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Kenneth M. Murchison
Louisiana State University Law Center,

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

Kenneth M. Murchison†

Typically, observers of the United States Supreme Court identify the Court by the name of its Chief Justice. Thus, articles and books often refer to the Marshall Court, the Taney Court, the Taft Court, and the Warren Court, to mention only a few of the most famous. The basis for the identification is undoubtedly the special position the Chief Justice enjoys as the first among a court of equals.¹ In conference, the Chief Justice speaks first and votes first after the discussion is completed.² In addition, a Chief Justice who is part of the majority chooses the author of the majority opinion.³ Perhaps not surprisingly, Chief Justices are often members of the majority in important cases and frequently choose themselves to author the Court's opinions.⁴

† James E. and Betty M. Phillips Professor at the Paul M. Hebert Law Center of Louisiana State University (B.A., 1969, Louisiana Polytechnic Institute; J.D., 1972, University of Virginia; M.A., 1975, University of Virginia; S.J.D., 1988, Harvard Law School). I presented a preliminary version of this Article at the 2007 meeting of the Southeastern Association of Law Schools at Amelia Island, Florida. Megan Streetman, my research assistant, provided valuable assistance in locating the materials on which this Article is based.

1. See G. Edward White, *The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy*, 154 U. PA. L. REV. 1463, 1465–66 (2006) (discussing the role of the Chief Justice and his personification of the Court).
2. See HENRY J. ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE* 215 (7th ed. 1998). Until sometime in the 1970s, the Court followed a somewhat different procedure in which the Chief Justice spoke first but voted last. That method arguably gave the Chief Justice even greater influence because the Chief Justice always knew the precise division of the Court when casting the final vote. See *id.* at 215 n.126.
3. See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 156 (1978) (demonstrating when a Chief Justice used his power as Chief Justice to assign a majority opinion to himself). For a brief description of how Chief Justice Burger voted and assigned the opinion in the case, see KENNETH M. MURCHISON, *THE SNAIL DARTER CASE: TVA VERSUS THE ENDANGERED SPECIES ACT* 125–26 (2007).
4. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 708 (2007) (Roberts, C.J.); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (Rehnquist, C.J.); *United States v. Nixon*, 418 U.S. 683, 686 (1974) (Burger, C.J.); *Brown v. Bd. of Educ.*, 347 U.S. 483, 486 (1954) (Warren, C.J.); *Shelley v. Kraemer*,

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

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

I. A BRIEF BACKGROUND

During the 2005 Term, new Justices joined the United States Supreme Court for the first time in more than a decade.⁵ Most commentators expected the appointments of Chief Justice John Roberts⁶ and Justice Samuel Alito⁷ to move the Court further to the

334 U.S. 1, 4 (1948) (Vinson, C.J.); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 311 (1945) (Stone, C.J.); *NLRB v. Jones & Laughlin Steel Corp.* 301 U.S. 1, 22 (1937) (Hughes, C.J.); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 34 (1922) (Taft, C.J.); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 30 (1911) (White, C.J.); *United States v. E.C. Knight Co.*, 156 U.S. 1, 9 (1895) (Fuller, C.J.); *United States v. Cruikshank*, 92 U.S. 542, 544 (1875) (Waite, C.J.); *Veazie Bank v. Fenno*, 75 U.S. 533, 536 (1869) (Chase, C.J.); *Scott v. Sandford*, 60 U.S. 393, 399 (1856) (Taney, C.J.); *Marbury v. Madison*, 5 U.S. 137, 137 (1803) (Marshall, C.J.).

5. Justice Stephen Breyer, the last Justice appointed before Chief Justice Roberts and Justice Alito, took his seat on August 3, 1994. The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Oct. 22, 2008) [hereinafter *The Justices of the Supreme Court*].
6. President George W. Bush nominated Chief Justice Roberts. *Id.* Following Senate confirmation, he took his seat on September 29, 2005. *Id.*
7. President Bush also nominated Justice Alito. *Id.* Following Senate confirmation, he took his seat on January 31, 2006. *Id.*

right and thus to shift the ideological balance of a Court whose decisions had completely satisfied no one.⁸ Supporters of the New Deal legacy criticized the rise of new federalism restraints on the ability of Congress to deal with national problems.⁹ Devotees of the Warren Court deplored the shrinking of the rights of criminal defendants¹⁰ and minorities,¹¹ and the expanded protection for economic interests.¹² If any disciple of Justice Frankfurter's judicial restraint¹³ still existed, she undoubtedly lamented the expansion of Supreme Court power in a variety of directions; an expansion that culminated in the Court rather than Congress resolving the disputed presidential election of 2000.¹⁴ Even the new conservatives—who won the majority of victories during the last decade before the appointment of Chief Justice Roberts—were dismayed by the Court's failure to overrule *Roe v. Wade*¹⁵ or to outlaw all race-based affirmative action programs,¹⁶ the continuing limits on the ability of

