect to suits in federal court); see also *Alden v. Maine*, 527 U.S. 706, 712 (1999) (Kennedy, J.) (holding that Congress cannot, under Article I, subject nonconsenting states to private suits for damages in their own courts).

⁷⁷ See Gregory M. Dickinson, *An Empirical Study of Obstacle Preemption in the Supreme Court*, 89 NEB. L. REV. 682, 692-700 & n.71 (2011) (noting Justice Kennedy’s voting habits in preemption cases, concluding that “Justice Kennedy, is . . . markedly more conservative on the issue of preemption than in his jurisprudence generally” and “is firmly within the conservative camp on preemption questions.”).

Like his separation-of-power decisions, Justice Kennedy's federalism jurisprudence was frequently grounded in liberty-based rationales. For instance, as Justice Kennedy maintained in his majority opinion in *Bond v. United States*, "[f]ederalism is more than an exercise in setting the boundary between different institutions of government for their own integrity."⁷⁸ Instead, the Justice viewed federalism as "secur[ing] the freedom of the individual" by allowing "those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power" and "by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions."⁷⁹ This central tenet of Justice Kennedy's judicial approach was captured by the joint dissent he coauthored in *NFIB v. Sebelius*:

Structural protections—notably, the restraints imposed by federalism and separation of powers—are less romantic and have less obvious a connection to personal freedom than the provisions of the Bill of Rights or the Civil War Amendments. Hence they tend to be undervalued or even forgotten by our citizens. It should be the responsibility of the Court to teach otherwise, to remind our people that the Framers considered structural protections of freedom the most important ones, for which reason they alone were embodied in the original Constitution and not left to later amendment. The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril.⁸⁰

The Role of the Judiciary

Justice Kennedy's jurisprudence was also undergirded by a relatively robust view of the role of the Court, in which the Court, led by the Justice, began to exercise its power of judicial review with respect to new or formerly ignored legal issues.⁸¹ Like other aspects of his judicial approach, Justice Kennedy was not uniform in his views on judicial power. He recognized, at times, limits to the power of the judiciary, particularly in cases interpreting the justiciability requirements of Article III of the Constitution.⁸² For example, Justice Kennedy joined the Court's 2013 opinion in *Clapper v. Amnesty International*, which held that a plaintiff seeking injunctive relief from a court first had to allege that any injury he was going to suffer as a result of the complained-of action was "certainly impending."⁸³ Likewise, in matters concerning the judiciary's role in scrutinizing national security decisions by the political branches, Justice Kennedy tended to view the Court's role more minimally.⁸⁴

⁷⁸ 564 U.S. 211, 221 (2011) (Kennedy, J.).

⁷⁹ *Id.* at 221-22.

⁸⁰ See *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 707 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

⁸¹ See Goldsmith, *supra* note 22 (noting a "third principle" that informed Justice Kennedy's rulings was a "robust conception of judicial power."); see also Jeffrey Rosen, *An Enigmatic Court? Examining the Roberts Court as it Begins Year Three: The Roberts Court & Executive Power*, 35 PEPP. L. REV. 503, 508 (2008) [hereinafter Rosen-Enigmatic] (describing Justice Kennedy as a "judicial supremacist" and the "Court's most vocal defender of judicial power.").

⁸² See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (joining Court's opinion holding plaintiffs failed to demonstrate an injury necessary for Article III standing); but see *Summers v. Earth Island Inst.*, 555 U.S. 488, 501 (2009) (Kennedy, J., concurring) (noting that while plaintiffs lacked Article III standing, Congress could in the future, by identifying or conferring "some interest separate and apart from a procedural right" on the plaintiffs, "provide redress for a concrete injury" "giving rise to a case or controversy where none existed before") (internal citations and quotations omitted); see also *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) (joining majority opinion concluding that petitioners had standing to challenge EPA's denial of their rulemaking petition).

⁸³ *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013).

⁸⁴ See, e.g., *Trump v. Hawaii*, No. 17-965, 2018 WL 3116337, at *25 (June 26, 2018) (Kennedy, J., concurring).

Nonetheless, during his time on the Court, Justice Kennedy voted to strike down federal or state laws as unconstitutional with greater regularity than most of his colleagues. Washington University Law's Supreme Court Database identifies Justice Kennedy, from the October 1988 term through the October 2016 term, as joining Court rulings striking down federal or state legislation with more regularity than 12 of the 16 Justices he served with during that period (Justices Harry Blackmun, William Brennan, Thurgood Marshall, and Byron White were Justice Kennedy's only colleagues from his tenure on the Court, through the October 2016 term, who were more likely to join such opinions).⁸⁵ Justice Kennedy's willingness to invalidate federal or state laws may be indicative of his broad conception of the Court's role in resolving issues of national significance.⁸⁶ As Justice Kennedy declared in an interview in 2005, the Supreme Court "make[s] more important decisions"—i.e., decisions that "will control the direction of society"—than the "legislative branch does—precluding foreign affairs perhaps."⁸⁷

In rulings where Justice Kennedy typically provided a critical vote, the Court in recent decades has made significant pronouncements in legal areas where it earlier had been silent or expressly recognized the decisions of the political branches as dispositive. For instance, in the era preceding Justice Kennedy's appointment to the High Court, a majority of the Court had concluded that the "political processes" (i.e., discretionary actions taken by Congress and the President), and not the Court, would be the primary means to enforce federalism-based limits on Congress's powers.⁸⁸ However, with the Rehnquist Court came a shift in federalism jurisprudence, and the judiciary began to police the limits of Congress's powers vis-à-vis the states.⁸⁹ Justice Kennedy's concurrence in *United States v. Lopez*⁹⁰ included a robust defense for this shift in approach:

[T]he absence of structural mechanisms to require those officials to undertake [the] principled task [of "maintaining the federal balance"], and the momentary political

(observing that "[t]here are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention"); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861(2017) (Kennedy, J.) (stating that "[n]ational-security policy is the prerogative of the Congress and President," requiring judicial deference to national security determinations); *but see Boumediene v. Bush*, 553 U.S. 723, 755 (2008) (Kennedy, J.) (concluding that "fundamental separation-of-powers principles" required judicial examination of whether Guantanamo Bay is under the *de facto* control of the United States).

⁸⁵ See WASHINGTON UNIVERSITY LAW, SUPREME COURT DATABASE (last accessed July 5, 2018), <http://scdb.wustl.edu/analysisOverview.php>. A search was conducted using Washington University Law's Supreme Court Database for cases from October Term 1987 through October Term 2016 in which the Court struck down a federal, state, or local law as unconstitutional and whether a particular Justice voted with the majority in such cases. (The database has not yet been updated to reflect the October 2017 term.) From the time Justice Kennedy joined the Court in February 1988, the Court struck down laws in 194 cases. Justice Kennedy was part of the deciding majority in 143 of those cases. Other Justices who joined rulings that struck down federal or state laws included the following: Souter (88); Stevens (96); Ginsburg (83); Scalia (90); O'Connor (83); Breyer (73); Rehnquist (63); Thomas (59); Roberts (32); Blackmun (36); Sotomayor (23); White (31); Alito (18); Kagan (18); Marshall (27); and Brennan (24). Averaging those numbers per year served on the Court results in the following: Brennan (8 cases/term); Marshall (6.8 cases/term); White (5.2 cases/term); Blackmun (5.1 cases/term); Kennedy (4.8 cases/term); Souter (4.6 cases/term); O'Connor (4.6 cases/term); Stevens (4.2 cases/term); Rehnquist (3.5 cases/term); Ginsburg (3.5 cases/term); Breyer (3.2 cases/term); Scalia (3.1 cases/term); Sotomayor (2.9 cases/term); Roberts (2.7 cases/term); Kagan (2.6 cases/term); Thomas (2.3 cases/term); and Alito (1.6 cases/term).

⁸⁶ See Rosen-Enigmatic, *supra* note 81, at 508 (describing Justice Kennedy's willingness to strike down legislation as indicative of his view of judicial power).

⁸⁷ See Hon. Anthony M. Kennedy, *The Essential Right to Human Dignity*, ACADEMY OF ACHIEVEMENT, (June 3, 2005), <http://www.achievement.org/achiever/anthony-m-kennedy/#interview>.

⁸⁸ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985).

⁸⁹ See *supra* notes 75-76.

⁹⁰ See *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role. Although it is the obligation of all officers of the Government to respect the constitutional design, . . . the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.⁹¹

Another example of how the Court's role ascended during Justice Kennedy's tenure concerned the Court's approach toward laws that discriminated against persons engaged in same-sex relationships. The decades that preceded Justice Kennedy's appointment saw the Court upholding laws criminalizing same-sex sodomy⁹² and summarily affirming rulings that rejected a constitutional right to same-sex marriage.⁹³ However, as discussed, Justice Kennedy's 1996 opinion in *Romer v. Evans*⁹⁴ ushered in a new era in which the Court began to scrutinize laws that denied certain rights to persons in same-sex relationships. In *Lawrence*, the Court reversed its earlier ruling with respect to the criminalization of same-sex sodomy,⁹⁵ and 12 years later, Justice Kennedy's opinion for the Court in *Obergefell* recognized a constitutional right for same-sex couples to marry,⁹⁶ marking a stark contrast to the Court's approach to such matters in the decades preceding Justice Kennedy joining the Court.⁹⁷

More broadly, Justice Kennedy's jurisprudence reaffirmed the role of the Court as the final expositor of the meaning of the Constitution.⁹⁸ For example, in *City of Boerne v. Flores*, which invalidated the Religious Freedom Restoration Act of 1993's application to state governments, Justice Kennedy's majority opinion rejected a reading of older precedent from the Warren Court era that implied that Congress, through enacting legislation under the Enforcement Clause of the Fourteenth Amendment, could expand upon the rights the Court previously had recognized the amendment to protect.⁹⁹ For Justice Kennedy, Congress's power under the Fourteenth Amendment was limited to "determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," but the Court retained the power to determine the meaning of the Constitution and its precedents. The Supreme Court's interpretation of the Constitution ultimately "must control,"¹⁰⁰ rather than the interpretation advanced by another branch of government.

Justice Kennedy's view of judicial supremacy with respect to constitutional interpretation was not limited to clashes between the legislative and judicial branches. For example, in *United States v. Windsor*, Justice Kennedy's majority opinion rejected the argument that the Court lacked jurisdiction to adjudicate an appeal when both the plaintiff and executive branch defendant agreed

⁹¹ *Id.* at 577-78.

⁹² See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

⁹³ See *Baker v. Nelson*, 409 U.S. 810 (1972).

⁹⁴ See 517 U.S. 620, 634 (1996) (Kennedy, J.).

⁹⁵ See 539 U.S. 558, 578 (2003) (Kennedy, J.).

⁹⁶ See 135 S. Ct. 2584, 2599 (2015) (Kennedy, J.).

⁹⁷ See *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 349-50 (7th Cir. 2017) (en banc) (discussing the evolution of the Court's jurisprudence with respect to laws that burden the liberty of same-sex couples).

⁹⁸ For a discussion about the debate over the Court's role in interpreting the Constitution, see CRS Report R44729, *Constitutional Authority Statements and the Powers of Congress: An Overview*, by Andrew Nolan.

⁹⁹ See 521 U.S. 507, 527-28 (1997) (rejecting reading *Katzenbach v. Morgan*, 384 U.S. 641 (1966) to "give Congress the power to interpret the Constitution.").

¹⁰⁰ *Id.* at 536.

as to the ultimate outcome of the case (i.e., that DOMA was unconstitutional).¹⁰¹ The *Windsor* Court believed that, if judicial review of the legality of a measure could be circumvented by the executive branch conceding a plaintiff's claim that a federal statute was unlawful, "[t]his would undermine the clear dictate of the separation-of-powers principle that when an Act of Congress is alleged to conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is."¹⁰² In a similar vein, Justice Kennedy, in concluding on behalf of the Court in *Boumediene v. Bush* that enemy belligerents detained at the U.S. Naval Base in Guantanamo Bay, Cuba, were entitled to seek writs of habeas corpus, rejected the executive branch's argument that the constitutional writ of habeas could never extend to noncitizens being held outside of U.S. sovereign territory, regardless of the degree of control the United States exercised over the location.¹⁰³ For Justice Kennedy, the Constitution "cannot be contracted away" through a lease between the U.S. and Cuban governments.¹⁰⁴ The political branches lacked the power to "say 'what the law is'" and could not "switch the Constitution on or off at will."¹⁰⁵ As a consequence, while Justice Kennedy may have occasionally recognized limits to the role of the Court in resolving legal disputes, opinions like *Boumediene* placed the Court, at least in the view of one legal commentator, at the "apex of power in the constitutional structure."¹⁰⁶

Justice Kennedy's Decisive Votes in Roberts Court-Era Cases

The principles that undergirded Justice Kennedy's judicial philosophy often cut across ideological lines, as his views on liberty, the structural Constitution, and the power of the Court resulted in the Justice taking sometimes idiosyncratic approaches to a given case.¹⁰⁷ As a result, Justice Kennedy's approach to the law placed him in the middle of the Roberts Court, with the Justice not necessarily voting in tandem with the blocs of Justices that commentators have labeled to be "liberal" or "conservative."¹⁰⁸ Justice Kennedy had a significant influence on the Court, sometimes because the substance of his opinions was jurisprudentially significant, as in the areas of free speech and substantive due process, and sometimes by means of providing a fifth vote in closely divided cases.

The following subsections broadly note critical areas of law in which Justice Kennedy was particularly influential on the Roberts Court. The subsections briefly highlight Justice Kennedy's approach to a given area of law, noting the key cases that help explain the Justice's views on a given legal issue. Throughout, the subsections, by noting Justice Kennedy's influence on a

¹⁰¹ See 570 U.S. 744, 762 (2013) (Kennedy, J.).

¹⁰² *Id.* (internal quotations and citations omitted).

¹⁰³ See 553 U.S. 723, 755 (2008) (Kennedy, J.).

¹⁰⁴ *Id.* at 765 (quoting *Marbury v. Madison*, 5 U.S. (Cranch) 137, 177 (1803)).

¹⁰⁵ *Id.*

¹⁰⁶ See Noah Feldman, *Justice Kennedy's Legacy is the Dignity He Bestowed*, BLOOMBERG OPINION (June 27, 2018, 3:24 PM), <https://www.bloomberg.com/view/articles/2018-06-27/anthony-kennedy-retirement-his-legacy-is-dignity-he-created>.

¹⁰⁷ See *supra* notes 7-17 and accompanying text.

¹⁰⁸ E.g., Gregory E. Maggs, *Justice Kennedy's Use of Sources of the Original Meaning of the Constitution*, 44 MCGEORGE L. REV. 77, 79 (2013) ("Scholars and commentators often describe Justice Kennedy as the 'swing vote' on the Supreme Court . . . As the swing vote, Justice Kennedy belongs to neither block, but 'swings' between them . . .").

particular area of law, signal how the trajectory of the Court’s jurisprudence in that area may change when Justice Kennedy retires from active service on the Court.

Administrative Law

Justice Kennedy was less influential on administrative law matters than he was in other areas of the law, though he did, at times, express the opinion that courts should carefully police the power of the administrative state based on separation-of-powers concerns. For instance, in a concurring opinion in *FCC v. Fox Television Stations, Inc.*, he noted the unique “role and position” of administrative agencies in the federal government, and stated that “if agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances.”¹⁰⁹ To address this danger, he argued that courts should carefully apply the various doctrines limiting agencies’ power.¹¹⁰

Nonetheless, like other legal issues he approached while on the Court, Justice Kennedy’s votes in administrative law cases tended to place him in the middle of the Roberts Court. One of the biggest flashpoints in administrative law is a judge’s stance on the doctrines governing judicial deference to agencies’ interpretations of statutes, and *Chevron* deference in particular.¹¹¹ *Chevron* deference counsels that if a statute is ambiguous, courts should defer to certain reasonable agency constructions of the statute.¹¹² Justice Kennedy’s track record under *Chevron* was relatively mixed overall: he provided the Roberts Court’s fifth vote in decisions deferring to an agency’s interpretation under *Chevron* in four cases¹¹³ and provided the fifth vote to reject deference in at least six cases.¹¹⁴ Moreover, Justice Kennedy authored the Court’s 2013 opinion in *Decker v. Northwest Environmental Defense Center*,¹¹⁵ relying, over Justice Scalia’s dissent,¹¹⁶ on the *Auer* doctrine, which affords deference toward an agency’s interpretation of its own regulations.¹¹⁷

¹⁰⁹ 556 U.S. 502, 536 (2009) (Kennedy, J., concurring).

¹¹⁰ See *id.* at 536-37.

¹¹¹ E.g., Gillian E. Metzger, *The Supreme Court 2016 Term, Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 93 (2017).

¹¹² *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984). See generally CRS Report R44954, *Chevron Deference: A Primer*, by Valerie C. Brannon and Jared P. Cole.

¹¹³ *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 224 (2009); *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007); *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 100 (2007); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007). See also *Dada v. Mukasey*, 554 U.S. 1, 20 (2008) (Kennedy, J.) (holding agency interpretation was entitled to “respectful consideration”). This list was created by comparing the lists of decisions in which Justice Kennedy cast the deciding vote, see *infra* **Appendix**, to the lists of decisions in which Justice Kennedy voted in favor of and against agency interpretations that were compiled by Jack M. Beermann, *Chevron at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731, 737-38 (2014). Opinions issued after the date of the article’s publication in which Justice Kennedy cast the deciding vote were independently reviewed for mentions of *Chevron*.

¹¹⁴ *Wisconsin Cent. Ltd. v. United States*, No. 17-530, 2018 WL 3058014, at *6 (U.S. June 21, 2018); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629–30 (2018); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358–59 (2018); *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015); *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 642 n.11 (2007). See also *Rapanos v. United States*, 547 U.S. 715, 782-783 (Kennedy, J., concurring) (concluding agency’s interpretation of statute might be reasonable under some circumstances, but concluding that a remand for reconsideration by the lower courts was necessary).

¹¹⁵ 568 U.S. 597 (2013).

¹¹⁶ *Id.* at 616 (Scalia, J., dissenting).

¹¹⁷ *Id.* at 613-14 (majority opinion).

However, in the Court's most recent term, less than a week before Justice Kennedy announced that he would be retiring, Justice Kennedy authored an opinion in which he called for the Court to "reconsider" *Chevron*.¹¹⁸ Echoing the separation-of powers concerns he had earlier voiced in opinions such as *FCC v. Fox Television Stations, Inc.*,¹¹⁹ Justice Kennedy expressed concern that lower courts had sometimes afforded agency interpretations "reflexive deference," abdicating "the Judiciary's proper role in interpreting federal statutes."¹²⁰ He suggested that this abdication violated "constitutional separation-of-powers principles."¹²¹ Accordingly, with a number of Justices arguing for reexaminations of both the *Chevron*¹²² and *Auer*¹²³ doctrines, Justice Kennedy's successor could have an important role to play regarding the future of administrative law and how courts scrutinize an agency's legal conclusions.¹²⁴

Business Law

Justice Kennedy cast numerous decisive votes in business law cases throughout his tenure on the Roberts Court, including in cases involving antitrust,¹²⁵ business taxation,¹²⁶ bankruptcy and debt collection,¹²⁷ intellectual property,¹²⁸ securities,¹²⁹ civil tort liability,¹³⁰ class action litigation,¹³¹ and employment discrimination.¹³² While it may be difficult to observe discernible trends across this diverse group of legal matters, at least two trends in Justice Kennedy's business law jurisprudence during the Roberts Court era are readily apparent. First, in a string of closely divided cases presenting the issue of whether businesses can require plaintiffs to submit their disputes to binding arbitration instead of litigating their disputes in court, Justice Kennedy

¹¹⁸ *Pereira v. Sessions*, No. 17-459, 2018 WL 3058276, at *14 (U.S. June 21, 2018) (Kennedy, J., concurring).

¹¹⁹ 556 U.S. 502, 536 (2009) (Kennedy, J., concurring).

¹²⁰ *Pereira*, 2018 WL 3058276 at *14.

¹²¹ *Id.*

¹²² *See, e.g., Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring).

¹²³ *See, e.g., Garco Constr., Inc. v. Speer*, 138 S. Ct. 1052, 1052 (2018) (Thomas, J., dissenting from denial of certiorari).

¹²⁴ *See, e.g.,* Bridget C.E. Dooling, *Justice Kennedy's parting swipe against judges deferring to administrative agencies*, THE HILL (July 9, 2018, 6:30 AM), <http://thehill.com/opinion/judiciary/396020-justice-kennedys-parting-swipe-against-judges-deferring-to-administrative>; Noah Feldman, *A Power Grab of Sorts, Buried in a Supreme Court Decision*, BLOOMBERG OPINION (June 24, 2018, 10:00 AM), <https://www.bloomberg.com/view/articles/2018-06-24/call-to-end-chevron-doctrine-is-a-justice-kennedy-power-grab>; Joshua Matz, *The Imminent Demise of Chevron Deference?*, TAKE CARE (June 21, 2018), <https://takecareblog.com/blog/the-imminent-demise-of-chevron-deference>.

¹²⁵ *See, e.g., Ohio v. Am. Express Co.*, No. 16-1454, 2018 WL 3096305, at *6 (June 25, 2018); *FTC v. Actavis, Inc.*, 570 U.S. 136, 140-60 (2013); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 881-908 (2007) (Kennedy, J.).

¹²⁶ *See, e.g., South Dakota v. Wayfair, Inc.*, No. 17-494, 2018 WL 3058015, at *4-18 (June 21, 2018) (Kennedy, J.).

¹²⁷ *See, e.g., Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1410-16 (2017); *Stern v. Marshall*, 564 U.S. 462, 468-503 (2011).

¹²⁸ *See, e.g., SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1352-60 (2018).

¹²⁹ *See, e.g., Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2047-55 (2017) (Kennedy, J.); *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 137-48 (2011); *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 152-67 (2008) (Kennedy, J.).

¹³⁰ *See, e.g., Jesner v. Arab Bank*, 138 S. Ct. 1386, 1393-1408 (2018) (Kennedy, J.); *Philip Morris USA v. Williams*, 549 U.S. 346, 349-58 (2007).

¹³¹ *See, e.g., Comcast Corp. v. Behrend*, 569 U.S. 27, 29-38 (2013); *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 342-67 (2011).

¹³² *See, e.g., Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 169-80 (2009).

frequently was part of Court majorities ruling that the claims were arbitrable.¹³³ Second, Justice Kennedy cast deciding votes in several cases holding that federal law preempted certain state tort causes of action, thereby limiting the circumstances in which plaintiffs could hold businesses liable for conduct that would otherwise violate state law.¹³⁴ Justice Kennedy's deciding vote in such cases may have helped solidify the Roberts Court's reputation as being particularly pro-business,¹³⁵ prompting the question of whether Justice Kennedy's departure from the Court will change the Roberts Court's approach to business matters.¹³⁶

Civil Rights

While serving on the Roberts Court, Justice Kennedy was a critical vote in civil rights cases, addressing both constitutional and statutory matters relating to a broad range of subjects, including voting rights,¹³⁷ education,¹³⁸ and labor and employment.¹³⁹ For instance, in the context of labor and employment law, Justice Kennedy sided with the majority in a number of closely divided rulings adopting a narrower interpretation of Title VII of the Civil Rights Act of 1964 relative to the approach favored by the dissenting Justices on the Court.¹⁴⁰ Justice Kennedy joined the majority opinion in *Ledbetter v. Goodyear Tire*, which held that a female employee's complaint of pay discrimination was time barred.¹⁴¹ In a ruling later abrogated by Congress,¹⁴² the majority reasoned that the statutory period for bringing such a claim began with the defendant's original discriminatory pay decision, and thus concluded that each subsequent paycheck that followed did not reset the statute of limitations.¹⁴³

¹³³ See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619-32 (2018); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 231-39 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336-52 (2011); *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 65-76 (2010); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 251-74 (2009).

¹³⁴ See, e.g., *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 475-93 (2013); *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 608-20, 623-26 (2011). But see *Altria Grp., Inc. v. Good*, 555 U.S. 70, 72-91 (2008).

¹³⁵ See, e.g., Lee Epstein, William M. Landes & Hon. Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013) ("Whether measured by decisions or Justices' votes, a plunge in warmth toward business during the 1960s (the heyday of the Warren Court) was quickly reversed; and the Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts, which preceded it, were.").

¹³⁶ See Tucker Higgins, *Anthony Kennedy's Retirement Threatens to Upend the Supreme Court on Social Issues, but Big Business will Hardly Notice*, CNBC (June 29, 2018, 1:15 PM), <https://www.cnbc.com/2018/06/28/effect-of-anthony-kennedys-retirement-on-business.html> (discussing Justice Kennedy's legacy on business law issues and noting the various business law matters that could be before the Court in the upcoming term).

¹³⁷ See, e.g., *Abbott v. Perez*, Nos. 17-586, 17-626, 2018 WL 3096311, at *4-24 (June 25, 2018); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1262-74 (2015); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 409-47 (2006) (Kennedy, J.).

¹³⁸ *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2204-15 (2016) (Kennedy, J.); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782-98 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

¹³⁹ See, e.g., *Vance v. Ball State Univ.*, 570 U.S. 421, 423-50 (2013); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 169-80 (2009); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621-43 (2007).

¹⁴⁰ See, e.g., *Vance*, 570 U.S. at 423-50 (holding that an employee is a "supervisor" within the meaning of Title VII only if he possesses the power to undertake tangible employment actions against the victim); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 342-63 (2013) (Kennedy, J.) (concluding that a plaintiff asserting a retaliation claim under Title VII must demonstrate but-for causation).

¹⁴¹ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621-43 (2007) (holding that only discriminatory pay decisions triggered the time limit for filing a charge with Equal Employment Opportunity Commission).

¹⁴² See Lilly Ledbetter Fair Pay Act of 2009, P.L. 111-2, 123 Stat. 5.

¹⁴³ *Ledbetter*, 550 U.S. at 621-43.

In other contexts, Justice Kennedy took a broader view regarding the statutory and constitutional protections afforded to certain marginalized groups. Most notably, as discussed,¹⁴⁴ Justice Kennedy authored four major opinions that recognized constitutional protections against state-sponsored discrimination based on sexual orientation.¹⁴⁵ Justice Kennedy also wrote the Court's opinion in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, in which a bare majority held that plaintiffs could, under the Fair Housing Act, assert disparate impact claims—that is, claims based not on intentional discrimination, but instead on a particular practice that adversely affects a protected group.¹⁴⁶

Justice Kennedy was particularly consequential in the Roberts Court's decisions concerning race-conscious education policies. For example, Justice Kennedy concurred in the judgment rendered in *Parents Involved in Community Schools v. Seattle School District No. 1*,¹⁴⁷ which invalidated school assignment plans that partially relied on race to determine which schools children in the districts could attend.¹⁴⁸ At the same time, however, Justice Kennedy wrote a separate opinion in *Parents Involved* expressing his view that school districts should nonetheless be “free to devise race-conscious measures” to promote diversity as long as those measures “address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.”¹⁴⁹ The Justice then authored the Court's latest pronouncement on affirmative action two terms ago in *Fisher v. University of Texas at Austin*, which rejected a white applicant's constitutional challenge to a state university's race-conscious admissions program.¹⁵⁰

Given Justice Kennedy's deciding vote on many of the cases mentioned above, his replacement could have an especially influential role in a host of civil rights matters.¹⁵¹

Criminal Law and Procedure

While Justice Kennedy was perhaps less consequential for the Court's jurisprudence in the area of criminal law and procedure than in other areas, he nonetheless provided the deciding vote in a number of cases concerning criminal law and procedure.¹⁵² In the realm of the Fourth Amendment, which provides protection from unreasonable searches and seizures,¹⁵³ Justice Kennedy often came down on the side of the government, upholding searches and seizures or otherwise allowing the admission of evidence.¹⁵⁴ In a number of cases, Justice Kennedy

¹⁴⁴ See *infra* “Substantive Due Process and Fundamental Rights.”

¹⁴⁵ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593-2608 (2015) (Kennedy, J.); *United States v. Windsor*, 570 U.S. 744, 749-75 (2013) (Kennedy, J.); *Lawrence v. Texas*, 539 U.S. 558, 562-79 (2003) (Kennedy, J.); *Romer v. Evans*, 517 U.S. 620, 623-36 (1996) (Kennedy, J.).

¹⁴⁶ 135 S. Ct. 2507, 2513-26 (2015) (Kennedy, J.).

¹⁴⁷ 551 U.S. 701, 782 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

¹⁴⁸ *Id.* at 748 (Roberts, C.J.) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

¹⁴⁹ *Id.* at 788-89 (Kennedy, J., concurring in part and concurring in the judgment).

¹⁵⁰ 136 S. Ct. 2198, 2205-15 (2016) (Kennedy, J.).

¹⁵¹ See Braden Campbell, *Post-Kennedy Court Likely To Take Narrow View Of Title VII*, Law360 (June 28, 2018, 10:31 PM), <https://www.law360.com/articles/1058583/post-kennedy-court-likely-to-take-narrow-view-of-title-vii>.

¹⁵² See *infra* “Table A-1, Justice Anthony Kennedy as a ‘Swing’ Vote: Constitutional Law Decisions.”

¹⁵³ U.S. CONST. amend. IV.

¹⁵⁴ See, e.g., *Utah v. Strieff*, 136 S. Ct. 2056, 2059 (2016); *Navarette v. California*, 134 S. Ct. 1683, 1686 (2014); *Maryland v. King*, 569 U.S. 435, 448 (2013) (Kennedy, J.); *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 566 U.S. 318, 323 (2012) (Kennedy, J.); *Herring v. United States*, 555 U.S. 135, 137 (2009); *Hudson v.*

suggested that the Court should leave room for local governments to develop their own procedures governing searches, giving local authorities discretion to strike the proper balance between preventing unreasonable searches while still allowing law enforcement officers to conduct effective searches in the interest of public security.¹⁵⁵ The Justice was similarly deferential to the government in the context of *Miranda* warnings,¹⁵⁶ citing police officers' need for discretion to make "difficult decisions" in the face of ambiguity.¹⁵⁷ In line with his tendency to side with the government in many criminal procedure disputes before the Court, Justice Kennedy was in dissent in a number of the Court's recent rulings taking more expansive views of the Fourth Amendment,¹⁵⁸ the Sixth Amendment's Confrontation Clause,¹⁵⁹ and the Sixth Amendment's right to a jury trial.¹⁶⁰

While often taking a position favorable to the government in criminal law cases, Justice Kennedy joined or authored Court rulings in several close decisions favorable to criminal defendants' ability to raise right-to-counsel claims.¹⁶¹ Perhaps most notably, Justice Kennedy authored a pair of 2012 opinions on behalf of a closely divided Court, *Missouri v. Frye* and *Lafler v. Cooper*, that held that "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused,"¹⁶² and held that a failure to abide by that rule might undermine even a subsequent prosecution before a jury.¹⁶³

Michigan, 547 U.S. 586, 594 (2006). *But see* *Missouri v. McNeely*, 569 U.S. 141, 144 (2013); *Georgia v. Randolph*, 547 U.S. 103, 106 (2006).

¹⁵⁵ *See* *King*, 569 U.S. at 447-48; *Hudson*, 547 U.S. at 603; *Florence*, 566 U.S. at 334; *McNeely*, 569 U.S. at 166 (Kennedy, J., concurring).

¹⁵⁶ *See* *Salinas v. Texas*, 570 U.S. 178, 186 (2013); *Berghuis v. Thompkins*, 560 U.S. 370, 381-82 (2010) (Kennedy, J.). *Cf.* *JDB v. North Carolina*, 564 U.S. 261, 271 (2011).

¹⁵⁷ *Berghuis*, 560 U.S. at 382.

¹⁵⁸ *See, e.g.*, *Carpenter v. United States*, No. 16-402, 2018 WL 3073916, at *16 (June 22, 2018) (Kennedy, J., dissenting) (maintaining that the collection of a criminal defendant's cell site location from his wireless carrier did not constitute a search under the Fourth Amendment); *Florida v. Jardines*, 569 U.S. 1, 16 (2013) (Alito, J., dissenting) (joining Justice Alito's dissent arguing that using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is not a search).

¹⁵⁹ *See, e.g.*, *Bullcoming v. New Mexico*, 564 U.S. 647, 674 (2011) (Kennedy, J., dissenting) (arguing that the Sixth Amendment permitted the introduction of a forensic lab report containing a testimonial certification through the in-court testimony of an analyst who did not sign the document or personally observe the test); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 330 (2009) (Kennedy, J., dissenting) (maintaining that a state forensic analyst's laboratory report prepared for use in a criminal prosecution is not "testimonial" evidence for purposes of the Confrontation Clause).

¹⁶⁰ *See, e.g.*, *Alleyne v. United States*, 570 U.S. 99, 124 (2013) (Roberts, CJ, dissenting) (joining Chief Justice Robert's dissent concluding that the determination of the factual predicate for a mandatory minimum increase did not need to be submitted to a jury); *Cunningham v. California*, 549 U.S. 270, 295 (2007) (Kennedy, J., dissenting) (noting his disagreement with the "wrong and unfortunate direction" of the case law following the Court's rulings in *United States v. Booker*, 543 U.S. 220 (2005), *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

¹⁶¹ *See* *McWilliams v. Dunn*, 137 S. Ct. 1790, 1793 (2017); *Trevino v. Thaler*, 569 U.S. 413, 417 (2013); *Lafler v. Cooper*, 566 U.S. 156, 164 (2012) (Kennedy, J.); *Missouri v. Frye*, 566 U.S. 134, 145 (2012) (Kennedy, J.); *Sears v. Upton*, 561 U.S. 945, 946 (2010); *Wellons v. Hall*, 558 U.S. 220, 226 (2010). *But see* *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011); *Dist. Atty's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009); *Montejo v. Louisiana*, 556 U.S. 778, 797 (2009); *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007); *Schiro v. Landrigan*, 550 U.S. 465, 469 (2007).

¹⁶² *Frye*, 566 U.S. at 145.

¹⁶³ *Cooper*, 566 U.S. at 168.

Justice Kennedy was arguably less often a “swing vote” in criminal law matters, regularly siding with the government, particularly in the area of the Fourth Amendment.¹⁶⁴ However, he was still decisive to the outcome of a number of criminal law cases, and some commentators have argued that his successor will have an important role to play in resolving cases dealing with privacy and the scope of the Fourth Amendment’s protections in light of evolving technology.¹⁶⁵

Cruel and Unusual Punishment

Justice Kennedy cast numerous decisive votes in closely divided Eighth Amendment cases, including death penalty cases.¹⁶⁶ In several of those cases, Justice Kennedy authored majority opinions granting relief to petitioners either based on their characteristics or those of the crimes they committed. For instance, in *Kennedy v. Louisiana*, Justice Kennedy authored the majority opinion ruling that the Eighth Amendment prohibits the death penalty as a punishment for the rape of a child where the crime does not result—and was not intended to result—in the victim’s death.¹⁶⁷ Similarly, in *Hall v. Florida*, Justice Kennedy, building upon the Court’s earlier ruling in *Atkins v. Virginia*,¹⁶⁸ authored an opinion ruling that Florida’s death penalty regime created an unconstitutional risk of executing persons with intellectual disabilities.¹⁶⁹ Justice Kennedy also wrote the Court’s 5-4 opinion in *Roper v. Simmons*, which held that the Eighth Amendment forbids executing defendants who were under 18 years of age at the time of their capital crimes,¹⁷⁰ and he joined the 5-4 opinion in *Miller v. Alabama*, which held that the Eighth Amendment prohibits mandatory life imprisonment for juveniles.¹⁷¹

However, Justice Kennedy also cast decisive votes against petitioners in a variety of Eighth Amendment cases,¹⁷² especially in cases presenting broader efforts to challenge the death penalty. For example, in *Glossip v. Gross*, the Court, in a 5-4 opinion with Justice Kennedy in the

¹⁶⁴ See, e.g., Michael A. McCall & Madhavi M. McCall, *Quantifying the Contours of Power: Chief Justice Roberts & Justice Kennedy in Criminal Justice Cases*, 37 PACE L. REV. 115, 126 (2016); Allison Grande, *Justice Kennedy’s Departure Leaves Privacy Limits Up In Air*, LAW360 (June 29, 2018, 11:04 PM), <https://www.law360.com/articles/1058913/justice-kennedy-s-departure-leaves-privacy-limits-up-in-air>.

¹⁶⁵ See Grande, *supra* note 164; Louise Matsakis, *Anthony Kennedy’s Retirement May Have Huge Consequence for Privacy*, WIRED (June 27, 2018, 6:06 PM), <https://www.wired.com/story/anthony-kennedy-retirement-consequences-for-privacy>.

¹⁶⁶ See, e.g., *Moore v. Texas*, 137 S. Ct. 1039, 1044-53 (2017); *Brumfield v. Cain*, 135 S. Ct. 2269, 2273-83 (2015); *Brewer v. Quarterman*, 550 U.S. 286, 288-96 (2007); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 237-65 (2007); *Panetti v. Quarterman*, 551 U.S. 930, 934 (2007) (Kennedy, J.); *Smith v. Texas*, 550 U.S. 297, 299-316 (2007) (Kennedy, J.); *House v. Bell*, 547 U.S. 518, 521-55 (2006) (Kennedy, J.).

¹⁶⁷ 554 U.S. 407, 412-47 (2008) (Kennedy, J.).

¹⁶⁸ 536 U.S. 304, 306-21 (2002).

¹⁶⁹ 134 S. Ct. 1986, 1990-2001 (2014) (Kennedy, J.). See also *Moore*, 137 S. Ct. at 1044-53 (concluding that a state’s legal standard for determining whether capital defendant was intellectually disabled did not comport with the Eighth Amendment).

¹⁷⁰ 543 U.S. 551, 555-79 (2005) (Kennedy, J.).

¹⁷¹ 567 U.S. 460, 465-89 (2012).