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8. See *infra* text accompanying notes 9–19 (demonstrating discontent among the Justices through various concurring and dissenting opinions within key cases).
 9. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992).
 10. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); *Illinois v. Rodriguez*, 497 U.S. 177 (1990). But see *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (describing an expanded interpretation of what facts the Sixth Amendment requires to be decided by a jury).
 11. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).
 12. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).
 13. See, e.g., *Baker v. Carr*, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting); *Mapp v. Ohio*, 367 U.S. 643, 672 (1961) (Frankfurter, J., joining dissenting opinion of Harlan, J.); *Trop v. Dulles*, 356 U.S. 86, 114 (1958) (Frankfurter, J., dissenting). For the suggestion that Justice Frankfurter was more ardent than consistent in his advocacy of judicial restraint, see JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 409 (2002); Harold J. Spaeth, *The Judicial Restraint of Mr. Justice Frankfurter—Myth or Reality*, 8 *MIDWEST J. POL. SCI.* 22 (1964).
 14. *Bush v. Gore*, 531 U.S. 98 (2000); see generally THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 267 (2004) (stating that most legal scholars would not have described presidential vote counting as an area of law for the Supreme Court).
 15. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).
 16. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003); *Easley v. Cromartie*, 532 U.S. 234, 237 (2001).

states to impose capital punishment,¹⁷ and the expanded protections afforded to women¹⁸ and homosexuals.¹⁹

Few observers thought replacing Chief Justice Rehnquist with Judge John Roberts of the District of Columbia Circuit would produce any dramatic shift in the Court's decisional pattern.²⁰ Instead, they assumed that the new Chief Justice, like his predecessor, would generally side with Justices Scalia and Thomas on ideologically divisive issues.²¹

The appointment of Judge Samuel Alito of the Third Circuit to replace Justice O'Connor was a different matter. Despite having been appointed by President Ronald Reagan, Justice O'Connor had been a centrist on the Rehnquist Court on several crucial issues.²² By contrast, most observers expected Justice Alito to align himself more closely with the new Chief Justice and Justices Scalia and Thomas, thus increasing the size of that ideological grouping to four.²³

When the new Justices vote as expected, the obvious impact of the shift in the Court's membership is to increase the influence of Justice Anthony Kennedy. Although Justice Kennedy joined the Scalia-Thomas bloc with some frequency in recent years,²⁴ he often backed

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17. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 578 (2005); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).
 18. See, e.g., *United States v. Virginia*, 518 U.S. 515, 519 (1996).
 19. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003); *Romer v. Evans*, 517 U.S. 620, 635–36 (1996).
 20. See, e.g., Kelly S. Terry, *Shifting Out of Neutral: Intelligent Design and the Road to Nonpreferentialism*, 18 B.U. PUB. INT. L.J. 67, 67–69 (2008).
 21. See, e.g., David S. Cohen, *Justice Kennedy's Gendered World*, 59 S.C. L. REV. 673, 673 (2007).
 22. See, e.g., *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 358 (2006) (holding that states are subject to proceedings to recover alleged preferential transfers); *Tennessee v. Lane*, 541 U.S. 509, 512 (2004) (holding that Title II of the Americans with Disabilities Act (ADA), as applied to cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress's authority to enforce the Fourteenth Amendment); *Grutter v. Bollinger*, 539 U.S. 306, 310 (2003) (holding that diversity in law school is a compelling interest in attaining a diverse student body); *Stenberg v. Carhart*, 530 U.S. 914, 918 (2000) (holding that a statute banning partial birth abortions was unconstitutional); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 841 (1992) (holding that the undue burden test should be used to evaluate abortion regulations). See Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1300–07 (2004), for an analysis of Justice O'Connor as a centrist.
 23. See Cohen, *supra* note 21.
 24. See, e.g., *United States v. Morrison*, 529 U.S. 598, 600 (2000); *Alden v. Maine*, 527 U.S. 706, 710 (1999); *Printz v. United States*, 521 U.S. 898, 900 (1997); *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997); *New York v. United States*, 505 U.S. 144, 147 (1992).

away from the most extreme positions that those two Justices endorsed.²⁵ As a result, he shared the Court's center with Justice O'Connor from 1995 to 2005.²⁶ Each (or both) of them occasionally slowed the rightward drift of the Court by joining with Justices Stevens, Souter, Ginsburg, and Breyer to create a more left-leaning majority.²⁷ Now that Justice Alito is expected to be a more consistent part of the ideological bloc on the right, Justice Kennedy's position becomes even more important. When he joins Chief Justice Roberts and Justices Scalia, Thomas, and Alito, he creates a majority for the right wing of the Court. When he joins the other four Justices, he creates a majority with the more liberal Justices.