¹⁷² See, e.g., *Davila v. Davis*, 137 S. Ct. 2058, 2062-70 (2017) (holding that federal habeas court could not hear petitioner’s challenge to death sentence); *Garcia v. Texas*, 564 U.S. 940, 940-43 (2011) (holding that capital defendant convicted of capital murder was not entitled to stay of execution notwithstanding a ruling from the International Court of Justice); *Medellin v. Texas*, 554 U.S. 759, 759-60 (2008) (same); *Lawrence v. Florida*, 549 U.S. 327, 329-37 (2007) (concluding that capital defendant’s habeas corpus petition was untimely); *Ayers v. Belmontes*, 549 U.S. 7, 9-24 (2006) (Kennedy, J.) (determining that jury instructions in capital murder case did not contravene constitutional right to present mitigating evidence in capital sentencing proceedings); *Brown v. Sanders*, 546 U.S. 212, 214-25 (2006) (ruling that capital murder defendant was not entitled to habeas corpus relief).

majority, rejected the petitioner's claim that Oklahoma's three-drug lethal injection protocol violated the Eighth Amendment by creating an unacceptable risk of severe pain.¹⁷³ Likewise, in *Kansas v. Marsh*, Justice Kennedy joined a 5-4 opinion concluding that Kansas's death penalty regime did not offend the Eighth Amendment.¹⁷⁴ As a result, Justice Kennedy's death penalty jurisprudence placed him squarely in the middle of the Roberts Court, making this area of law a critical one that is likely to be influenced by whoever replaces the Justice.¹⁷⁵

Environmental Law

Justice Kennedy authored or joined several consequential opinions in closely divided environmental law cases during his time on the Roberts Court.¹⁷⁶ For example, Justice Kennedy wrote an influential opinion concurring in the judgment in *Rapanos v. United States*, which concerned the proper interpretation of the term "waters of the United States" for the purposes of the Clean Water Act.¹⁷⁷ Justice Kennedy's concurrence became the controlling opinion for many lower courts, thereby defining the scope of the federal government's authority to regulate certain bodies of water and wetlands connected to them.¹⁷⁸ Justice Kennedy also joined the Court's 5-4 opinion in *Massachusetts v. EPA*, a case that some scholars have characterized as "one of the most significant cases in the history of federal environmental litigation."¹⁷⁹ The *Massachusetts* Court held (1) that the State of Massachusetts had standing to challenge the Environmental Protection Agency's alleged failure to adequately regulate greenhouse gas;¹⁸⁰ and (2) that greenhouse gases fit within the Clean Air Act's definition of "air pollutant" and therefore fell within the EPA's regulatory authority.¹⁸¹ The Court's ruling in *Massachusetts* not only expanded the universe of environmental law challenges that federal courts had authority to adjudicate, but it also directly influenced the EPA to establish a new program to regulate greenhouse gases.¹⁸²

Nonetheless, Justice Kennedy also cast several critical votes that did not necessarily align him with those seeking greater legal protections for the environment. For example, Justice Kennedy joined the 5-4 opinion in *Summers v. Earth Island Institute*, in which the Court ruled that a group of environmental organizations lacked standing to challenge certain federal regulations.¹⁸³ Additionally, Justice Kennedy joined the Court's 5-4 opinion in *Michigan v. EPA*, which held that

¹⁷³ 135 S. Ct. 2726, 2731-46 (2015).

¹⁷⁴ 548 U.S. 163, 165-81 (2006).

¹⁷⁵ See Carol Streiker and Jordan Streiker, *Justice Kennedy: He Swung left on the Death Penalty but Declined to Swing for the Fences*, SCOTUSBLOG (Jul. 2, 2018, 11:27 AM), <http://www.scotusblog.com/2018/07/justice-kennedy-he-swung-left-on-the-death-penalty-but-declined-to-swing-for-the-fences/>.

¹⁷⁶ See, e.g., Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 649-73 (2007) (concluding that the Environmental Protection Agency permissibly transferred certain permitting powers to state authorities).

¹⁷⁷ 547 U.S. 715, 759-87 (2006) (Kennedy, J., concurring in the judgment).

¹⁷⁸ See CRS Report R44585, *Evolution of the Meaning of "Waters of the United States" in the Clean Water Act*, by Stephen P. Mulligan.

¹⁷⁹ Randall S. Abate, *Massachusetts v. EPA and the Future of Environmental Standing in Climate Change Litigation and Beyond*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 121, 124 (2008). Accord, e.g., Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943, 954 (2009) (describing *Massachusetts v. EPA* as "by far the most significant environmental decision decided by the Roberts Court thus far").

¹⁸⁰ 549 U.S. 497, 504-26 (2007).

¹⁸¹ *Id.* at 526-35.

¹⁸² See Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation Under the Obama Administration*, 34 HARV. J.L. & PUB. POL'Y 421, 423-40 (2011).

¹⁸³ 555 U.S. 488, 490-501 (2009); *id.* at 501 (Kennedy, J., concurring).

the Environmental Protection Agency unreasonably deemed cost irrelevant with respect to certain regulations of power plants.¹⁸⁴ As a consequence, like in other areas of law, Justice Kennedy was often at the center of the Court's environmental law decisions, making it likely that his replacement will have significant influence on the future of environmental law.¹⁸⁵

Federalism

Justice Kennedy helped shape the Court's jurisprudence regarding the relationship between the federal government and the states. As noted above, beginning in the Rehnquist Court era, Justice Kennedy frequently authored or joined majority opinions recognizing federalism-based limitations on the federal government's power.¹⁸⁶ That trend continued during the Roberts Court. For instance, Justice Kennedy authored the Court's opinion in *Coleman v. Court of Appeals of Maryland*, which held that Congress did not validly abrogate the states' sovereign immunity when it enacted a provision of the Family Medical Leave Act.¹⁸⁷ Justice Kennedy likewise joined the Court's 5-4 opinion in *Shelby County v. Holder*, which held that Section 5 of the federal Voting Rights Act—a formula that determined which states were required “to obtain federal permission before enacting any law related to voting”—impermissibly interfered with “the traditional course of relations between the States and the Federal Government.”¹⁸⁸

That said, Justice Kennedy nonetheless tended to favor a somewhat broader conception of federal power in a few contexts.¹⁸⁹ In preemption cases, Justice Kennedy commonly (though not invariably) voted to invalidate state statutes or common law doctrines on the grounds that they conflicted with federal law.¹⁹⁰ More broadly, Justice Kennedy's expansive view of the role of the Court in protecting individual liberty resulted in a number of votes to invalidate state laws on the ground that they violated the Constitution. Most obviously, Justice Kennedy's majority opinion in *Obergefell v. Hodges*¹⁹¹ “struck down bans on same-sex marriage in 13 states.”¹⁹² Justice Kennedy also authored several key opinions articulating federal constitutional standards for when state judges were required to recuse themselves from state court cases.¹⁹³ As a consequence,

¹⁸⁴ 135 S. Ct. 2699, 2704-12 (2015). *See also* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 212-27 (2009) (holding that EPA permissibly relied on cost-benefit analysis when promulgating certain regulations).

¹⁸⁵ *See* Brad Plumer, *Kennedy's Retirement Could Clear Path for Trump's Environmental Rollbacks*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/climate/anthony-kennedy-supreme-court-environment.html> (discussing Justice Kennedy's influence on environmental law and the significance of his successor).

¹⁸⁶ *See supra* “Structural Protections of the Constitution.”

¹⁸⁷ 566 U.S. 30, 33-44 (2012) (Kennedy, J.).

¹⁸⁸ 570 U.S. 529, 557 (2013) (quoting *Presley v. Etowah Cty. Comm'n*, 502 U.S. 491, 500-01 (1992)).

¹⁸⁹ *See, e.g.*, *Haywood v. Drown*, 556 U.S. 729, 731-42 (2009) (holding that state law that divested state courts of general jurisdiction over suits filed under 42 U.S.C. § 1983 for monetary damages against state corrections officers violated the Supremacy Clause); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 6-22 (2007) (holding that bank's mortgage business was subject to the superintendence of the Office of the Comptroller of the Currency, rather than that of the states).

¹⁹⁰ *See, e.g.*, *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 475-93 (2013) (Kennedy, J.); *Arizona v. United States*, 567 U.S. 387, 392-416 (2012) (Kennedy, J.); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336-52 (2011); *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 608-20, 623-26 (2011); *see also supra* note 77. *But see* *Chamber of Commerce v. Whiting*, 563 U.S. 582, 587-611 (2011); *Altria Grp., Inc. v. Good*, 555 U.S. 70, 72-91 (2008).

¹⁹¹ 135 S. Ct. 2584, 2593-2608 (2015) (Kennedy, J.).

¹⁹² Steve Sanders, *Race, Restructurings, and Equal Protection Doctrine Through the Lens of Schuette v. BAMN*, 81 BROOK L. REV. 1393, 1458 (2016).

¹⁹³ *See, e.g.*, *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1903-10 (2016) (Kennedy, J.); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872-90 (2009) (Kennedy, J.). *Cf.* *Wellons v. Hall*, 558 U.S. 220, 220-26 (2010) (holding that

Justice Kennedy's influence on the balance of powers between the federal and state governments was pronounced, making it a key area to consider with regard to how a successor might approach similar issues.¹⁹⁴

Freedom of Religion

Justice Kennedy played a pivotal role in cases involving religious liberty interests.¹⁹⁵ Most recently, Justice Kennedy wrote the Court's opinion in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, in which the Court concluded that a state civil rights commission contravened the Free Exercise Clause when evaluating a baker's claim that selling a wedding cake to a same-sex couple would violate his religious convictions.¹⁹⁶ As discussed above, *Masterpiece Cakeshop* built on an earlier Justice Kennedy opinion, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, in which the Court struck down an ordinance forbidding practitioners of Santeria from engaging in animal sacrifice in accordance with the tenets of their religion.¹⁹⁷ Justice Kennedy also joined the Roberts Court's 5-4 opinion in *Burwell v. Hobby Lobby Stores, Inc.*, which held that regulations promulgated pursuant to the Patient Protection and Affordable Care Act that required employers to provide cost-free contraception to their employees contravened the Religious Freedom Restoration Act.¹⁹⁸

Nonetheless, Justice Kennedy did not uniformly side with the interests of religious objectors. For instance, he joined the Court's 5-4 opinion in *Christian Legal Society v. Martinez*, which held that a public law school did not violate the First Amendment by refusing to officially recognize a Christian student organization because the organization did not comply with the school's policy of allowing all students to join its group.¹⁹⁹ Justice Kennedy further noted in *Masterpiece Cakeshop* that when reviewing the claims of those who deny goods and services to individuals protected by federal or state public accommodations laws, courts must resolve these disputes "without subjecting gay persons to indignities when they seek goods and services in an open market."²⁰⁰

With respect to the Establishment Clause, an issue that has tended to divide the Court over the past half century,²⁰¹ Justice Kennedy has tended to adopt a more accommodationist approach, wherein his assessment of whether an Establishment Clause violation occurred stemmed from evidence of religious discrimination or coercion by the government, as opposed to mere endorsement of religion.²⁰² During the Rehnquist Court era, Justice Kennedy often found himself

petitioner could pursue claim that state judge engaged in judicial misconduct during capital murder trial).

¹⁹⁴ See Daniel Becker, *Justice Kennedy: Foot Soldier of the Federalism Revolution*, WAKE FOREST J. OF LAW & POLICY, (July 2, 2018), <https://wfulawpolicyjournal.com/2018/07/02/justice-kennedy-foot-soldier-of-the-federalism-revolution/>.

¹⁹⁵ See, e.g., *Salazar v. Buono*, 559 U.S. 700, 705-22 (2010) (Kennedy, J.) (holding that lower courts erred by enjoining government from implementing statute that would transfer memorial containing religious symbol from federal land to private land).

¹⁹⁶ 138 S. Ct. 1719, 1723-32 (2018) (Kennedy, J.).

¹⁹⁷ 508 U.S. 520, 524 (1993).

¹⁹⁸ 134 S. Ct. 2751, 2759-85 (2014); *id.* at 2785-87 (Kennedy, J., concurring).

¹⁹⁹ 561 U.S. 661, 667-98 (2010); *id.* at 703-06 (Kennedy, J., concurring).

²⁰⁰ 138 S. Ct. at 1732 (Kennedy, J.).

²⁰¹ See Samuel J. Levine, *A Look at the Establishment Clause Through the Prism of Religious Perspectives: Religious Majorities, Religious Minorities, and Nonbelievers*, 87 CHI.-KENT L. REV. 775, 798 (2012) (noting "deep and abiding divisions in the interpretation and application of the Establishment Clause" on the Supreme Court).

²⁰² See Erwin Chemerinsky, *Why Church and State Should Be Separate*, 49 WM. & MARY L. REV. 2193, 2201 (2008)

in dissent in rulings counseling for stricter separation of church and state.²⁰³ Nonetheless, Justice Kennedy authored the Court's opinion in *Lee v. Weisman* in 1993, concluding that the Establishment Clause prohibited a nonsectarian prayer at a public school graduation ceremony because of the coercive effects the prayer would have on nonadherents.²⁰⁴

With Justice O'Connor's retirement from the Court in 2005, Justice Kennedy became the Court's median vote on Establishment Clause issues.²⁰⁵ While the Roberts Court has entertained few appeals on Establishment Clause issues, in its most notable ruling, *Town of Greece, New York v. Galloway*, Justice Kennedy, writing for a plurality of the Court, embraced a most accommodationist view of the First Amendment to conclude that a municipality did not violate the Constitution by opening its meetings with a prayer.²⁰⁶ Given Justice Kennedy's critical role on religious freedom matters and a spate of disputes over religious liberty continuing to arise in the lower courts, Justice Kennedy's successor could be quite influential in how the Court resolves such disputes in the future.²⁰⁷

Freedom of Speech

Throughout his tenure on the Roberts Court, Justice Kennedy authored or joined numerous opinions invoking the First Amendment's Free Speech Clause to strike down state and federal laws.²⁰⁸ In particular, Justice Kennedy frequently voted to invalidate statutes that, in his view, unconstitutionally restricted political participation.²⁰⁹ For instance, Justice Kennedy authored the 5-4 majority opinion in *Citizens United v. FEC*, which held that a federal campaign finance law banning corporate independent expenditures for electioneering communications violated the First Amendment.²¹⁰ Justice Kennedy also joined the Court's 5-4 opinion in *McCutcheon v. FEC*, which invoked the First Amendment to invalidate a federal statute that imposed aggregate limits on political contributions.²¹¹

Justice Kennedy's broad conception of the Free Speech Clause carried over into other contexts as well. For one, Justice Kennedy cast decisive votes in several First Amendment cases involving

(describing Justice Kennedy as an accommodationist).

²⁰³ See, e.g., *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., dissenting) (arguing that the display of a crèche in a county courthouse did not violate the Establishment Clause); see *McCreary Cty. v. ACLU*, 545 U.S. 844, 885 (2005) (Scalia, J., dissenting; joined by Kennedy, J.) (maintaining that the display of the Ten Commandments at a county courthouse did not run afoul of the Establishment Clause).

²⁰⁴ 505 U.S. 577, 580-99 (1992).

²⁰⁵ Kyle Langvardt, *The Lawless Rule of the Norm in the Government Religious Speech Cases*, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 405, 441 (2014) (describing Justice Kennedy as replacing Justice O'Connor as the Court's "ideological fulcrum" on establishment matters).

²⁰⁶ 134 S. Ct. 1811, 1815-28 (2014) (Kennedy, J.).

²⁰⁷ See Amy Goldstein, *Religious Liberty becomes a Main Focus for Conservatives in Supreme Court Nomination*, WASH. POST (July 7, 2018, 8:22 PM), https://www.washingtonpost.com/national/health-science/religious-liberty-becomes-a-main-focus-for-conservatives-in-supreme-court-nomination/2018/07/07/45503c2c-807e-11e8-b0ef-ffffcbeff946_story.html.

²⁰⁸ See, e.g., *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. ___, 2018 WL 3116336, at *16 (June 26, 2018) (Kennedy, J., concurring).

²⁰⁹ See, e.g., *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 727-55 (2011); *Davis v. FEC*, 554 U.S. 724, 728-45 (2008); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 483-504 (2007) (Scalia, J., concurring, joined by Kennedy, J.).

²¹⁰ 558 U.S. 310, 318-72 (2010) (Kennedy, J.). See also *Am. Tradition P'ship Inc. v. Bullock*, 567 U.S. 516, 516-17 (2012) (concluding that *Citizens United*'s holding applied to the states).

²¹¹ 134 S. Ct. 1434, 1440-62 (2014).

labor organizations.²¹² Most significantly, Justice Kennedy joined the Court's recent 5-4 opinion in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, which held that a state's extraction of agency fees from nonconsenting public sector employees violated the First Amendment.²¹³ In addition, Justice Kennedy regularly voted to invalidate restrictions on commercial or professional speech.²¹⁴ For example, Justice Kennedy's majority opinion in *Sorrell v. IMS Health Inc.*, struck down a state statute restricting speech in aid of pharmaceutical marketing.²¹⁵

Nevertheless, Justice Kennedy believed that speech could at times be subject to government restraint. Justice Kennedy's 5-4 majority opinion in *Garcetti v. Ceballos*, for instance, concluded that statements made by government employees pursuant to their official duties were not protected by the First Amendment.²¹⁶ Justice Kennedy also joined the Court's 5-4 opinion in *Morse v. Frederick*, which held that a school principal did not violate a student's right to free speech by confiscating a banner that the student displayed at an off-campus, school-approved activity.²¹⁷ Additionally, Justice Kennedy joined the majority opinion in *Holder v. Humanitarian Law Project*, in which the Court concluded that a federal law making it a crime to "knowingly provid[e] material support or resources to a foreign terrorist organization," including "training" or "expert advice and assistance," did not violate certain plaintiffs' free speech rights.²¹⁸ With the prospect of free speech issues continuing to dominate the Roberts Court's docket, it remains to be seen whether Justice Kennedy's free speech jurisprudence will continue to be the prevailing view on the High Court.²¹⁹

National Security

Justice Kennedy authored or joined a number of majority opinions that closely divided the Court on matters related to national security. These opinions have tended to defer to the authority of the political branches on national security matters.²²⁰ For example, in *Ziglar v. Abbasi*, writing the opinion of the Court, Justice Kennedy held that lower courts had erred by allowing certain detained foreign nationals to sue the government under an implied cause of action.²²¹ He wrote that "[n]ational-security policy is the prerogative of the Congress and President," cautioning that "judicial inquiry into the national-security realm" raises separation-of-powers concerns.²²²

²¹² See, e.g., *Harris v. Quinn*, 134 S. Ct. 2618, 2623-44 (2014) (holding that the First Amendment prohibited the collection of an agency fee from certain persons who did not wish to join or support a union).

²¹³ 585 U.S. ___, 2018 WL 3129785, at *5-32 (June 27, 2018).

²¹⁴ See, e.g., *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. ___, 2018 WL 3116336, at *12 (June 26, 2018).

²¹⁵ 564 U.S. 552, 557-80 (2011) (Kennedy, J.).

²¹⁶ 547 U.S. 410, 413-26 (2006) (Kennedy, J.).

²¹⁷ 551 U.S. 393, 396-410 (2007); *id.* at 422-25 (Alito, J., concurring, joined by Kennedy, J.).

²¹⁸ 561 U.S. 1, 7-8, 25-39 (2010) (quoting 18 U.S.C. § 2339B(a)(1)).

²¹⁹ See Erwin Chemerinsky, *Anthony Kennedy and Free Speech*, SCOTUSBLOG, (Jul. 2, 2018, 2:38 PM), <http://www.scotusblog.com/2018/07/anthony-kennedy-and-free-speech/> (discussing Justice Kennedy's free speech legacy on the Court).

²²⁰ See *Trump v. Hawaii*, No. 17-965, 2018 WL 3116337, at *25 (June 26, 2018) (Kennedy, J., concurring); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017) (Kennedy, J.); *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring); *Boumediene v. Bush*, 553 U.S. 723, 796-97 (2008) (Kennedy, J.). See also *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34-35 (2010); *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring).

²²¹ 137 S. Ct. at 1863.

²²² *Id.* at 1861.