As noted above, Justice Kennedy shared the center of the Court with Justice O'Connor throughout the 1990s and the first five years of the new century. As a result, he contributed to alterations of the landscape of constitutional doctrine in a wide variety of areas. In many of these cases, Justice Kennedy articulated a position that significantly qualified the majority that he joined.²⁸ The remainder of this section first summarizes some of these areas and then describes them in more detail.

Justice Kennedy and Justice O'Connor most commonly joined with Chief Justice Rehnquist and Justices Scalia and Thomas to form a majority for constitutional change.²⁹ That majority reinvigorated federalism limits on congressional power,³⁰ established the Equal Protection Clause³¹ as a restraint on affirmative action programs and state election procedures,³² and strengthened the Takings Clause³³ as

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25. See, e.g., *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1032 (1992) (Kennedy, J., concurring); *Planned Parenthood*, 505 U.S. at 843 (Kennedy, J., joint author of plurality opinion); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 579 (1992) (Kennedy, J., concurring).
 26. Justice Kennedy's views were even more influential in the early and middle years of the 1990s. Between the 1991 Term and the 1997 Term, he dissented only forty-three times in 667 cases that the Court disposed of by signed opinion. Earl M. Waltz, *Anthony Kennedy and the Jurisprudence of Respectable Conservatism*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 140, 140 (Earl M. Waltz ed., 2003).
 27. See, e.g., *Rasul v. Bash*, 542 U.S. 466 (2004).
 28. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 562 (2003); *Romer v. Evans*, 517 U.S. 620, 623 (1996).
 29. See, e.g., *Lopez*, 514 U.S. 549.
 30. See *infra* Part I.A.
 31. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").
 32. See cases cited *infra* notes 110–11.
 33. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

a limit on state regulatory power.³⁴ At the same time, it narrowed the scope of a woman's right to choose an abortion,³⁵ the rights of criminal defendants,³⁶ and some First Amendment claims.³⁷

Less frequently, Justice Kennedy (either by himself or with Justice O'Connor) formed a majority with Justices Stevens, Souter, Ginsburg, and Breyer or their predecessors. Those majorities reaffirmed a woman's right to choose an abortion,³⁸ provided substantial protection for women under the Equal Protection Clause,³⁹ declined to invalidate all race-based affirmative action,⁴⁰ confirmed a broad congressional power to adopt comprehensive federal statutes,⁴¹ and broadly defined what constitutes a "public use" under the Takings Clause.⁴²

Finally, Justice Kennedy also provided the decisive vote in some cases when the Court divided on less ideologically predictable lines. Two of the most important areas decided by such majorities involved the dormant Commerce Clause as a restriction on state regulation of economic activity⁴³ and substantive due process as a limit on punitive damages in tort suits in state courts.⁴⁴

A. Federalism Issues

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

Justice Kennedy and Justice O'Connor joined with Chief Justice Rehnquist and Justices Scalia and Thomas in a series of decisions that narrowed congressional authority to regulate private conduct. In 1995 and 2000, Justice Kennedy joined opinions by Chief Justice Rehnquist denying congressional power to regulate "noneconomic" activities because of their aggregate effect on interstate commerce,⁴⁵ although in the 1995 case his concurring opinion stressed the continued breadth of congressional power under the Commerce

34. See cases cited *infra* notes 105, 145–51.

35. See cases cited *infra* notes 121–23.

36. See cases cited *infra* notes 156–60.

37. See cases cited *infra* notes 172–74.

38. See cases cited *infra* notes 118–20.

39. See *infra* note 140 and accompanying text.

40. See cases cited *infra* notes 135–39.

41. See *infra* note 46 and accompanying text.

42. See cases cited *infra* notes 153–55.

43. See cases cited *infra* notes 76–77.

44. See cases cited *infra* note 127.

45. *United States v. Morrison*, 529 U.S. 598, 600–01 (2000); *Lopez*, 514 U.S. at 550–51.

Clause.⁴⁶ Justice Kennedy also authored the opinion invalidating Congress's attempt to use Section 5 of the Fourteenth Amendment to require strict scrutiny for state actions that substantially burden an individual's free exercise of religion,⁴⁷ and he joined opinions finding that Congress lacked power under the Fourteenth Amendment to ban trademark and patent infringement by states⁴⁸ or to prohibit discrimination against those who are disabled⁴⁹ or elderly.⁵⁰

Indeed, Justice Kennedy would have imposed stricter limits on congressional power under the Fourteenth Amendment than a majority of the Supreme Court eventually established. He sided with Chief Justice Rehnquist and Justices Scalia and Thomas in dissent when Justice O'Connor joined Justice Stevens's opinion holding that the Fourteenth Amendment authorized Congress to grant damages against states that failed to make reasonable accommodations for the disabled to attend court.⁵¹ He also joined Justices Scalia and Thomas in dissenting from Chief Justice Rehnquist's opinion holding that the Fourteenth Amendment allowed Congress to extend the Family Medical Leave Act to states.⁵²

Justice Kennedy was also decisive in marking an important qualification to the decisions limiting congressional authority. In 2005, he sided with the Justices who had dissented in the cases limiting federal power and joined a decision that refused to extend those decisions, by requiring that comprehensive statutes create exceptions for localized activity.⁵³ Unlike Justice Scalia who concurred only in the judgment in that case,⁵⁴ Justice Kennedy joined the majority opinion written by Justice Stevens.⁵⁵

Justice Kennedy played an equally pivotal role in the cases recognizing new state immunities from federal regulations. He joined Justice O'Connor's opinion holding that Congress could not force New York to enact a low-level nuclear waste law that met

46. *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring).

47. *City of Boerne v. Flores*, 521 U.S. 507, 511, 534–36 (1997).

48. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647–48 (1999).

49. *See Bd. of Trs. v. Garrett*, 531 U.S. 356, 374–76 (2001).

50. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 65, 82–83 (2000).

51. *Tennessee v. Lane*, 541 U.S. 509, 538 (2004) (Rehnquist, C.J., dissenting).

52. *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 744 (2003) (Kennedy, J., dissenting).

53. *See Gonzales v. Raich*, 545 U.S. 1, 3, 32–33 (2005).

54. *Id.* at 33 (Scalia, J., concurring in the judgment).

55. *Id.* at 3.

federal standards.⁵⁶ He also joined Justice Scalia's opinion declaring that Congress could not require local law enforcement officials to participate in the implementation of the federal statute that mandated background checks for gun purchases.⁵⁷

Justice Kennedy's role was especially prominent in the decisions establishing state immunity from private actions for damages. He joined in opinions⁵⁸ ruling that states were immune from private actions for damages in federal courts when those actions were based on statutes enacted under the Commerce Clause⁵⁹ and the Copyright and Patent Clause.⁶⁰ He also authored the opinion holding that the immunity applied to claims brought in state court as well as those filed in federal court⁶¹ and joined the opinion extending the immunity to adjudications by federal agencies.⁶²

Perhaps surprisingly for a Court that tried to rein in federal power, the Supreme Court under Chief Justice Rehnquist frequently concluded that valid federal law preempted additional state regulations.⁶³ The Court invalidated most of these state laws by

56. *See* *New York v. United States*, 505 U.S. 144, 147, 149 (1992).
57. *Printz v. United States*, 521 U.S. 898, 900, 932–35 (1997).
58. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 65, 82–83 (2000); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 667, 691 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 629, 647–48 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996).
59. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”).
60. U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .”).
61. *See Alden v. Maine*, 527 U.S. 706, 711–12 (1999) (holding that states are not subject to private suits in state courts for claims under the Fair Labor Standard Act).
62. *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 746–47 (2002) (holding that the same principles of dignity and respect due to a state sovereign that bar suit in court against a state apply to bar administrative adjudications).
63. *See Egelhoff v. Egelhoff*, 532 U.S. 141, 142–43 (2001) (holding that the Federal Employee Retirement Security Act (ERISA) preempted state statutes that provided that divorce automatically revoked the designation of a spouse as the beneficiary of a “nonprobate asset”); *United States v. Locke*, 529 U.S. 89, 116 (2000) (holding that the Federal Ports and Waterways Safety Act preempts state tanker regulations that addressed general navigation watch procedures, English skills, training, and casualty reporting); *Foster v. Love*, 522 U.S. 67, 74 (1997) (holding that federal election law preempts state statutes setting dates for open primary for election of United States senators and representatives); *Doctor’s Assoc. v. Casarotto*, 517 U.S. 681, 683 (1996) (holding that the Federal Arbitration Act preempts special notice provisions in state arbitration acts); *Barnett Bank v. Nelson*, 517 U.S. 25, 28 (1996) (holding that federal banking law preempts state statutes that forbid banks from selling insurance in small