Justice Kennedy similarly emphasized national security concerns in several of the Court's rulings with respect to immigration matters. In at least two determinative opinions, Justice Kennedy accorded significant deference to immigration decisions of the political branches because they implicated foreign affairs and national security.²²³ Most recently, in *Trump v. Hawaii*, Justice Kennedy joined an opinion reaffirming the deference afforded to the political branches on immigration when upholding a presidential proclamation restricting the entry of foreign nationals from specified countries.²²⁴

Nonetheless, Justice Kennedy has also provided the deciding vote in cases recognizing limitations on the authority of the President over matters concerning national security.²²⁵ For example, in *Hamdan v. Rumsfeld*, he joined the Court in an opinion concluding that a presidential order creating a military commission to try enemy belligerents for specified categories of offenses violated the governing federal statutes.²²⁶

Perhaps most notably, Justice Kennedy authored the majority opinion in *Boumediene v. Bush*, in which the Court held that foreign nationals “designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba”²²⁷ were entitled to invoke the constitutional “privilege of habeas corpus.”²²⁸ While Justice Kennedy's majority opinion recognized the President's “substantial authority to apprehend and detain those who pose a real danger to our security,” the Court ultimately concluded that this power would be “vindicated, not eroded,” by extending the writ of habeas corpus.²²⁹ He wrote that “few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.”²³⁰ Given how closely divided the Court has been in cases like *Trump* and *Boumediene*, a critical question going forward is how the Roberts Court will approach national security matters without Justice Kennedy.²³¹

Second Amendment

Justice Kennedy also provided key deciding votes in the few but significant cases the Roberts Court heard on the Second Amendment. Most notably, Justice Kennedy joined the five-Justice majority that concluded in *District of Columbia v. Heller* that the Second Amendment protected an individual (as opposed to collective) right to keep and bear arms.²³² Two years later, he joined a majority of the Court to hold in *McDonald v. City of Chicago* that the Second Amendment governed state and local governments through the Fourteenth Amendment.²³³ However, Justice

²²³ See, e.g., *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (Kennedy, J., concurring).

²²⁴ See 2018 WL 3116337, at *25 (Kennedy, J., concurring).

²²⁵ See, e.g., *Boumediene*, 553 U.S. at 795; *Hamdan v. Rumsfeld*, 548 U.S. 557, 646 (2006) (Kennedy, J., concurring).

²²⁶ *Hamdan*, 548 U.S. at 636.

²²⁷ *Boumediene*, 553 U.S. at 732.

²²⁸ *Id.* at 771.

²²⁹ *Id.* at 797.

²³⁰ *Id.*

²³¹ See Pratheepan Gulasekaram, *An Immigration Legacy at Odds with Justice Kennedy's Animating Principles*, SCOTUSblog (Jul. 3, 2018, 7:29 PM), <http://www.scotusblog.com/2018/07/an-immigration-legacy-at-odds-with-justice-kennedys-animating-principles/> (discussing Justice Kennedy's jurisprudence with respect to immigration and national security matters).

²³² 554 U.S. 570, 573-636 (2008).

²³³ 561 U.S. 742, 748-91 (2010).

Kennedy declined to join other Justices who called for the Supreme Court to consider Second Amendment challenges to laws imposing waiting periods for purchasing firearms²³⁴ or restricting the right to carry firearms in public.²³⁵ Given the close divide on the Court relating to the regulation of firearms, Justice Kennedy's successor could have a notable effect on how the Second Amendment and the *Heller* ruling are interpreted going forward.²³⁶

Separation of Powers

As discussed, since his appointment to the Court, Justice Kennedy has frequently stressed the importance of the Constitution's separation of the legislative, executive, and judicial powers, often casting decisive votes in the Court's separation-of-powers cases.²³⁷ For example, in a 2011 decision, Justice Kennedy emphasized the historical and practical importance of constitutional limitations on the power of the judicial branch.²³⁸ Justice Kennedy provided the fifth vote in a number of Roberts Court decisions interpreting Article III of the Constitution, delineating—and frequently limiting—the authority of the courts to adjudicate disputes.²³⁹ Justice Kennedy has authored or joined opinions limiting the power of the legislative²⁴⁰ and executive²⁴¹ branches, as well. For example, as discussed above,²⁴² Justice Kennedy has called for the judicial branch to carefully police the administrative state,²⁴³ while also recognizing that the judicial branch should tread carefully in realms committed to the political branches, such as national security.²⁴⁴

In so doing, Justice Kennedy has not necessarily adopted a uniform approach toward separation-of-power matters.²⁴⁵ He has, at times, authored or joined opinions taking a more formalist

²³⁴ See *Silvester v. Becerra*, 138 S. Ct. 945, 945-52 (2018) (Thomas, J., dissenting from the denial of certiorari).

²³⁵ See *Peruta v. California*, 137 S. Ct. 1995, 1996-2000 (2017) (Thomas, J., dissenting from the denial of certiorari).

²³⁶ See Robert Barnes, *Justice Anthony M. Kennedy May be the Middleman in the Gun-Rights Debate*, WASH. POST (June 22, 2014), https://www.washingtonpost.com/national/justice-anthony-m-kennedy-may-also-be-the-middleman-in-the-gun-rights-debate/2014/06/22/9075e0b6-f947-11e3-a3a5-42be35962a52_story.html.

²³⁷ See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) (Kennedy, J., concurring); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring).

²³⁸ *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 132-33 (2011) (Kennedy, J.).

²³⁹ *United States v. Windsor*, 570 U.S. 744, 759, 761 (2013) (Kennedy, J.); *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 69 (2013); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013); *United States v. Juvenile Male*, 564 U.S. 932, 938 (2011); *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 130 (2011) (Kennedy, J.); *Salazar v. Buono*, 559 U.S. 700, 713 (2010) (Kennedy, J., plurality opinion); *Summers v. Earth Island Inst.*, 555 U.S. 488, 500 (2009); *Davis v. FEC*, 554 U.S. 724, 733-34 (2008); *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 275 (2008); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719-20 (2007); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 608 (2007); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007); *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007). See also *South Carolina v. North Carolina*, 558 U.S. 256, 267-68 (2010) (outlining standard for nonstate parties to intervene in cases arising under the Supreme Court's original jurisdiction).

²⁴⁰ See *Salazar*, 559 U.S. at 717; *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 502 (2010). See also *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015) (Kennedy, J.).

²⁴¹ See *supra* note 237; *Boumediene v. Bush*, 553 U.S. 723, 797 (2008) (Kennedy, J.). See also *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2557 (2014).

²⁴² See *supra* "Administrative Law;" "National Security."

²⁴³ See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536-37 (2009) (Kennedy, J., concurring).

²⁴⁴ See, e.g., *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017) (Kennedy, J.).

²⁴⁵ Two schools of thought have developed for approaching separation-of-powers disputes. The formalist interpretation focuses on the structural divisions in the Constitution with the idea that close adherence to these rules is required in order to achieve the preservation of liberty. The functionalist interpretation takes a more flexible approach,

approach toward analyzing whether a particular action violates the separation of powers, and supported invalidating some acts that transgress upon the separation of powers regardless of the severity of the violation.²⁴⁶ In other cases, however, Justice Kennedy has embraced a more functionalist approach to such claims,²⁴⁷ one that investigates the nature of the challenged action and the extent to which that action violates separation-of-powers principles before concluding that the action is unlawful.²⁴⁸ His willingness to employ both formalist and functionalist approaches to separation-of-powers issues was illustrated by a concurring opinion he authored during his first term on the Court, where he suggested that, at least in the context of intrusions on executive authority, the approach the Court takes in separation-of-powers disputes should depend upon the particulars of the dispute and on whether the Constitution explicitly assigns a given power exclusively to the President.²⁴⁹ Justice Kennedy's views on the separation of powers placed him in the middle of the Roberts Court in cases concerning the allocation of powers among the three branches of the federal government, suggesting that Justice Kennedy's successor may be quite influential on the future direction of the Court's approach in such cases.²⁵⁰

Substantive Due Process and Fundamental Rights

Justice Kennedy played an especially important role in shaping the Supreme Court's substantive due process jurisprudence. The substantive due process doctrine holds that the Constitution's Due Process Clauses protect certain unenumerated "fundamental rights and liberties which are . . . 'deeply rooted in this Nation's history and tradition,'"²⁵¹ such as the right to marry²⁵² and the right to privacy.²⁵³ On many occasions throughout his tenure on the Court, Justice Kennedy authored or joined opinions invoking the substantive due process doctrine to invalidate a variety

emphasizing the core functions of each of the branches and asking whether an overlap in these functions upsets the equilibrium the Framers sought to maintain. See CRS Report R45129, *Modes of Constitutional Interpretation*, by Brandon J. Murrill. For an overview of the functionalist and formalist lines of analysis, see generally John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011).

²⁴⁶ See *Stern v. Marshall*, 564 U.S. 462, 483-84 (2011); *Free Enter. Fund*, 561 U.S. at 508; *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring).

²⁴⁷ *Public Citizen*, 491 U.S. at 484.

²⁴⁸ See *Boumediene v. Bush*, 553 U.S. 723, 779-80 (2008) (Kennedy, J.). Cf. *United States v. Windsor*, 570 U.S. 744, 759, 763 (2013) (investigating relationship between the executive and judicial branches in the context of prudential limits on courts' exercise of jurisdiction). See also *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944 (2015); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014); *Loving v. United States*, 517 U.S. 748, 772-73 (1996) (Kennedy, J.).

²⁴⁹ *Public Citizen*, 491 U.S. at 485.

²⁵⁰ See Kelso, Charles D. and Kelso, R. Randall, *The Constitutional Jurisprudence of Justice Kennedy on Federalism and Separation of Powers*, PACIFIC MCGEORGE SCHOOL OF LAW RESEARCH PAPER 39 (April 26, 2013), <https://ssrn.com/abstract=2257022> or <http://dx.doi.org/10.2139/ssrn.2257022> (discussing Justice Kennedy as the "critical deciding" vote on separation-of-powers matters).

²⁵¹ *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (plurality opinion of Powell, J.)).

²⁵² See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men . . . To deny this fundamental freedom . . . is surely to deprive all the State's citizens of liberty *without due process of law*." (emphasis added)).

²⁵³ See, e.g., *Glucksberg*, 521 U.S. at 720 ("In addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[] to . . . privacy." (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965))). See also Patrick M. Garry, *A Different Model for the Right to Privacy: The Political Question Doctrine as a Substitute for Substantive Due Process*, 61 U. MIAMI L. REV. 169, 201 (2006) ("The Court derived its constitutional right of privacy through the substantive due process approach.").

of federal and state laws—most consequentially on the subjects of abortion and sexual orientation.

As noted above,²⁵⁴ Justice Kennedy is perhaps best known for authoring many of the Supreme Court’s landmark opinions on issues pertaining to sexual orientation, several of which were based on the substantive due process doctrine.²⁵⁵ Justice Kennedy’s opinion for the Court in *Lawrence v. Texas*, for example, invoked substantive due process and the right to privacy to invalidate a state statute criminalizing private sexual conduct between persons of the same sex.²⁵⁶ Similarly, Justice Kennedy’s opinion in *Obergefell v. Hodges*, which held that prohibitions on same-sex marriage were unconstitutional, was likewise based in part on the substantive due process doctrine and the fundamental right to marriage.²⁵⁷

Nonetheless, Justice Kennedy did find limits on the rights recognized in cases like *Lawrence* and *Obergefell*, especially when those rights clashed with other constitutional rights. For example, Justice Kennedy wrote the majority opinion in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, in which the Court ruled in favor of a baker who refused to create a cake for a same-sex wedding reception, concluding that in justifying its decision to enforce state antidiscrimination laws against the baker, the State of Colorado had exhibited impermissible “hostility” toward the baker’s religious beliefs.²⁵⁸ And Justice Kennedy likewise voted with the majority in *Boy Scouts of America v. Dale*, in which the Court refused to force the Boy Scouts to readmit a scoutmaster it had previously expelled because of his sexual orientation.²⁵⁹

Justice Kennedy also played an important role in shaping the Supreme Court’s substantive due process jurisprudence in the abortion context. Not only was Justice Kennedy one of the coauthors of the joint plurality opinion in *Planned Parenthood v. Casey* during the Rehnquist Court era,²⁶⁰ but he also continued to cast decisive votes in closely divided Roberts Court-era abortion cases. In some of those cases, Justice Kennedy voted to uphold abortion restrictions. Most notably, Justice Kennedy wrote the Court’s 5-4 opinion in *Gonzales v. Carhart*, which upheld the constitutionality of the federal Partial Birth Abortion Ban Act.²⁶¹ In other cases, by contrast, Justice Kennedy voted to invalidate abortion laws, including *Whole Woman’s Health v. Hellerstedt*, in which Justice Kennedy joined a five-Justice majority opinion holding that a Texas

²⁵⁴ See *supra* “Individual Liberty.”

²⁵⁵ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598, 2602 (2015) (Kennedy, J.) (“The Court has reiterated that the right to marry is fundamental under the Due Process Clause.”); *United States v. Windsor*, 570 U.S. 744, 769 (2013) (Kennedy, J.) (holding that the Defense of Marriage Act violated “basic due process”); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (Kennedy, J.) (“The State cannot demean [petitioners’] existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”).

²⁵⁶ 539 U.S. at 562-79 (Kennedy, J.).

²⁵⁷ 135 S. Ct. at 2593-2608 (Kennedy, J.).

²⁵⁸ 138 S. Ct. 1719, 1723-32 (2018) (Kennedy, J.).

²⁵⁹ 530 U.S. 640, 643-61 (2000).

²⁶⁰ 505 U.S. 833, 843-901 (1992) (joint plurality opinion of O’Connor, Kennedy, and Souter, JJ.). As discussed above, see “Justice Kennedy and Liberty,” *Casey* reaffirmed the “central holding” of *Roe v. Wade* that, under limited circumstances, the Constitution protects a woman’s right to terminate her pregnancy. *Id.* at 861. At the same time, however, the joint plurality opinion recognized that restrictions on abortion may be constitutionally permissible if they do not place an undue burden on a woman’s ability to terminate a pregnancy prior to the fetus’s viability. *Id.* at 874.

²⁶¹ 550 U.S. 124, 132-68 (2007) (Kennedy, J.).

law unconstitutionally imposed an undue burden on women's right to seek previability abortions.²⁶²

Outside the contexts of challenges to statutes restricting sexual and reproductive autonomy, however, Justice Kennedy's approach to substantive due process was more circumscribed. For instance, Justice Kennedy joined the Court's refusal to recognize a constitutional right to physician-assisted suicide in *Washington v. Glucksberg*,²⁶³ evidently agreeing with the Court's conclusion that substantive due process protects only those rights that are "deeply rooted in [the nation's] history and traditions."²⁶⁴ Yet, Justice Kennedy's subsequent opinion in *Obergefell* rejected *Glucksberg*'s admonition that the substantive due process doctrine only protects rights with a long historical pedigree, and instead concluded that "history and tradition . . . do not set [the] outer boundaries" of the unenumerated rights guaranteed by the Due Process Clause.²⁶⁵ Going forward, Justice Kennedy's role in the Court's abortion and sexual orientation jurisprudence, which in large part stems from his views about the substantive component of the Due Process Clauses, will likely loom large as the Senate considers the Justice's successor.²⁶⁶

The Takings Clause and Eminent Domain

Like other areas of law, Justice Kennedy cast several important votes in eminent domain cases—that is, cases involving whether and when federal and state governments may take private property for public use. In several eminent domain cases Justice Kennedy sided with the government.²⁶⁷ Perhaps most significantly, Justice Kennedy joined the Court's opinion for five Justices in *Kelo v. City of New London, Connecticut*, which upheld a city's use of its eminent domain power to implement an economic development plan, even though the plan would benefit private parties.²⁶⁸ In other cases, by contrast, Justice Kennedy sided with the property owner.²⁶⁹ For example, Justice Kennedy joined the majority opinion in *Horne v. Department of Agriculture*,²⁷⁰ in which the Court ruled that (1) the Constitution's Takings Clause applies to real property and personal property alike;²⁷¹ and (2) the federal government had violated the Takings Clause by requiring raisin growers to relinquish their crops without paying them just

²⁶² 136 S. Ct. 2292, 2300-20 (2016).

²⁶³ 521 U.S. 702, 705-36 (1997).

²⁶⁴ *Id.* at 727.

²⁶⁵ 135 S. Ct. 2584, 2598 (2015) (Kennedy, J.).

²⁶⁶ See Lawrence Hurley, *Kennedy's Departure Puts Abortion, Gay Rights in Play at the High Court*, REUTERS (June 27, 2018, 6:47 PM) <https://www.reuters.com/article/us-usa-court-kennedy-cases/kennedys-departure-puts-abortion-gay-rights-in-play-at-high-court-idUSKBN1JN3AF> (discussing Justice Kennedy's "deciding votes" on "several key social issues.").

²⁶⁷ See, e.g., *Murr v. Wisconsin*, 137 S. Ct. 1933, 1939-50 (2017) (Kennedy, J.) (holding that courts must consider a number of factors in determining the proper denominator for purposes of a takings inquiry); see generally Robinson Meyer, *Justice Kennedy's Retirement Could Reshape the Environment*, THE ATLANTIC (June 27, 2018), <https://www.theatlantic.com/science/archive/2018/06/kennedys-departure-could-reshape-the-environment/563930/> (noting that while the 1980s saw a push for "more and more aggressive readings of the takings clause," "the speed of those rulings slowed" "when Kennedy joined the court in 1988.").

²⁶⁸ 545 U.S. 469, 472-90 (2005); *id.* at 490-93 (Kennedy, J., concurring).

²⁶⁹ See, e.g., *Koontz v. St. Johns River Water Mgmt. Dist.* 570 U.S. 595, 599-619 (2013) (holding that governmental units must comply with constitutional limitations on their ability to condition the approval of a land use permit even when the government has denied the permit and even when the government has made a demand for money).

²⁷⁰ 135 S. Ct. 2419, 2425-33 (2015).

²⁷¹ *Id.* at 2425-28.

compensation.²⁷² With Justice Kennedy's retirement, legal commentators have speculated what the Justice's successor could mean for the future of property rights and the Court's view of the Takings Clause.²⁷³

Conclusion

Justice Byron White noted that "every time a new justice comes to the Supreme Court, it's a different court."²⁷⁴ That adage could be particularly true when the departing Justice is considered a "swing vote." Several Justices considered "swing votes" who left the Court in recent decades were replaced, respectively, by Justices who altered the trajectory of the Court's jurisprudence. Justice Lewis Powell's retirement in 1987 and Justice Kennedy's arrival on the Court the next year witnessed noticeable changes in the Court's jurisprudence,²⁷⁵ including with respect to abortion,²⁷⁶ the death penalty,²⁷⁷ and the rights of same-sex couples.²⁷⁸ Justice Sandra Day O'Connor's departure had similar consequences on the Court's jurisprudence. Not only did Justice O'Connor's replacement, Justice Alito, take a markedly different approach than his predecessor on a number of legal issues,²⁷⁹ but her departure also cemented Justice Kennedy's position as the critical vote in closely divided cases decided by the Court.²⁸⁰ Accordingly, because of the "difference one Justice [can] make" on the Court,²⁸¹ Justice Kennedy's jurisprudence and the areas in which he was a deciding vote may be relevant considerations as the Senate determines whether to confirm the President's choice to replace the soon-to-be-retired Justice.

²⁷² *Id.* at 2428-33.

²⁷³ *See, e.g.,* Meyer, *supra* note 267.

²⁷⁴ *See* Clifford May, *On Judges and Justice: Justice Byron White Reflects on Court and Critics*, ROCKY MOUNTAIN NEWS, June 30, 1996, at A69.

²⁷⁵ *See* JEFFRIES, *supra* note 19, at 556 (noting the shift at the Court following Justice Powell's retirement).

²⁷⁶ *Compare* Webster v. Reproductive Health Servs., 492 U.S. 490, 499 (1989) (with Justice Kennedy part of a four-Justice plurality, limiting the constitutional right to abortion), *with* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 750 (1986) (with Justice Powell in the majority, striking down Pennsylvania law the regulated the provision of abortions within the state).

²⁷⁷ *See, e.g.,* Payne v. Tennessee, 501 U.S. 808, 830 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987), a decision written by Justice Powell, and holding that the Eighth Amendment does not bar the admission of victim impact evidence during the sentencing phase of a capital trial).

²⁷⁸ *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (Kennedy, J.) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), a case in which Justice Powell was in the majority, and holding that law criminalizing same-sex sodomy violated the Constitution).