substantial majorities of which Justice Kennedy was a part of.⁶⁴ Justice Kennedy dissented only once in the preemption cases⁶⁵ and in the one case when the Court divided five to four, he was a member of the majority.⁶⁶

In 1992, the Supreme Court decided the first in a series of important preemption cases considering when federal regulatory statutes precluded private actions for damages under state law.⁶⁷ The 1992 decision was a fragmented one in which the Court concluded that the Federal Cigarette Labeling and Advertising Act preempted certain failure-to-warn claims, but not claims based on express warranty, intentional fraud, misrepresentation, or conspiracy.⁶⁸ Justice Kennedy joined Justice Blackmun's concurring and dissenting opinion that also would have allowed the failure-to-warn claims.⁶⁹ Since 1995, the Court has addressed the issue of preemption of private remedies in a steady stream of cases. The decisions vary, depending on the particular federal statute involved. The Court has found that some federal statutes preempt state claims,⁷⁰ but that others

towns). *But see* *Mid-Con Freight Sys., Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 440, 442 (2005) (holding that a federal statute establishing single state registration system does *not* preempt a state licensing fee of \$100 for trucks operating entirely in interstate commerce). The Court has been especially willing to find preemption when the state claim impacted foreign commerce or international relations. *See* *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 401 (2003) (holding that federal law preempts state's holocaust victim insurance relief act because the state law interfered with the President's conduct of foreign affairs); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 366 (2000) (holding that federal law imposing sanctions against Burma preempts state statutes that restricted the ability of the state and its agencies to purchase goods or services from companies that did business with Burma).

64. *See, e.g., Crosby*, 530 U.S. at 365–66 (unanimous decision); *Locke*, 529 U.S. at 94 (opinion by Justice Kennedy, for a unanimous Court); *Foster*, 522 U.S. at 68, 74 (unanimous decision except that Justices Scalia, Kennedy, and Thomas did not join in Part III of the Court's opinion); *Doctor's Assoc.*, 517 U.S. at 682–83 (eight-member majority with Justice Thomas dissenting).
65. *Mid-Con Freight Sys., Inc.*, 545 U.S. at 456 (Kennedy, J., dissenting joined by Chief Justice Rehnquist and Justice O'Connor).
66. *Am. Ins. Ass'n*, 539 U.S. at 400.
67. *See Cippollone v. Liggett Group, Inc.*, 505 U.S. 504, 516–20 (1992).
68. *Id.* at 530–31. For a contemporary assessment of *Cipollone*, see Thomas C. Galligan, Jr., *Product Liability—Cigarettes and Cipollone: What's Left? What's Gone?*, 53 LA. L. REV. 713 (1993).
69. *See Cippollone*, 505 U.S. at 531, 543–44 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part) (outlining the difficulties that trial courts would face in implementing the decision).
70. *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 213–14 (2004) (holding that ERISA preempts claims under the Texas Health Care Liability Act); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10–11 (2003) (finding that the National Bank Act provides an

do not.⁷¹ Significantly, Justice Kennedy was a member of the majority in all twelve cases that involved claims of preemption of private remedies,⁷² including two cases in which the Court divided five to four on the issue.⁷³

When the federalism questions shifted to state power, Justice Kennedy was more willing to imply federalism limits on state legislative power than the group with which he generally sided.⁷⁴ In a case from Arkansas, he agreed with Justices Stevens, Souter, Ginsburg, and Breyer that the Constitution prohibits states from

exclusive cause of action for usury claims against national banks); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352–53 (2001) (holding that the Food, Drug, and Cosmetic Act preempts state law claims that a regulatory consultant made fraudulent claims to the Food and Drug Administration); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 866–67 (2000) (holding that the National Traffic and Motor Safety Act preempts a District of Columbia tort claim that a manufacturer was negligent in failing to equip automobile with driver's side airbag); *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 378–79 (1999) (holding that ERISA preempts state rules allowing employers of policyholders to be deemed agents of insurers for group insurance plans); *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214 (1998) (holding that the Federal Communications Act preempts state law claims for breach of contract and tortious interference with contract).