²⁷⁹ *Compare, e.g.,* McConnell v. FEC, 540 U.S. 93, 207-09 (2003) (Justice O'Connor voting with the majority to uphold limits on electioneering communications by corporate entities); *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000) (Justice O'Connor voting with the majority of the Court to strike down a Nebraska law banning "partial birth abortions"), *with* *Citizens United v. FEC*, 558 U.S. 310, 319 (2010) (Justice Alito voting with the majority to strike down federal restrictions on corporate expenditures on electioneering communications); *Gonzales v. Carhart*, 550 U.S. 124, 132 (2007) (Justice Alito voting with the majority of the Court to sustain the federal Partial-Birth Abortion Ban Act of 2003).

²⁸⁰ *See* Ethan P. Fallon, *The Lingering Battleground Between Race and Education*, 60 LOY. L. REV. 727, 730 (2014).

²⁸¹ *Id.*

Appendix. Justice Kennedy As a “Swing” Vote on the Roberts Court: Select Data

Justice Kennedy cast the deciding vote in many consequential Supreme Court cases, particularly during the Roberts Court era beginning with the October 2005 Supreme Court term.²⁸² This section includes several tables relating to 186 cases²⁸³ where Justice Kennedy cast a deciding vote from the date of Chief Justice Roberts’s elevation to the Court to the date of Justice Kennedy’s retirement. For purposes of the tables, Justice Kennedy is considered to have cast a “deciding vote” any time he joined a majority or plurality opinion or concurred in the result of a case where the Justices were divided either 5-4, 5-3, 4-3, or 4-2 on one or more issues. *Per curiam* opinions are included only if they resolved an appeal pending before the Court.

Table A-1 identifies cases primarily centering on questions of constitutional interpretation in which Justice Kennedy cast a deciding vote. **Table A-2** includes cases mainly addressing questions of statutory interpretation—including the interpretation of administrative regulations, procedural rules, and other legal rules promulgated in accordance with statutory authority—in which Justice Kennedy cast a deciding vote. **Table A-3** compiles closely divided cases that do not fall neatly into either of the prior tables (e.g., cases centering on issues of federal common law or principles of equity). **Table A-1**, **Table A-2**, and **Table A-3** also identify (1) the statute, constitutional provision,²⁸⁴ or other source of law primarily at issue in the case; and (2) Justice Kennedy’s position on the key issue in the case. The cases in these three tables are listed alphabetically by year, and are categorized under the following subject areas:

- Abortion Law,
- Administrative Law,
- Business Law (including issues arising in antitrust, banking, bankruptcy and debt collection, consumer law, contract law, intellectual property law, and securities law),

²⁸² Cases preceding Chief Justice Roberts’s elevation to the Supreme Court are less likely to reflect the current dynamics of the Court—and, by extension, are less likely to illuminate the effect that Justice Kennedy’s successor might have on those dynamics. See, e.g., Caitlin E. Borgmann, *Holding Legislatures Constitutionally Accountable Through Facial Challenges*, 36 HASTINGS CONST. L.Q. 563, 589 (2009) (opining that “the Roberts Court has heralded a rightward ideological shift on the bench, from a split in which Justice O’Connor served as the swing vote and Justice Kennedy was counted in the conservative half, to one in which a solidly conservative four face off against the four more liberal Justices, with Justice Kennedy functioning as the swing vote”).

²⁸³ These 186 cases were obtained using three methods:

- Searching Washington University School of Law’s Supreme Court Database for 5-4, 5-3, 4-3, and 4-2 cases in which Justice Kennedy voted with the majority or plurality from 2006 onward.
- Referencing SCOTUSBlog’s “Stat Pack” compendia of 5-4 cases from October Term 2005 onward, available at <http://www.scotusblog.com/reference/stat-pack/> (last visited July 10, 2018).
- Searching LexisNexis’s database of Supreme Court cases from October 2005 onward in which one or more Justices recused themselves.

²⁸⁴ Some of the cases listed in the tables presented the issue of whether the Fourteenth Amendment “incorporates” other provisions of the U.S. Constitution such that those provisions apply equally to the state and federal governments. For such cases, the tables identify only the substantive provision of the U.S. Constitution at issue. To illustrate, the primary issue in *McDonald v. City of Chicago, Illinois*, 561 U.S. 742 (2010) was whether the Fourteenth Amendment rendered the Second Amendment fully applicable to the states. This report accordingly lists *McDonald* as a Second Amendment case, rather than a Fourteenth Amendment case.

- Civil Rights Law (including issues arising under the Fourteenth Amendment and civil actions brought under 42 U.S.C. §1983),
- Civil Liability (including torts),
- Communications Law,
- Criminal Law and Procedure,
- Education Law,
- Election Law,
- Environmental Law,
- Family Law,
- Food and Drug Law,
- Freedom of Association,
- Freedom of Religion,
- Freedom of Speech,
- Habeas Corpus,
- Immigration Law,
- Indian Law,
- International Law,
- Judicial System (including issues involving federal and state courts generally, civil procedure, standing and justiciability, class actions, equitable remedies, arbitration, and judicial ethics),
- Labor and Employment Law,
- Maritime Law,
- Military Law,
- National Security,
- Privacy Law,
- Public Benefits,
- Second Amendment,
- Separation of Powers,
- Takings,
- Tax Law, and
- Territorial Law.

For purposes of brevity, no more than two subject areas are identified as relevant to a particular case. While these categorizations are intended to provide a helpful guide to readers in identifying the subject matters of decisions, they do not necessarily reflect the full range of legal issues a judicial opinion may involve.

Table A-1, Table A-2, and Table A-3 also identify the composition of Justices hearing a listed case, dividing the members of the Court who participated in the case into two categories: (1) Justices making up the majority or controlling plurality, including those who concurred with the Court's judgment; and (2) those Justices who dissented in whole or in part from the key ruling of the case. The author of the primary opinion is designated with an asterisk (*). Authors of concurring and dissenting opinions are identified with plus signs (+). Justice Kennedy's name has

been capitalized throughout for the reader's convenience. For ease of reference, Justices are listed in alphabetical order, rather than order of seniority. **Table A-4** identifies how frequently Justice Kennedy voted with specific lineups of Justices in the cases in which he cast a decisive vote.

Table A-1. Justice Anthony Kennedy As a “Swing” Vote: Constitutional Law Decisions

Cases Centering on Questions of Constitutional Interpretation in Which Justice Kennedy Cast a Deciding Vote (October 2005 Term-October 2017 Term)

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Constitutional Provision Interpreted	Area of Law	Justice Kennedy’s Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Currier v. Virginia	Alito, Gorsuch*, KENNEDY+, Roberts, Thomas	Breyer, Ginsburg+, Kagan, Sotomayor	585 U.S. ____ (2018)	Fifth Amendment: Double Jeopardy Clause	Criminal Law and Procedure	When a defendant’s voluntary choices lead to a second criminal prosecution, that defendant cannot invoke the Double Jeopardy Clause to forestall the second prosecution.
Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31	Alito*, Gorsuch, KENNEDY, Roberts, Thomas	Breyer, Ginsburg, Kagan+, Sotomayor+	585 U.S. ____ (2018)	First Amendment: Free Speech Clause	Labor and Employment Law	State’s extraction of agency fees from nonconsenting public-sector employees violated the First Amendment.
Nat’l Inst. of Family & Life Advocates v. Becerra	Alito, Gorsuch, KENNEDY+, Roberts, Thomas*	Breyer+, Kagan, Ginsburg, Sotomayor	585 U.S. ____ (2018)	First Amendment: Free Speech Clause	Freedom of Speech	Provision of state law regulating crisis pregnancy centers likely violated the First Amendment.
South Dakota v. Wayfair, Inc.	Alito, Ginsburg, Gorsuch+, KENNEDY*, Thomas+	Breyer, Kagan, Roberts+, Sotomayor	585 U.S. ____ (2018)	Article I: Commerce Clause	Tax Law	Prior Supreme Court cases prohibiting a state from requiring an out-of-state seller with no physical presence in the state to collect and remit sales taxes were incorrectly decided.
Trump v. Hawaii	Alito, Gorsuch, KENNEDY+, Roberts*, Thomas	Breyer+, Ginsburg, Kagan, Sotomayor+	585 U.S. ____ (2018)	First Amendment: Establishment Clause	Immigration Law; National Security	President lawfully suspended entry of certain aliens into the United States.
Hernandez v. Mesa	Per Curiam (Alito, KENNEDY, Roberts, Sotomayor)	Breyer+, Ginsburg, Thomas+	137 S. Ct. 2003 (2017)	Fourth Amendment; Fifth Amendment	Civil Rights Law	Court of Appeals erred by granting qualified immunity to Border Patrol agent who killed Mexican teenager, as qualified immunity cannot be based on facts an officer learns after the incident ended.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Constitutional Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
McWilliams v. Dunn	Breyer*, Ginsburg, Kagan, KENNEDY, Sotomayor	Alito+, Gorsuch, Roberts, Thomas	137 S. Ct. 1790 (2017)	Fourteenth Amendment: Due Process	Habeas Corpus	State unlawfully failed to provide defendant with mental health expert to assist in evaluation, preparation, and presentation of defense to capital murder charges.
Moore v. Texas	Breyer, Ginsburg*, Kagan, KENNEDY, Sotomayor	Alito, Roberts+, Thomas	137 S. Ct. 1039 (2017)	Eighth Amendment: Cruel and Unusual Punishment	Habeas Corpus	State's legal standard for determining whether capital defendant was intellectually disabled did not comport with the Eighth Amendment.
Murr v. Wisconsin	Breyer, Ginsburg, Kagan, KENNEDY*, Sotomayor	Alito, Roberts+, Thomas+	137 S. Ct. 1933 (2017)	Fifth Amendment: Takings Clause; Fourteenth Amendment	Takings	Courts must consider a number of factors in determining the proper denominator for purposes of a takings inquiry.
Peña-Rodriguez v. Colorado	Breyer, Ginsburg, Kagan, KENNEDY*, Sotomayor	Alito+, Roberts, Thomas+	137 S. Ct. 855 (2017)	Sixth Amendment: Right to Jury Trial; Fourteenth Amendment: Equal Protection Clause	Criminal Law and Procedure	The "no-impeachment" rule does not apply when a juror makes clear statements indicating that he relied on racial stereotypes or animus when voting to convict a criminal defendant.
Ziglar v. Abbasi	Alito, KENNEDY*, Roberts, Thomas+	Breyer*, Ginsburg	137 S. Ct. 1843 (2017)	Fourth Amendment; Fifth Amendment	Civil Rights Law; National Security	Alien detention policy claims could not be the basis for a <i>Bivens</i> action; plaintiffs adequately alleged that the facility's warden showed deliberate indifference to prisoner abuse; officials and wardens were entitled to qualified immunity with respect to civil rights conspiracy claims.
Fisher v. Univ. of Tex. Austin	Breyer, Ginsburg, KENNEDY*, Sotomayor	Alito+, Roberts, Thomas+	136 S. Ct. 2198 (2016)	Fourteenth Amendment: Equal Protection Clause	Civil Rights Law; Education Law	University's admissions program did not violate the Equal Protection Clause.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Constitutional Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Utah v. Strieff	Alito, Breyer, KENNEDY, Roberts, Thomas*	Kagan+, Ginsburg, Sotomayor+	136 S. Ct. 2056 (2016)	Fourth Amendment	Criminal Law and Procedure	Preexisting arrest warrant rendered certain evidence admissible in defendant's criminal case.
Whole Woman's Health v. Hellerstedt	Breyer*, Ginsburg+, Kagan, KENNEDY, Sotomayor	Alito+, Roberts, Thomas+	136 S. Ct. 2292 (2016)	Fourteenth Amendment	Abortion Law	State laws imposed undue burden on women's right to seek previability abortions.
Williams v. Pennsylvania	Breyer, Ginsburg, Kagan, KENNEDY*, Sotomayor	Alito, Roberts+, Thomas+	136 S. Ct. 1899 (2016)	Fourteenth Amendment: Due Process Clause	Criminal Law and Procedure; Judicial System	Due process compelled recusal of judge presiding over death penalty case.
Ala. Legislative Black Caucus v. Alabama	Breyer*, Ginsburg, Kagan, KENNEDY, Sotomayor	Alito, Roberts, Scalia+, Thomas+	135 S. Ct. 1257 (2015)	Fourteenth Amendment: Equal Protection Clause	Election Law; Civil Rights Law	District court applied incorrect legal standards when evaluating whether changes to electoral districts constituted an unlawful racial gerrymander.
Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n	Breyer, Ginsburg*, Kagan, KENNEDY, Sotomayor	Alito, Roberts+, Scalia+, Thomas+,	135 S. Ct. 2652 (2015)	Article I: Elections Clause	Election Law	Ballot initiative creating state congressional redistricting commission did not violate the Constitution's Elections Clause.
Brumfield v. Cain	Breyer, Ginsburg, Kagan, KENNEDY, Sotomayor*	Alito+, Roberts, Scalia, Thomas+	135 S. Ct. 2269 (2015)	Eighth Amendment: Cruel and Unusual Punishment Clause	Habeas Corpus	Habeas corpus petitioner on death row was entitled to a hearing on claim that he suffered from an intellectual disability that would render his execution unconstitutional.
City of Los Angeles v. Patel	Breyer, Ginsburg, Kagan, KENNEDY, Sotomayor*	Alito+, Roberts, Scalia+, Thomas	135 S. Ct. 2443 (2015)	Fourth Amendment	Criminal Law and Procedure	Municipal code provision requiring hotel operators to provide guest information to requesting police officers violated the Fourth Amendment.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Constitutional Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Comptroller of Treas. of Md. v. Wynne	Alito*, Breyer, KENNEDY, Roberts, Sotomayor	Ginsburg+, Kagan, Scalia+, Thomas+	135 S. Ct. 1787 (2015)	Article I: Commerce Clause	Tax Law	State's personal income tax scheme, which failed to provide a full credit for income taxes paid to other states, violated the dormant Commerce Clause.
Davis v. Ayala	Alito*, KENNEDY+, Roberts, Scalia, Thomas+	Breyer, Ginsburg, Kagan, Sotomayor+	135 S. Ct. 2187 (2015)	Fourteenth Amendment: Equal Protection Clause	Habeas Corpus	Any constitutional error resulting from criminal defense counsel's absence from hearing was harmless.
Glossip v. Gross	Alito*, KENNEDY, Roberts, Scalia+, Thomas+	Breyer+, Ginsburg, Kagan, Sotomayor+	135 S. Ct. 2726 (2015)	Eighth Amendment: Cruel and Unusual Punishment Clause	Criminal Law and Procedure; Civil Rights Law	Proposed method of executing capital defendants did not violate the Eighth Amendment.
Horne v. Dep't of Agric. ^a	Alito, KENNEDY, Roberts*, Scalia, Thomas ^a	Breyer+, Ginsburg, Kagan, Sotomayor ^a	135 S. Ct. 2419 (2015)	Fifth Amendment: Takings Clause	Takings	Court would not remand case for determination of whether compensation would be due under the Takings Clause if property owners had complied with a federal order regulating the property. ^a
Kerry v. Din	Alito, KENNEDY+, Roberts, Scalia*, Thomas	Breyer+, Ginsburg, Kagan, Sotomayor	135 S. Ct. 2128 (2015)	Fifth Amendment: Due Process Clause	Immigration Law; National Security	The United States, by providing notice to a citizen regarding the government's reason for denying her alien husband's visa, satisfied the requirements of due process.
Kingsley v. Hendrickson	Breyer*, Ginsburg, Kagan, KENNEDY, Sotomayor	Alito+, Roberts, Scalia+, Thomas	135 S. Ct. 2466 (2015)	Fourteenth Amendment: Due Process Clause	Civil Rights Law	To prevail on an excessive force claim, a pretrial detainee need only show that the force used was objectively unreasonable.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Constitutional Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Obergefell v. Hodges	Breyer, Ginsburg, Kagan, KENNEDY*, Sotomayor	Alito+, Roberts+, Scalia+, Thomas+	135 S. Ct. 2584 (2015)	Fourteenth Amendment: Due Process Clause; Fourteenth Amendment: Equal Protection Clause	Family Law; Civil Rights Law	A state, by failing to recognize marriages between same-sex couples, violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.
Hall v. Florida	Breyer, Ginsburg, Kagan, KENNEDY*, Sotomayor	Alito+, Roberts, Scalia, Thomas	134 S. Ct. 1986 (2014)	Eighth Amendment: Cruel and Unusual Punishment Clause	Criminal Law and Procedure	State's capital punishment regime created unacceptable risk of unconstitutionally executing persons with intellectual disabilities.
Harris v. Quinn	Alito*, KENNEDY, Roberts, Scalia, Thomas	Breyer, Ginsburg, Kagan+, Sotomayor	134 S. Ct. 2618 (2014)	First Amendment: Free Speech Clause	Labor and Employment Law; Freedom of Speech	First Amendment prohibited collection of agency fee from certain persons who did not wish to join or support a union.
McCutcheon v. FEC	Alito, KENNEDY, Roberts*, Scalia, Thomas+	Breyer+, Ginsburg, Kagan, Sotomayor	134 S. Ct. 1434 (2014)	First Amendment: Free Speech Clause	Election Law; Freedom of Speech	Statutory aggregate limits on political contributions violated First Amendment.
Navarette v. California	Alito, Breyer, KENNEDY, Roberts, Thomas*	Ginsburg, Kagan, Scalia+, Sotomayor	134 S. Ct. 1683 (2014)	Fourth Amendment	Criminal Law and Procedure	Traffic stop complied with the Fourth Amendment because investigating officer had reasonable suspicion that the stopped driver was intoxicated.
Town of Greece, N.Y. v. Galloway	Alito+, KENNEDY*, Roberts, Scalia, Thomas+	Breyer+, Ginsburg, Kagan+, Sotomayor	134 S. Ct. 1811 (2014)	First Amendment: Establishment Clause	Freedom of Religion	Town did not violate Constitution by opening meetings with a prayer.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Constitutional Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Clapper v. Amnesty Int'l USA	Alito*, KENNEDY, Roberts, Scalia, Thomas	Breyer+, Ginsburg, Kagan, Sotomayor	568 U.S. 398 (2013)	Article III	Judicial System; National Security	Plaintiffs lacked standing to challenge constitutionality of a provision of the Foreign Intelligence Surveillance Act.
Genesis Healthcare Corp. v. Symczyk	Alito, KENNEDY, Roberts, Scalia, Thomas*	Breyer, Ginsburg, Kagan+, Sotomayor	569 U.S. 66 (2013)	Article III	Judicial System	Fair Labor Standards Act lawsuit was moot.
Koontz v. St. Johns River Water Mgmt. Dist.	Alito*, KENNEDY, Roberts, Scalia, Thomas	Breyer, Ginsburg, Kagan+, Sotomayor	570 U.S. 595 (2013)	Fifth Amendment: Takings Clause	Takings	Governmental units must comply with constitutional limitations on their ability to condition the approval of a land use permit, even when the government has denied the permit and even when the government has made a demand for money.
Maryland v. King	Alito, Breyer, KENNEDY*, Roberts, Thomas	Ginsburg, Kagan, Scalia+, Sotomayor	569 U.S. 435 (2013)	Fourth Amendment	Criminal Law and Procedure	Analysis of criminal defendant's DNA did not violate the Fourth Amendment.
Missouri v. McNeely	Ginsburg, Kagan, KENNEDY+, Scalia, Sotomayor*	Alito, Breyer, Roberts+, Thomas+	569 U.S. 141 (2013)	Fourth Amendment	Criminal Law and Procedure	Natural metabolization of alcohol in the bloodstream does not create a categorical exception to the search warrant requirement to allow for warrantless, nonconsensual blood testing in drunk driving cases.
Peugh v. United States	Breyer, Ginsburg, Kagan, KENNEDY, Sotomayor*	Alito+, Roberts, Scalia, Thomas+	569 U.S. 530 (2013)	Article I: Ex Post Facto Clause	Criminal Law and Procedure	Sentencing a criminal defendant under current sentencing guidelines violates the Ex Post Facto Clause if the applicable sentencing range would be higher than the sentencing guidelines that were in effect at the time of the offense.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Constitutional Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Salinas v. Texas	Alito*, KENNEDY, Roberts, Scalia, Thomas+	Breyer+, Ginsburg, Kagan, Sotomayor	570 U.S. 178 (2013)	Fifth Amendment: Self-Incrimination Clause	Criminal Law and Procedure	A criminal defendant cannot invoke a Fifth Amendment right against self-incrimination solely by remaining mute during custodial interrogation.
Shelby Cty., Ala. v. Holder	Alito, KENNEDY, Roberts*, Scalia, Thomas+	Breyer, Ginsburg+, Kagan, Sotomayor	570 U.S. 529 (2013)	Fifteenth Amendment: Enforcement Clause; Tenth Amendment	Election Law	Coverage formula provision of the Voting Rights Act was unconstitutional in light of current conditions.
Trevino v. Thaler	Breyer*, Ginsburg, Kagan, KENNEDY, Sotomayor	Alito, Roberts+, Scalia+, Thomas	569 U.S. 413 (2013)	Sixth Amendment: Right to Counsel	Habeas Corpus	Under specified circumstances, federal habeas courts can entertain certain ineffective assistance of counsel claims even if they are procedurally defaulted.
United States v. Windsor	Breyer, Ginsburg, Kagan, KENNEDY*, Sotomayor	Alito+, Roberts+, Scalia+, Thomas	570 U.S. 744 (2013)	Fifth Amendment: Due Process Clause	Family Law; Civil Rights Law	Federal statute defining marriage to exclude same-sex partnerships was unconstitutional.
Am. Tradition P'ship Inc. v. Bullock	Per Curiam (Alito, KENNEDY, Roberts, Scalia, Thomas)	Breyer+, Ginsburg, Kagan, Sotomayor	567 U.S. 516 (2012)	First Amendment: Free Speech Clause	Election Law; Freedom of Speech	State statute limiting the ability of corporations to make financial contributions to political candidates and committees violated the First Amendment.
Coleman v. Ct. App. of Md.	Alito, KENNEDY*, Roberts, Scalia+, Thomas+	Breyer, Ginsburg+, Kagan, Sotomayor	566 U.S. 30 (2012)	Fourteenth Amendment: Enforcement Clause	Labor and Employment Law	Congress did not validly abrogate states' sovereign immunity when enacting provision of the Family Medical Leave Act.
Florence v. Bd. of Chosen Freeholders of Cty. of Burlington	Alito+, KENNEDY*, Roberts+, Scalia, Thomas	Breyer+, Ginsburg, Kagan, Sotomayor	566 U.S. 318 (2012)	Fourth Amendment	Criminal Law and Procedure	Searches conducted before arrestee entered jail's general population were not unconstitutional.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Constitutional Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Lafler v. Cooper	Breyer, Ginsburg, Kagan, KENNEDY*, Sotomayor	Alito+, Roberts, Scalia+, Thomas	566 U.S. 156 (2012)	Sixth Amendment: Right to Counsel	Criminal Law and Procedure; Habeas Corpus	Defense counsel prejudicially rendered ineffective assistance by advising the criminal defendant to reject plea offer.
Miller v. Alabama	Breyer+, Ginsburg, Kagan*, KENNEDY, Sotomayor+	Alito+, Roberts+, Scalia, Thomas+	567 U.S. 460 (2012)	Eighth Amendment: Cruel and Unusual Punishment Clause	Criminal Law and Procedure	Sentences mandating life imprisonment without the possibility of parole for juveniles violated the Eighth Amendment.
Missouri v. Frye	Breyer, Ginsburg, Kagan, KENNEDY*, Sotomayor	Alito, Roberts, Scalia+, Thomas	566 U.S. 134 (2012)	Sixth Amendment: Right to Counsel	Habeas Corpus	Criminal defense counsel must timely communicate favorable plea offers to the defendant.
Williams v. Illinois	Alito*, Breyer+, KENNEDY, Roberts, Thomas+	Ginsburg, Kagan+, Scalia, Sotomayor	567 U.S. 50 (2012)	Sixth Amendment: Confrontation Clause	Criminal Law and Procedure	Introduction of DNA expert's testimony in a criminal case did not violate the Confrontation Clause.
Ariz. Christian Sch. Tuition Org. v. Winn	Alito, KENNEDY*, Roberts, Scalia+, Thomas,	Breyer, Ginsburg, Kagan+, Sotomayor	563 U.S. 125 (2011)	Article III	Judicial System	Taxpayers lacked standing to challenge constitutionality of state's tuition tax credit.
Ariz. Free Enter. Club's Freedom Club PAC v. Bennett	Alito, KENNEDY, Roberts*, Scalia, Thomas	Breyer, Ginsburg, Kagan+, Sotomayor	564 U.S. 721 (2011)	First Amendment: Free Speech Clause	Election Law; Freedom of Speech	"Matching funds" provision of state election law was unconstitutional.
Brown v. Plata	Breyer, Ginsburg, Kagan, KENNEDY*, Sotomayor	Alito+, Roberts, Scalia+, Thomas	563 U.S. 493 (2011)	Eighth Amendment: Cruel and Unusual Punishment Clause	Civil Rights Law	Caps on population of overcrowded state prisons were necessary to remedy violations of prisoners' constitutional rights.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Constitutional Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Connick v. Thompson	Alito, KENNEDY, Roberts, Scalia+, Thomas*	Breyer, Kagan, Ginsburg+, Sotomayor	563 U.S. 51 (2011)	Fourteenth Amendment: Due Process Clause	Civil Rights Law	Court could not hold a district attorney's office liable under a "failure to train" theory based on a prosecutor's single failure to provide exculpatory evidence to a criminal defendant.
Cullen v. Pinholster	Alito+, KENNEDY, Roberts, Scalia, Thomas*	Breyer+, Ginsburg, Kagan, Sotomayor+	563 U.S. 170 (2011)	Sixth Amendment: Right to Counsel	Habeas Corpus	Criminal defendant on death row was not entitled to habeas corpus relief on a claim of ineffective assistance of counsel.
JDB v. North Carolina	Breyer, Ginsburg, Kagan, KENNEDY, Sotomayor*	Alito+, Roberts, Scalia, Thomas	564 U.S. 261 (2011)	Fifth Amendment: Self-Incrimination Clause	Criminal Law and Procedure	A juvenile defendant's age is generally relevant to whether that juvenile is in "custody" for the purposes of the <i>Miranda</i> doctrine.
Stern v. Marshall	Alito, KENNEDY, Roberts*, Scalia+, Thomas	Breyer+, Ginsburg, Kagan, Sotomayor	564 U.S. 462 (2011)	Article III	Business Law; Judicial System	Bankruptcy courts lacked constitutional authority to adjudicate certain types of claims.
Turner v. Rogers	Breyer*, Ginsburg, Kagan, KENNEDY, Sotomayor	Alito, Roberts, Scalia, Thomas+	564 U.S. 431 (2011)	Fourteenth Amendment: Due Process Clause	Family Law	The Due Process Clause does not automatically require appointment of counsel to indigent parties in civil contempt proceedings in child support cases, but the failure to provide alternate procedural safeguards in such cases can violate due process.
United States v. Juvenile Male	Per Curiam (Alito, KENNEDY, Roberts, Scalia, Thomas)	Breyer, Ginsburg, Sotomayor	564 U.S. 932 (2011)	Article III	Judicial System	Juvenile offender's challenge to mandatory sex offender registration was moot.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Constitutional Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Berghuis v. Thompkins	Alito, KENNEDY*, Roberts, Scalia, Thomas	Breyer, Ginsburg, Sotomayor+, Stevens	560 U.S. 370 (2010)	Fifth Amendment: Self-Incrimination Clause	Criminal Law and Procedure; Habeas Corpus	Criminal defendant waived <i>Miranda</i> right to remain silent when he knowingly and voluntarily made a statement to the police.
Christian Legal Soc'y v. Martinez	Breyer, Ginsburg*, KENNEDY+, Sotomayor, Stevens+	Alito+, Roberts, Scalia, Thomas	561 U.S. 661 (2010)	First Amendment: Free Speech Clause; First Amendment: Free Exercise Clause	Freedom of Religion; Freedom of Association	School did not violate First Amendment by refusing to recognize a student organization that did not accept all students who wished to join the organization, including those who did not share the organization's views about religion and sexual orientation.
Citizens United v. FEC	Alito, KENNEDY*, Roberts+, Scalia+, Thomas+	Breyer, Ginsburg, Sotomayor, Stevens+	558 U.S. 310 (2010)	First Amendment: Free Speech Clause	Election Law; Freedom of Speech	Federal campaign finance law banning corporate independent expenditures for electioneering communications violated the First Amendment.
Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.	Alito, KENNEDY, Roberts*, Scalia, Thomas	Breyer+, Ginsburg, Sotomayor, Stevens	561 U.S. 477 (2010)	Article II	Separation of Powers	Dual for-cause limitations on removal of officers of federal agency were unconstitutional.
McDonald v. City of Chicago	Alito*, KENNEDY, Roberts, Scalia+, Thomas+	Breyer+, Ginsburg, Sotomayor, Stevens+	561 U.S. 742 (2010)	Second Amendment	Second Amendment	Second Amendment applied to the states through the Fourteenth Amendment's Due Process Clause.
Salazar v. Buono	Alito+, KENNEDY*, Roberts+, Scalia+, Thomas	Breyer+, Ginsburg, Sotomayor, Stevens+	559 U.S. 700 (2010)	First Amendment: Establishment Clause; Article III	Freedom of Religion; Judicial System	Lower courts erred by enjoining government from implementing statute that would transfer a memorial containing religious symbol from federal land to private land.

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Sears v. Upton	Per Curiam (Breyer, Ginsburg, KENNEDY, Sotomayor, Stevens)	Alito, Roberts, Scalia+, Thomas	561 U.S. 945 (2010)	Sixth Amendment: Right to Counsel	Habeas Corpus	State postconviction court failed to apply proper legal standards when assessing whether inadequacies in defense counsel's mitigation investigation prejudiced the petitioner.
Wellons v. Hall	Per Curiam (Breyer, Ginsburg, KENNEDY, Sotomayor, Stevens)	Alito+, Roberts, Scalia+, Thomas	558 U.S. 220 (2010)	Fourteenth Amendment: Due Process Clause	Habeas Corpus; Judicial System	Capital murder defendant was not barred from pursuing claims of judge, juror, and bailiff misconduct.
Caperton v. A.T. Massey Coal Co.	Breyer, Ginsburg, KENNEDY*, Souter, Stevens	Alito, Roberts+, Scalia+, Thomas	556 U.S. 868 (2009)	Fourteenth Amendment: Due Process Clause	Judicial System	Due Process Clause requires a judge to recuse himself when failure to do so creates a probability of bias.
Dist. Atty's Office for the Third Judicial Dist. v. Osborne	Alito+, KENNEDY, Roberts*, Scalia, Thomas	Breyer, Ginsburg, Souter+, Stevens+	557 U.S. 52 (2009)	Fourteenth Amendment: Due Process Clause	Civil Rights Law; Habeas Corpus	The Supreme Court's ruling in <i>Brady v. Maryland</i> did not extend to the postconviction context.
Haywood v. Drown	Breyer, Ginsburg, KENNEDY, Souter, Stevens*	Alito, Roberts, Scalia, Thomas+	556 U.S. 729 (2009)	Article VI: Supremacy Clause	Civil Rights Law; Judicial System	State law that divested state courts of general jurisdiction over suits filed under 42 U.S.C. § 1983 for monetary damages against state corrections officers violated the Supremacy Clause.
Herring v. United States	Alito, KENNEDY, Roberts*, Scalia, Thomas	Breyer+, Ginsburg+, Souter, Stevens	555 U.S. 135 (2009)	Fourth Amendment	Criminal Law and Procedure	Evidentiary exclusionary rule did not apply in criminal cases where police mistakes leading to an unlawful search are due to isolated negligence attenuated from the search.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Constitutional Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Montejo v. Louisiana	Alito+, KENNEDY, Roberts, Scalia*, Thomas	Breyer+, Ginsburg, Souter, Stevens+	556 U.S. 778 (2009)	Sixth Amendment: Right to Counsel	Criminal Law and Procedure	Neither the defendant's request for counsel at arraignment nor the appointment of counsel by the court triggered a presumption that any subsequent waiver by the defendant to a police-initiated interrogation would be invalid.
Oregon v. Ice	Alito, Breyer, Ginsburg*, KENNEDY, Stevens	Roberts, Scalia+, Souter, Thomas	555 U.S. 160 (2009)	Sixth Amendment: Right to Jury Trial	Criminal Law and Procedure	Sixth Amendment did not prohibit states from allowing judges (rather than juries) to find facts necessary to support the imposition of consecutive criminal sentences.
Summers v. Earth Island Inst.	Alito, KENNEDY+, Roberts, Scalia*, Thomas	Breyer+, Ginsburg, Souter, Stevens	555 U.S. 488 (2009)	Article III	Judicial System; Environmental Law	Environmental organizations lacked standing to challenge certain U.S. Forest Service regulations.
Boumediene v. Bush	Breyer, Ginsburg, KENNEDY*, Souter+, Stevens	Alito, Roberts+, Scalia+, Thomas	553 U.S. 723 (2008)	Article I: Suspension Clause	National Security; Habeas Corpus	Enemy belligerents detained at Guantanamo Bay were entitled to seek habeas review of the legality of their detention.
Davis v. FEC	Alito*, KENNEDY, Roberts, Scalia, Thomas	Breyer, Ginsburg+, Souter, Stevens+	554 U.S. 724 (2008)	Article III; First Amendment: Free Speech Clause	Election Law; Freedom of Speech	Provisions of the Bipartisan Campaign Reform Act restricting the ability of a self-financing candidate to spend his or her own money violated the First Amendment.
Dist. of Columbia v. Heller	Alito, KENNEDY, Roberts, Scalia*, Thomas	Breyer+, Ginsburg, Souter, Stevens+	554 U.S. 570 (2008)	Second Amendment	Second Amendment	Second Amendment conferred individual right to bear arms, resulting in the invalidation of D.C. laws that generally prohibited the possession of handguns.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Constitutional Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Kennedy v. Louisiana	Breyer, Ginsburg, KENNEDY*, Souter, Stevens	Alito+, Roberts, Scalia, Thomas	554 U.S. 407 (2008)	Eighth Amendment: Cruel and Usual Punishment Clause	Criminal Law and Procedure	The Eighth Amendment forbids imposing the death penalty for the rape of a child in a case where the victim did not die and the defendant did not intend the victim's death.
Sprint Commc'ns Co. v. APCC Servs., Inc.	Breyer*, Ginsburg, KENNEDY, Souter, Stevens	Alito, Roberts+, Scalia, Thomas	554 U.S. 269 (2008)	Article III	Judicial System; Communications Law	Assignees of payphone operators had standing to sue long-distance carriers.
Abdul-Kabir v. Quarterman	Breyer, Ginsburg, KENNEDY, Souter, Stevens*	Alito, Roberts+, Scalia+, Thomas	550 U.S. 233 (2007)	Eighth Amendment: Cruel and Unusual Punishment Clause	Habeas Corpus	State court improperly rejected capital defendant's claim that the sentencing jury was unable to consider mitigating evidence concerning the defendant's family background and mental defects.
Brewer v. Quarterman	Breyer, Ginsburg, KENNEDY, Souter, Stevens*	Alito, Roberts+, Scalia+, Thomas	550 U.S. 286 (2007)	Eighth Amendment: Cruel and Unusual Punishment Clause	Habeas Corpus	Jury instructions in a capital murder case did not provide the sentencing jury an adequate opportunity to consider mitigating evidence.
FEC v. Wis. Right to Life, Inc.	Alito+, KENNEDY, Roberts*, Scalia+, Thomas	Breyer, Ginsburg, Souter+, Stevens	551 U.S. 449 (2007)	First Amendment: Free Speech Clause	Election Law; Freedom of Speech	Joining a concurrence by Justice Scalia, Justice Kennedy concluded that the federal prohibition on the use of corporate funds to finance electioneering communications violated a corporation's free speech rights.
Gonzales v. Carhart	Alito, KENNEDY*, Roberts, Scalia, Thomas+	Breyer, Ginsburg+, Souter, Stevens	550 U.S. 124 (2007)	Fifth Amendment: Due Process Clause	Abortion Law	Partial Birth Abortion Ban Act was not unconstitutional.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Constitutional Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Hein v. Freedom from Religion Found., Inc.	Alito*, KENNEDY+, Roberts, Scalia+, Thomas	Breyer, Ginsburg, Souter+, Stevens	551 U.S. 587 (2007)	Article III	Judicial System; Freedom of Religion	Organization lacked standing to challenge certain federal faith-based initiatives.
Massachusetts v. EPA	Breyer, Ginsburg, KENNEDY, Souter, Stevens*	Alito, Roberts+, Scalia+, Thomas	549 U.S. 497 (2007)	Article III	Judicial System; Environmental Law	State had standing to challenge the Environmental Protection Agency's alleged failure to adequately regulate greenhouse gases; greenhouse gases fit within the Clean Air Act's definition of "air pollutant" and therefore fell within EPA's regulatory authority.
Morse v. Frederick	Alito+, KENNEDY, Roberts*, Scalia, Thomas+	Breyer+, Ginsburg, Souter, Stevens+	551 U.S. 393 (2007)	First Amendment: Free Speech Clause	Freedom of Speech; Education Law	School principal did not violate a student's right to free speech because schools can regulate speech that could be regarded as encouraging illegal drug use.
Panetti v. Quarterman	Breyer, Ginsburg, KENNEDY*, Souter, Stevens	Alito, Roberts, Scalia, Thomas+	551 U.S. 930 (2007)	Eighth Amendment: Cruel and Unusual Punishment Clause	Habeas Corpus	State failed to afford petitioner a constitutionally adequate procedure to prove he lacked the mental competency required to be subject to capital punishment.
Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1	Alito, KENNEDY+, Roberts*, Scalia, Thomas+	Breyer+, Ginsburg, Souter, Stevens+	551 U.S. 701 (2007)	Fourteenth Amendment: Equal Protection Clause; Article III	Civil Rights Law; Education Law	In a separate opinion concurring in the judgment, Justice Kennedy agreed that racial classifications in student assignment plans were unlawful, but stated that race-conscious strategies aimed at promoting diversity in education could be devised that would satisfy strict scrutiny.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Constitutional Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Philip Morris USA v. Williams	Alito, Breyer*, KENNEDY, Roberts, Souter	Ginsburg+, Scalia, Stevens+, Thomas+	549 U.S. 346 (2007)	Fourteenth Amendment: Due Process Clause	Civil Liability	A punitive damages award is unconstitutional if it is partially based on a jury's desire to punish a defendant for harming persons who are not parties to the case.
Schriro v. Landrigan	Alito, KENNEDY, Roberts, Scalia, Thomas*	Breyer, Ginsburg, Souter, Stevens+	550 U.S. 465 (2007)	Sixth Amendment: Right to Counsel	Habeas Corpus	Habeas corpus petitioner on death row was not entitled to an evidentiary hearing on his ineffective assistance of counsel claims.
Smith v. Texas	Breyer, Ginsburg, KENNEDY*, Souter+, Stevens	Alito+, Roberts, Scalia, Thomas	550 U.S. 297 (2007)	Eighth Amendment: Cruel and Unusual Punishment Clause	Habeas Corpus	Erroneous jury instructions in capital murder case entitled the petitioner to habeas corpus relief.
Uttecht v. Brown	Alito, KENNEDY*, Roberts, Scalia, Thomas	Breyer+, Ginsburg, Souter, Stevens+	551 U.S. 1 (2007)	Sixth Amendment: Right to Jury Trial; Fourteenth Amendment	Habeas Corpus; Judicial System	State court permissibly excused a prospective juror from a death penalty case.
Ayers v. Belmontes	Alito, KENNEDY*, Roberts, Scalia+, Thomas	Breyer, Ginsburg, Souter, Stevens+	549 U.S. 7 (2006)	Eighth Amendment: Cruel and Unusual Punishment Clause	Habeas Corpus	Jury instructions in a capital murder case did not contravene the constitutional right to present mitigating evidence in capital sentencing proceedings.
Brown v. Sanders	KENNEDY, O'Connor, Scalia*, Roberts, Thomas	Breyer+, Ginsburg, Souter, Stevens+	546 U.S. 212 (2006)	Eighth Amendment; Cruel and Unusual Punishment Clause	Habeas Corpus	The invalidity of two criteria for determining whether a capital defendant was eligible for a death sentence did not affect the constitutionality of the death sentence ultimately imposed.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Constitutional Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Garcetti v. Ceballos	Alito, KENNEDY*, Roberts, Scalia, Thomas	Breyer+, Ginsburg, Souter+, Stevens+	547 U.S. 410 (2006)	First Amendment: Free Speech Clause	Freedom of Speech; Labor and Employment Law	First Amendment did not insulate an employee from being disciplined for statements made in connection with the employee's official duties.
Georgia v. Randolph	Breyer+, Ginsburg, KENNEDY, Souter*, Stevens+	Roberts+, Scalia+, Thomas	547 U.S. 103 (2006)	Fourth Amendment	Criminal Law and Procedure	A physically present inhabitant's express refusal of consent to a police search of his home overrides the consent of a fellow occupant, necessitating a warrant for such a search.
Hudson v. Michigan	Alito, KENNEDY+, Roberts, Scalia*, Thomas	Breyer+, Ginsburg, Souter, Stevens	547 U.S. 586 (2006)	Fourth Amendment	Criminal Law and Procedure	In a separate opinion concurring in the Court's judgment, Justice Kennedy concluded the violation of the knock-and-announce rule was not sufficiently related to the later discovery of evidence to justify suppression.
Kansas v. Marsh	Alito, KENNEDY, Roberts, Scalia+, Thomas*	Breyer, Ginsburg, Souter+, Stevens+	548 U.S. 163 (2006)	Eighth Amendment: Cruel and Unusual Punishment Clause	Criminal Law and Procedure	Kansas's death penalty statute did not violate the Eighth Amendment.

Source: Created by CRS.

Notes: Author of primary opinion designated with an asterisk (*). Authors of concurring and dissenting opinions identified with plus signs (+). If a decision primarily involved constitutional law issues, but also raised other legal matters, the case was placed in this table.

- a. Although eight of the Justices in *Horne* agreed regarding most of the substantive issues posed by the case, the Court split 5-3-1 regarding the proper procedural resolution of the case.

Table A-2. Justice Anthony Kennedy As a “Swing” Vote: Statutory Law Decisions

Cases Centering on Questions of Statutory Interpretation in Which Justice Kennedy Cast a Deciding Vote (October 2005 Term-October 2017 Term)

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Statutory Provision Interpreted	Area of Law	Justice Kennedy’s Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Abbott v. Perez	Alito*, Gorsuch, KENNEDY, Roberts, Thomas+	Breyer, Ginsburg, Kagan, Sotomayor+	585 U.S. ____ (2018)	Voting Rights Act	Election Law; Civil Rights Law	All but one of state’s legislative districts were lawfully drawn.
Encino Motorcars, LLC v. Navarro	Alito, Gorsuch, KENNEDY, Roberts, Thomas*	Breyer, Ginsburg+, Kagan, Sotomayor	584 U.S. ____ (2018)	Fair Labor Standards Act	Labor and Employment Law	Service advisors were exempt from Fair Labor Standards Act’s overtime pay requirement.
Epic Sys. Corp. v. Lewis	Alito, Gorsuch*, KENNEDY, Roberts, Thomas+	Breyer, Ginsburg+, Kagan, Sotomayor	584 U.S. ____ (2018)	National Labor Relations Act; Federal Arbitration Act	Judicial System; Labor and Employment Law	National Labor Relations Act did not override Federal Arbitration Act’s mandate that courts must enforce arbitration agreements, including those that require individualized proceedings.
Husted v. A. Philip Randolph Institute	Alito*, Gorsuch, KENNEDY, Roberts, Thomas+	Breyer+, Ginsburg, Kagan, Sotomayor+	584 U.S. ____ (2018)	National Voter Registration Act	Election Law	State’s procedure for removing voters from its rolls did not violate federal law.
Jennings v. Rodriguez	Alito*, Gorsuch, KENNEDY, Roberts, Thomas+	Breyer+, Ginsburg, Sotomayor	583 U.S. ____ (2018)	Immigration and Nationality Act	Immigration Law	Provisions of immigration laws did not limit the permissible length of an alien’s detention without a bond hearing.
Jesner v. Arab Bank	Alito+, Gorsuch+, KENNEDY*, Roberts, Thomas+	Breyer, Ginsburg, Kagan, Sotomayor+	584 U.S. ____ (2018)	Alien Tort Statute	Civil Liability	Foreign corporations could not be defendants in suits under the Alien Tort Statute.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Statutory Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Murphy v. Smith	Alito, Gorsuch*, KENNEDY, Roberts, Thomas	Breyer, Ginsburg, Kagan, Sotomayor+	583 U.S. ____ (2018)	Civil Rights of Institutionalized Persons Act	Civil Rights Law	In a case governed by 42 U.S.C. § 1997e(d), district courts must apply as much of the judgment as necessary, up to 25%, to satisfy an award of attorney's fees.
Ohio v. Am. Express Co.	Alito, Gorsuch, KENNEDY, Roberts, Thomas*	Breyer+, Ginsburg, Kagan, Sotomayor	585 U.S. ____ (2018)	Sherman Act	Business Law	Credit card company's antisteering provisions did not violate antitrust law.
SAS Inst. Inc. v. Iancu	Alito, Gorsuch*, KENNEDY, Roberts, Thomas	Breyer+, Ginsburg+, Kagan, Sotomayor	584 U.S. ____ (2018)	Leahy-Smith American Invents Act	Business Law	When Patent and Trademark Office institutes <i>inter partes</i> review, it must decide the patentability of all claims the petitioner has challenged.
Wis. Cent. Ltd. v. United States	Alito, Gorsuch*, KENNEDY, Roberts, Thomas	Breyer+, Ginsburg, Kagan, Sotomayor	585 U.S. ____ (2018)	Railroad Retirement Tax Act	Tax Law	Employee stock options did not qualify as taxable compensation under the Railroad Retirement Tax Act.
Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.	Alito, Gorsuch, KENNEDY*, Roberts, Thomas	Breyer, Ginsburg+, Kagan, Sotomayor	137 S. Ct. 2042 (2017)	Securities Act of 1933	Business Law	Securities lawsuit was untimely because Section 13 of the Securities Act of 1933's three-year time limit is a statute of repose, displacing the traditional equitable powers of courts to modify statutory time limits.
Davila v. Davis	Alito, Gorsuch, KENNEDY, Roberts, Thomas*	Breyer+, Ginsburg, Kagan, Sotomayor	137 S. Ct. 2058 (2017)	Antiterrorism and Effective Death Penalty Act	Habeas Corpus	Federal courts are statutorily limited from adjudicating certain types of habeas corpus claims.
Midland Funding, LLC v. Johnson	Alito, Breyer*, KENNEDY, Roberts, Thomas	Ginsburg, Kagan, Sotomayor+	137 S. Ct. 1407 (2017)	Fair Debt Collection Practices Act	Business Law	Creditors did not violate Fair Debt Collection Practices Act by filing time-barred proof of claim in a bankruptcy case.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Statutory Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Ocasio v. United States	Alito*, Breyer+, Ginsburg, Kagan KENNEDY	Roberts, Sotomayor+, Thomas+	136 S. Ct. 1423 (2016)	Hobbs Act	Criminal Law and Procedure	Defendant could be convicted of conspiracy to violate the Hobbs Act upon proof that he reached an agreement to obtain property under color of official right.
RJR Nabisco, Inc. v. European Cmty.	Alito*, KENNEDY, Roberts, Thomas	Breyer+, Ginsburg+, Kagan	136 S. Ct. 2090 (2016)	Racketeer Influenced and Corrupt Organizations Act	Civil Liability	The Racketeer Influenced and Corrupt Organizations Act could apply extraterritorially, but only in certain limited circumstances.
Torres v. Lynch	Alito, Ginsburg, Kagan*, KENNEDY, Roberts	Breyer, Sotomayor+, Thomas	136 S. Ct. 1619 (2016)	Immigration and Nationality Act	Immigration Law	Alien's conviction for arson rendered him ineligible for cancellation of removal.
Michigan v. EPA	Alito, KENNEDY, Roberts, Scalia*, Thomas+	Breyer, Ginsburg, Kagan+, Sotomayor	135 S. Ct. 2699 (2015)	Clean Air Act	Environmental Law; Administrative Law	Environmental Protection Agency unreasonably deemed costs of compliance as irrelevant when it decided to regulate power plants under the Clean Air Act.
Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.	Breyer, Ginsburg, Kagan, KENNEDY*, Sotomayor	Alito+, Roberts, Scalia, Thomas+	135 S. Ct. 2507 (2015)	Fair Housing Act	Civil Rights Law	Disparate impact claims were cognizable under the Fair Housing Act.
United States v. Kwai Fun Wong	Breyer, Ginsburg, Kagan*, KENNEDY, Sotomayor	Alito+, Roberts, Scalia, Thomas	135 S. Ct. 1625 (2015)	Federal Tort Claims Act	Civil Liability; Judicial System	The Federal Tort Claims Act's time limitations were nonjurisdictional and could accordingly be extended according to equitable principles.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Statutory Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Abramski v. United States	Breyer, Ginsburg, Kagan*, KENNEDY, Sotomayor	Alito, Roberts, Scalia+, Thomas	134 S. Ct. 2259 (2014)	Gun Control Act	Criminal Law and Procedure	Straw firearms purchasers who presented themselves as actual buyers made false statements in violation of the Gun Control Act.
Burwell v. Hobby Lobby Stores, Inc.	Alito*, KENNEDY+, Roberts, Scalia, Thomas	Breyer+, Ginsburg+, Kagan+, Sotomayor	134 S. Ct. 2751 (2014)	Religious Freedom Restoration Act	Freedom of Religion	Requirement that a closely held corporation provide its employees with no-cost access to contraceptives violated the Religious Freedom Restoration Act.
Paroline v. United States	Alito, Breyer, Ginsburg, Kagan, KENNEDY*	Roberts+, Scalia, Sotomayor+, Thomas	134 S. Ct. 1710 (2014)	Mandatory Victims Restitution Act	Criminal Law and Procedure	Restitution for child pornography possession should be awarded in amount comporting with the defendant's relative role in causal process underlying the victim's losses.
Scialabba v. Cuellar de Osorio	Ginsburg, Kagan*, KENNEDY, Roberts+, Scalia	Alito+, Breyer, Sotomayor+, Thomas	134 S. Ct. 2191 (2014)	Child Status Protection Act	Administrative Law; Immigration Law	Interpretation given to the Child Status Protection Act by the Board of Immigration Appeals was reasonable and entitled to deference.
Adoptive Couple v. Baby Girl	Alito*, Breyer+, KENNEDY, Roberts, Thomas+	Ginsburg, Kagan, Scalia+, Sotomayor+	570 U.S. 637 (2013)	Indian Child Welfare Act	Indian Law; Family Law	Certain provisions of the Indian Child Welfare Act did not apply to the contested adoption of a child.
Am. Express Co. v. Italian Colors Rest.	Alito, KENNEDY, Roberts, Scalia*, Thomas+	Breyer, Ginsburg, Kagan+	570 U.S. 228 (2013)	Federal Arbitration Act	Judicial System	Federal Arbitration Act did not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a claim exceeded the potential recovery.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Statutory Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Comcast Corp. v. Behrend	Alito, KENNEDY, Roberts, Scalia*, Thomas	Breyer+, Ginsburg+, Kagan, Sotomayor	569 U.S. 27 (2013)	Federal Rule of Civil Procedure 23	Judicial System	Certain types of evidence did not support a plaintiff's request to certify a class action.
FTC v. Actavis, Inc.	Breyer*, Ginsburg, Kagan, KENNEDY, Sotomayor	Roberts+, Scalia, Thomas	570 U.S. 136 (2013)	Hatch-Waxman Act; Federal Trade Commission Act	Business Law	Reverse payment settlements in patent infringement litigation could violate antitrust laws under certain circumstances.
Maracich v. Spears	Alito, Breyer, KENNEDY*, Roberts, Thomas	Ginsburg+, Kagan, Scalia, Sotomayor	570 U.S. 48 (2013)	Driver's Privacy Protection Act	Privacy Law	Attorney's solicitation of prospective clients fell outside limit of exception from liability under the Driver's Privacy Protection Act.
McQuiggin v. Perkins	Breyer, Ginsburg*, Kagan, KENNEDY, Sotomayor	Alito, Roberts, Scalia+, Thomas	569 U.S. 383 (2013)	Antiterrorism and Effective Death Penalty Act	Habeas Corpus	Petitioner's plea of actual innocence could potentially overcome statute of limitations in habeas corpus statute.
Mut. Pharm. Co. v. Bartlett	Alito*, KENNEDY, Roberts, Scalia, Thomas	Breyer+, Ginsburg, Kagan, Sotomayor+	570 U.S. 472 (2013)	Federal Food, Drug, and Cosmetic Act	Civil Liability; Food and Drug Law	Federal law preempted certain tort claims against manufacturers of generic medications.
Univ. of Texas Sw. Med. Ctr. v. Nassar	Alito, KENNEDY*, Roberts, Scalia, Thomas	Breyer, Ginsburg+, Kagan, Sotomayor	570 U.S. 338 (2013)	Title VII of the Civil Rights Act of 1964	Labor and Employment Law; Civil Rights Law	Plaintiff asserting retaliation claim under Title VII was required to demonstrate but-for causation.
US Airways, Inc. v. McCutchen	Breyer, Ginsburg, Kagan*, KENNEDY, Sotomayor	Alito, Roberts, Scalia+, Thomas	569 U.S. 88 (2013)	Employment Retirement Income Security Act	Labor and Employment Law; Business Law	Equitable principles could not override the plain terms of a plan established under the Employee Retirement Income Security Act (ERISA), but equitable principles could influence the interpretation of an ERISA plan whose terms were not plain.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Statutory Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Vance v. Ball State Univ.	Alito*, KENNEDY, Roberts, Scalia, Thomas+	Breyer, Ginsburg+, Kagan, Sotomayor	570 U.S. 421 (2013)	Title VII of the Civil Rights Act of 1964	Labor and Employment Law; Civil Rights Law	Employee was a "supervisor" within the meaning of Title VII if he had the power to undertake tangible employment actions against the victim.
Arizona v. United States	Breyer, Ginsburg, KENNEDY*, Roberts, Sotomayor	Alito+, Scalia+, Thomas+	567 U.S. 387 (2012)	Immigrant Reform & Control Act	Immigration Law	Federal law preempted several provisions of state statute relating to aliens present in the United States without authorization.
Christopher v. Smithkline Beecham Corp.	Alito*, KENNEDY, Roberts, Scalia, Thomas	Breyer+, Ginsburg, Kagan, Sotomayor	567 U.S. 142 (2012)	Fair Labor Standards Act	Labor and Employment Law; Administrative Law	Wage and hour law did not apply to certain sales representatives.
Dorsey v. United States	Breyer*, Ginsburg, Kagan, KENNEDY, Sotomayor	Alito, Roberts, Scalia+, Thomas	567 U.S. 260 (2012)	Fair Sentencing Act	Criminal Law and Procedure	Fair Sentencing Act's new, lower mandatory minimums applied to those sentenced after the enactment of the law for offenses taking place prior to the enactment of the law.
Fed. Aviation Admin. v. Cooper	Alito*, KENNEDY, Roberts, Scalia, Thomas	Breyer, Ginsburg, Sotomayor+	566 U.S. 284 (2012)	Privacy Act	Civil Liability; Privacy Law	Civil remedy provision of Privacy Act did not waive federal government's sovereign immunity from liability for mental or emotional distress.
Salazar v. Ramah Navajo Chapter	Kagan, KENNEDY, Scalia, Sotomayor*, Thomas	Alito, Breyer, Ginsburg, Roberts+	567 U.S. 182 (2012)	Indian Self-Determination and Education Assistance Act	Indian Law	Federal government was required to pay Indian tribes for costs incurred in the course of performing certain contracts.
AT&T Mobility LLC v. Concepcion	Alito, KENNEDY, Roberts, Scalia*, Thomas+	Breyer+, Ginsburg, Kagan, Sotomayor	563 U.S. 333 (2011)	Federal Arbitration Act	Judicial System; Business Law	Federal Arbitration Act preempted state law forbidding class action arbitration waivers in consumer contracts.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Statutory Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Chamber of Commerce v. Whiting	Alito, KENNEDY, Roberts*, Scalia, Thomas	Breyer+, Ginsburg Sotomayor+	563 U.S. 582 (2011)	Immigration Reform and Control Act	Immigration Law	Federal immigration law did not preempt state's law revoking licenses of businesses found to employ unauthorized aliens.
Freeman v. United States	Breyer, Ginsburg, Kagan, KENNEDY*, Sotomayor+	Alito, Roberts+, Scalia, Thomas	564 U.S. 522 (2011)	Federal Rule of Criminal Procedure 11(c)(1)(C); Sentencing Reform Act	Criminal Law and Procedure	Defendant was eligible for a reduction of his criminal sentence pursuant to 18 U.S.C. § 3582(c)(2).
Janus Capital Grp., Inc. v. First Derivative Traders	Alito, KENNEDY, Roberts, Scalia, Thomas*	Breyer+, Ginsburg, Kagan, Sotomayor	564 U.S. 135 (2011)	Securities and Exchange Commission Rule 10b-5	Business Law; Civil Liability	Defendants could not be held liable under Securities and Exchange Commission rule.
PLIVA, Inc. v. Mensing	Alito, KENNEDY, Roberts, Scalia, Thomas*	Breyer, Ginsburg, Kagan, Sotomayor+	564 U.S. 604 (2011)	Federal Food, Drug, and Cosmetic Act; Hatch-Waxman Amendments	Civil Liability; Food and Drug Law	Federal law preempted state laws that impose duty upon generic pharmaceutical manufacturers to change their drug labels.
Schindler Elevator Corp. v. United States ex rel. Kirk	Alito, KENNEDY, Roberts, Scalia, Thomas*	Breyer, Ginsburg+, Sotomayor	563 U.S. 401 (2011)	False Claims Act	Civil Liability	Written Freedom of Information Act responses by federal agency qualified as "reports" for the purposes of the False Claims Act's disclosure bar.
Wal-Mart Stores v. Dukes	Alito, KENNEDY, Roberts, Scalia*, Thomas	Breyer, Ginsburg+, Kagan, Sotomayor	564 U.S. 338 (2011)	Federal Rule of Civil Procedure 23	Judicial System; Labor and Employment Law	Employees could not pursue their sex discrimination claims as a class action because the proposed class lacked common questions of law or fact.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Statutory Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Conkright v. Frommert	Alito, KENNEDY, Roberts*, Scalia, Thomas	Breyer+, Ginsburg, Stevens	559 U.S. 506 (2010)	Employee Retirement Income Security Act	Labor and Employment Law	District court should have utilized deferential standard of review when assessing plan administrator's interpretation of a plan under the Employee Retirement Income Security Act.
Hollingsworth v. Perry	Per Curiam (Alito, KENNEDY, Roberts, Scalia, Thomas)	Breyer+, Ginsburg, Sotomayor, Stevens	558 U.S. 183 (2010)	Judicial Improvements and Access to Justice Act	Judicial System	District court's amendment of its local rules to permit audio and video broadcast of a high-profile trial likely contravened federal law.
Perdue v. Kenny A. ex rel. Winn	Alito*, KENNEDY+, Roberts, Scalia, Thomas+	Breyer+, Ginsburg, Sotomayor, Stevens	559 U.S. 542 (2010)	Civil Rights Attorney's Fees Awards Act	Civil Rights Law	Although attorney's fees may be increased due to superior performance, district court reversibly erred by failing to provide proper justification for enhancing attorney fee award.
Rent-A-Ctr., W., Inc. v. Jackson	Alito, KENNEDY, Roberts, Scalia*, Thomas	Breyer, Ginsburg, Sotomayor, Stevens+	561 U.S. 63 (2010)	Federal Arbitration Act	Judicial System; Labor and Employment Law	Under the Federal Arbitration Act, if the parties agree that an arbitrator will determine the enforceability of a larger agreement, the parties may litigate in district court over the enforceability clause, but challenges to enforceability of the entire agreement are for an arbitrator to decide.
Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.	Alito*, KENNEDY, Roberts, Scalia, Thomas	Breyer, Ginsburg+, Stevens	559 U.S. 662 (2010)	Federal Arbitration Act	Judicial System	Imposing class arbitration on parties who had not agreed to authorize class arbitration contravened the Federal Arbitration Act.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Statutory Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
I 4 Penn Plaza LLC v. Pyett	Alito, KENNEDY, Roberts, Scalia, Thomas*	Breyer, Ginsburg, Souter+, Stevens+	556 U.S. 247 (2009)	Federal Arbitration Act; Age Discrimination in Employment Act; National Labor Relations Act	Labor and Employment Law; Judicial System	Collective bargaining agreement provision requiring union members to arbitrate age discrimination claims was enforceable.
Ashcroft v. Iqbal	Alito, KENNEDY*, Roberts, Scalia, Thomas	Breyer+, Ginsburg, Souter+, Stevens	556 U.S. 662 (2009)	Federal Rules of Civil Procedure 8, 9	Judicial System; National Security	Muslim pretrial detainee's complaint against governmental officials failed to state sufficient facts to survive dismissal.
Bartlett v. Strickland	Alito, KENNEDY*, Roberts, Scalia, Thomas+	Breyer+, Ginsburg+, Souter+, Stevens	556 U.S. 1 (2009)	Voting Rights Act	Election Law; Civil Rights Law	Section 2 of the Voting Rights Act did not mandate the creation of legislative districts in which the population of racial minority voters was large enough to elect those voters' candidate of choice with the help of nonminority voters.
Corley v. United States	Breyer, Ginsburg, KENNEDY, Souter*, Stevens	Alito+, Roberts, Scalia, Thomas	556 U.S. 303 (2009)	Omnibus Crime Control and Safe Streets Act	Criminal Law and Procedure	Statute governing admissibility of confessions in criminal proceedings limited, but did not eliminate, the applicability of the evidentiary exclusionary rule.
Entergy Corp. v. Riverkeeper, Inc.	Alito, KENNEDY, Roberts, Scalia*, Thomas	Breyer+, Ginsburg, Souter, Stevens+	556 U.S. 208 (2009)	Clean Water Act	Administrative Law; Environmental Law	EPA permissibly relied on cost-benefit analysis when promulgating certain regulations under the Clean Water Act.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Statutory Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
FCC v. Fox Television Stations, Inc.	Alito, KENNEDY+, Roberts, Scalia*, Thomas+	Breyer+, Ginsburg+, Souter, Stevens+	556 U.S. 502 (2009)	Administrative Procedure Act	Administrative Law; Communications Law	Federal Communications Commission's "fleeting expletives" ban was neither arbitrary nor capricious.
Gross v. FBL Fin. Servs., Inc.	Alito, KENNEDY, Roberts, Scalia, Thomas*	Breyer+, Ginsburg, Souter, Stevens+	557 U.S. 167 (2009)	Age Discrimination in Employment Act	Labor and Employment Law	"Mixed-motives" jury instructions were improper in Age Discrimination in Employment Act case.
Horne v. Flores	Alito*, KENNEDY, Roberts, Scalia, Thomas	Breyer+, Ginsburg, Souter, Stevens	557 U.S. 433 (2009)	Federal Rule of Civil Procedure 60(b)(5)	Judicial System	Lower courts incorrectly interpreted procedural rule that permitted parties to seek relief from a judgment or order.
Ricci v. DeStefano	Alito+, KENNEDY*, Roberts, Scalia+, Thomas	Breyer, Ginsburg+, Souter, Stevens	557 U.S. 557 (2009)	Title VII of the Civil Rights Act of 1964	Civil Rights Law	City violated Title VII by discarding results of examinations for determining which employees were best qualified for promotion.
United States v. Denedo	Breyer, Ginsburg, KENNEDY*, Souter, Stevens	Alito, Roberts+, Scalia, Thomas	556 U.S. 904 (2009)	Military Justice Act; Uniform Code of Military Justice	Military Law; Criminal Law and Procedure	Military appellate court had jurisdiction to entertain challenge to prior criminal conviction.
Vaden v. Discover Bank	Ginsburg*, KENNEDY, Scalia, Souter, Thomas	Alito, Breyer, Roberts+, Stevens	556 U.S. 49 (2009)	Federal Arbitration Act	Judicial System	District court lacked subject matter jurisdiction to entertain petition to compel arbitration because the case did not arise under the laws of the United States.
Altria Grp., Inc. v. Good	Breyer, Ginsburg, KENNEDY, Souter, Stevens*	Alito, Roberts, Scalia, Thomas+	555 U.S. 70 (2008)	Federal Cigarette Labeling and Advertising Act	Civil Liability; Business Law	Federal law did not preempt state law unfair trade practices claim against tobacco manufacturer.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Statutory Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Dada v. Mukasey	Breyer, Ginsburg, KENNEDY*, Souter, Stevens	Alito+, Roberts, Scalia+, Thomas	554 U.S. 1 (2008)	Illegal Immigration Reform and Immigrant Responsibility Act of 1996	Immigration Law	Alien had to be granted opportunity to timely withdraw motion for voluntary departure.
Exxon Shipping Co. v. Baker ^a	KENNEDY, Roberts, Scalia+, Souter*, Thomas ^a	Breyer+, Ginsburg+, Stevens+ ^a	554 U.S. 471 (2008)	Clean Water Act	Environmental Law; Maritime Law	Clean Water Act's penalties for water pollution did not preempt maritime common law on punitive damages. ^a
Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.	Alito, KENNEDY*, Roberts, Scalia, Thomas	Ginsburg, Souter, Stevens+	552 U.S. 148 (2008)	Securities Exchange Act; Securities & Exchange Commission Rule 10b-5	Business Law; Civil Liability	Private right of action under securities law was unavailable against corporation because investors did not rely upon corporation's statements or representations.
Bowles v. Russell	Alito, KENNEDY, Roberts, Scalia, Thomas*	Breyer, Ginsburg, Souter+, Stevens	551 U.S. 205 (2007)	Federal Rule of Appellate Procedure 4(a)(6)	Habeas Corpus	Appellant's appeal was untimely even though it was filed in reliance on a district court's order.
Fry v. Pliler	Alito, KENNEDY, Roberts, Scalia*, Thomas	Breyer+, Ginsburg, Souter, Stevens+	551 U.S. 112 (2007)	Antiterrorism and Effective Death Penalty Act	Habeas Corpus	A federal habeas court must assess whether a constitutional error in a state criminal trial has a "substantial and injurious effect."
James v. United States	Alito*, Breyer, KENNEDY, Roberts, Souter	Ginsburg, Scalia+, Stevens, Thomas+	550 U.S. 192 (2007)	Armed Career Criminal Act	Criminal Law and Procedure	Prior conviction for attempted burglary triggered mandatory minimum sentence provision.
Lawrence v. Florida	Alito, KENNEDY, Roberts, Scalia, Thomas*	Breyer, Ginsburg+, Souter, Stevens	549 U.S. 327 (2007)	Antiterrorism and Effective Death Penalty Act	Habeas Corpus	Capital defendant's habeas corpus petition was untimely.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Statutory Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Ledbetter v. Goodyear Tire and Rubber Co.	Alito*, KENNEDY, Roberts, Scalia, Thomas	Breyer, Ginsburg+, Souter, Stevens	550 U.S. 618 (2007)	Title VII of the Civil Rights Act of 1964	Labor and Employment Law	Only discriminatory pay decisions triggered time limit for filing charge with Equal Employment Opportunity Commission.
Leegin Creative Leather Prods., Inc. v. PSKS, Inc.	Alito, KENNEDY*, Roberts, Scalia, Thomas	Breyer+, Ginsburg, Souter, Stevens	551 U.S. 877 (2007)	Sherman Act	Business Law	It was not <i>per se</i> illegal for a manufacturer to agree with its distributor to set the minimum price the distributor could charge for the manufacturer's goods.
Limtiaco v. Camacho	Breyer, KENNEDY, Roberts, Scalia, Thomas*	Alito, Ginsburg, Souter+, Stevens	549 U.S. 483 (2007)	Organic Act of Guam	Territorial Law	Guam's debt limitation under the Organic Act of Guam had to be calculated in accordance with the assessed valuation of property in Guam.
Marrama v. Citizens Bank of Mass.	Breyer, Ginsburg, KENNEDY, Souter, Stevens*	Alito+, Roberts, Scalia, Thomas	549 U.S. 365 (2007)	Bankruptcy Code	Business Law	Debtor could not utilize specialized provisions of the Bankruptcy Code governing consumer debtors.
Nat'l Ass'n of Home Builders v. Defs. of Wildlife	Alito*, KENNEDY, Roberts, Scalia, Thomas	Breyer+, Ginsburg, Souter, Stevens+	551 U.S. 644 (2007)	Clean Water Act; Endangered Species Act	Environmental Law; Administrative Law	Environmental Protection Agency permissibly transferred certain permitting powers to state authorities.
Watters v. Wachovia Bank, N.A.	Alito, Breyer, Ginsburg*, KENNEDY, Souter	Roberts, Scalia, Stevens+	550 U.S. 1 (2007)	National Bank Act	Business Law	Bank's mortgage business was subject to the superintendence of the Office of the Comptroller of the Currency, rather than that of the states.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Statutory Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.	Alito, Breyer*, Ginsburg, KENNEDY+, Stevens+	Roberts, Scalia+, Souter+, Thomas	550 U.S. 81 (2007)	Federal Impact Aid Act	Education Law; Administrative Law	Secretary of Education could consider population of school districts when assessing whether a state had implemented a program that equalized expenditures for free public education among the state's local educational agencies.
Day v. McDonough	Alito, Ginsburg*, KENNEDY, Roberts, Souter	Breyer, Scalia+, Stevens+, Thomas	547 U.S. 198 (2006)	Antiterrorism and Effective Death Penalty Act	Habeas Corpus	District court did not reversibly err by dismissing untimely habeas corpus petition.
Hamdan v. Rumsfeld	Breyer+, Ginsburg, KENNEDY+, Souter, Stevens*	Alito+, Scalia+, Thomas+	548 U.S. 557 (2006)	Uniform Code of Military Justice; Detainee Treatment Act	National Security	Justice Kennedy, concurring in part with the opinion of the Court, agreed that a presidential order violated statutes governing the President's authority to convene military courts.
House v. Bell	Breyer, Ginsburg, KENNEDY*, Souter, Stevens	Roberts+, Scalia, Thomas	547 U.S. 518 (2006)	Antiterrorism and Effective Death Penalty Act	Habeas Corpus	Procedural default of petitioner on death row who made a showing of actual innocence could be excused, and the habeas corpus petition could proceed.
League of United Latin Am. Citizens v. Perry ^b	KENNEDY ^b	See below ^b	548 U.S. 399 (2006)	Voting Rights Act	Election Law	Redrawing of one legislative district violated Voting Rights Act, but other aspects of redistricting did not violate the Voting Rights Act. ^b

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Statutory Provision Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Rapanos v. United States	Alito, KENNEDY+, Roberts+, Scalia*, Thomas	Breyer+, Ginsburg, Souter, Stevens+	547 U.S. 715 (2006)	Clean Water Act	Environmental Law; Administrative Law	Justice Kennedy, in a separate opinion concurring in the judgment, concluded that, for the purposes of determining whether wetlands constitute "waters of the United States" for the purposes of the Clean Water Act, the U.S. Army Corps of Engineers should determine, on a case-by-case basis, whether the wetland possesses a "significant nexus" to waters that are navigable in fact.

Source: Created by CRS.

Notes: Author of primary opinion designated with asterisk (*). Authors of concurring and dissenting opinions identified with plus signs (+). The statutory interpretation table includes cases interpreting administrative regulations and procedural rules promulgated pursuant to statutes. If a decision primarily involved a statutory interpretation issue, but also raised other legal matters, the case was placed in this table.

- a. In addition to dividing 5-3 on the issue discussed in this chart, the *Exxon* court was evenly divided on an issue related to punitive damages.
- b. The Supreme Court fractured markedly in *League of United American Latin American Citizens v. Perry*, resulting in six different opinions that reached a variety of different legal conclusions. This chart therefore reflects only the legal positions adopted by Justice Kennedy.

Table A-3. Justice Anthony Kennedy As a “Swing” Vote: Miscellaneous Legal Decisions

Cases Centering on Questions of Miscellaneous Issues of Law (e.g. federal common law; principles of equity) in Which Justice Kennedy Cast a Deciding Vote
(October 2005 Term-October 2017 Term)

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Legal Issue Interpreted	Area of Law	Justice Kennedy’s Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
Florida v. Georgia	Breyer*, Ginsburg, KENNEDY, Roberts, Sotomayor	Alito, Kagan, Gorsuch, Thomas+	585 U.S. ____ (2018)	Equitable Apportionment	Environmental Law	Further factual findings were necessary in water apportionment dispute between two states.
Michigan v. Bay Mills Indian Cmty.	Breyer, Kagan*, KENNEDY, Roberts, Sotomayor+	Alito, Ginsburg+, Scalia+, Thomas+	134 S. Ct. 2024 (2014)	Tribal Sovereign Immunity	Indian Law	Tribal sovereign immunity prohibited state’s suit against Indian tribe.
Douglas v. Indep. Living Ctr. of S. Cal., Inc.	Breyer*, Ginsburg, Kagan, KENNEDY, Sotomayor	Alito, Roberts+, Scalia, Thomas	565 U.S. 606 (2012)	Title XIX of the Social Security Act (Medicaid)	Public Benefits	Changed circumstances in case warranted remand for determination of whether challenges to state Medicaid statutes could proceed.
Garcia v. Texas	Per Curiam (Alito, KENNEDY, Roberts, Scalia, Thomas)	Breyer+, Ginsburg, Kagan, Sotomayor	564 U.S. 940 (2011)	Vienna Convention on Consular Relations	Habeas Corpus; International Law	Criminal defendant convicted of capital murder was not entitled to stay of execution notwithstanding a ruling from the International Court of Justice.
South Carolina v. North Carolina	Alito*, Breyer, KENNEDY, Scalia, Stevens	Ginsburg, Sotomayor, Roberts+, Thomas	558 U.S. 256 (2010)	Intervention in Federal Litigation	Judicial System	Several entities could intervene in water dispute between two states, but another entity could not.
Medellin v. Texas	Per Curiam (Alito, KENNEDY, Roberts, Scalia, Thomas)	Breyer*, Ginsburg+, Souter+, Stevens+	554 U.S. 759 (2008)	Vienna Convention on Consular Relations	Habeas Corpus; International Law	Capital defendant was not entitled to stay of execution notwithstanding a ruling from the International Court of Justice.

Case Name	Justices in the Majority / Plurality, Including Concurrences	Justices Dissenting from the Majority Opinion, Including Partial Dissents	Case Citation with Year	Legal Issue Interpreted	Area of Law	Justice Kennedy's Position in the Case (If He Joined the Majority in Full, Position Adopted by the Majority)
New Jersey v. Delaware	Ginsburg*, KENNEDY, Roberts, Souter, Thomas	Alito, Scalia+, Stevens+	552 U.S. 597 (2008)	Interstate Compact Between New Jersey and Delaware	Environmental Law	Provision of compact between two states did not grant one of those states exclusive jurisdiction over certain riparian improvements.
Plains Commerce Bank v. Long Family Land & Cattle Co.	Alito, KENNEDY, Roberts*, Scalia, Thomas	Breyer, Ginsburg+, Souter, Stevens	554 U.S. 316 (2008)	Tribal Sovereignty	Indian Law	Tribal court lacked jurisdiction over discriminatory lending claim.
Winter v. Nat. Res. Def. Council, Inc.	Alito, KENNEDY, Roberts*, Scalia, Thomas	Breyer+, Ginsburg+, Souter, Stevens	555 U.S. 7 (2008)	Injunctive Relief	Military Law; Environmental Law	Lower court reversibly erred by upholding restrictions on the U.S. Navy's sonar training.

Source: Created by CRS.

Notes: Author of primary opinion designated with an asterisk (*). Authors of concurring and dissenting opinions identified with plus signs (+). If a decision primarily involved miscellaneous legal issues, but also raised other statutory or constitutional law matters, the case was placed in this table.

Table A-4. Common Voting Groups in Closely Divided Cases During the Roberts Court Era (October 2005 Term-October 2017 Term)

Lineup	Number and Percentage of Constitutional Law Cases (Table A-1)	Number and Percentage of Statutory Interpretation Cases (Table A-2)	Number and Percentage of Miscellaneous Cases (Table A-3)	Number and Percentage of All Cases (Tables A1-A3)
Alito, KENNEDY, Roberts, Scalia, Thomas ^a	43 (45%)	36 (44%)	4 (44%)	83 (45%)
Breyer, Ginsburg, KENNEDY, Kagan, Sotomayor	22 (23%)	8 (10%)	1 (11%)	31 (17%)
Breyer, Ginsburg, KENNEDY, Souter, Stevens	11 (11%)	7 (9%)	0 (0%)	18 (10%)
Alito, Gorsuch, KENNEDY, Roberts, Thomas	4 (4%)	12 (15%)	0 (0%)	16 (9%)
Alito, Breyer, KENNEDY, Roberts, Thomas	5 (5%)	4 (5%)	0 (0%)	9 (5%)
Breyer, Ginsburg, KENNEDY, Sotomayor, Stevens	3 (3%)	0 (0%)	0 (0%)	3 (2%)
Other ^b	8 (8%)	14 (17%)	4 (44%)	26 (14%)
TOTAL	96	81	9	186

Source: Created by CRS.

Notes: For ease of reference, this table lists the Justices' names in alphabetical order, rather than in order of seniority.

- a. The "Alito, KENNEDY, Roberts, Scalia, Thomas" category includes (1) *Horne v. Department of Agriculture*, in which the Court split 5-3-1 (with Alito, KENNEDY, Roberts, Scalia, and Thomas in the majority) regarding the proper procedural resolution of the case, but otherwise split 8-1 regarding the substantive legal issue; and (2) *Rapanos v. United States*, in which Justice Kennedy concurred in the judgment but disagreed regarding the governing legal standard.
- b. The "Other" category contains all lineups not listed in the other rows of **Table A-4**, including *League of United American Latin American Citizens v. Perry*, in which the Court fractured markedly, resulting in six different opinions that reached a variety of different legal conclusions.

Author Information

Andrew Nolan
Section Research Manager

Valerie C. Brannon
Legislative Attorney

Kevin M. Lewis
Legislative Attorney

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