71. *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 432, 444, 453 (2005) (holding that the Federal Insecticide, Fungicide, and Rodenticide Act does not preempt state claims for defective design, defective manufacture, negligent testing, breach of express warranty, or violation of state Deceptive Trade Practices Act; failure to warn claims should be referred to courts of appeals for further analysis); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 70 (2002) (finding that the Federal Boat Safety Act does not preempt common law tort claims arising out of failure to install propeller guards on boat engines); *Atherton v. FDIC*, 519 U.S. 213, 227–28 (1997) (finding that the Financial Institutions Reform, Recovery, and Enforcement Act does not preempt state negligence standards in liability actions against former officers and directors of federally insured savings institutions); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 500–01 (1996) (holding that the Medical Device Amendments do not preempt claims based on state or local requirements that are equal to, or substantially identical to, requirements imposed under federal law); *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 215–16 (1996) (finding that the judicial recognition of federal maritime wrongful death actions does not preempt the application of state wrongful death and survival statute to accidents in which non-seamen are injured in territorial waters); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289–90 (1995) (holding that the National Traffic and Motor Vehicle Safety Act does not preempt state law claims for personal injury sustained in vehicle collisions).
72. *Bates*, 544 U.S. at 433; *Aetna Health Inc.*, 542 U.S. at 202; *Beneficial Nat'l Bank*, 539 U.S. at 2; *Sprietsma*, 537 U.S. at 521; *Buckman Co.*, 531 U.S. at 342; *Geier*, 529 U.S. at 863; *UNUM Life Ins. Co. of Am.*, 526 U.S. at 362; *Am. Tel. & Tel. Co.*, 534 U.S. at 215; *Atherton*, 519 U.S. at 215; *Medtronic, Inc.*, 518 U.S. at 472–74; *Yamaha Motor Corp.*, 516 U.S. at 201; *Freightliner Corp.*, 514 U.S. at 281.
73. *See Geier*, 529 U.S. at 863; *Medtronic, Inc.*, 518 U.S. at 472–74, 500–01.
74. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 781 (1995).

limiting the number of terms a representative or senator can serve in Congress.⁷⁵ Similarly, he has found fairly stringent limits on state regulatory power in the dormant Commerce Clause, although the Court's division has been less ideologically predictable on that issue.⁷⁶ In one important case, his opinion for a divided Court ruled that a local waste management ordinance requiring that all waste in the county be delivered to a single privately owned transfer station violated the dormant Commerce Clause.⁷⁷

B. Separation of Powers Questions

Justice Kennedy consistently voted with the majority in separation of powers cases,⁷⁸ but the majority in many of those cases was a substantial one. He joined the unanimous opinion that rejected President Clinton's claim that he was entitled to a temporary immunity from private lawsuits while serving as President.⁷⁹ He was also part of a six-member majority that invalidated the Line Item Veto Act.⁸⁰ In the latter case, he added a concurring opinion declaring that "the [f]ailure of political will [in limiting federal spending] does not justify unconstitutional remedies."⁸¹

When the Court faced the issue of standing to invoke the federal judicial power, Justice Kennedy frequently provided a centrist vote. He joined the major decisions of the Rehnquist Court constricting

75. *Id.* at 783, 837–38.

76. Another example of a five to four decision in which Justice Kennedy provided the decisive fifth vote for the majority is *Granholm v. Heald*, 544 U.S. 460 (2005). In *Granholm*, Justice Kennedy's majority opinion concluded that state statutes allowing only in-state wineries to ship wine directly to consumers discriminated against interstate commerce and violated the dormant Commerce Clause. 544 U.S. at 466. For other cases in which Justice Kennedy joined larger majorities recognizing limits based on the dormant Commerce Clause, see *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 566, 572–77 (1997); *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 94, 100 (1994); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 335–37 (1992).

77. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391–93 (1994).

78. Justice Kennedy did not participate in *Morrison v. Olson*, 487 U.S. 654, 658–60 (1988), even though the case was argued and decided after he joined the Court. In *Morrison*, a seven-member majority upheld the federal statute authorizing appointment of an "independent counsel" to investigate and, when appropriate, prosecute the President and certain high-ranking government officials for violations of federal criminal laws. 487 U.S. at 660.

79. *Clinton v. Jones*, 520 U.S. 681, 692 (1997).

80. *See Clinton v. New York*, 524 U.S. 417, 438–40 (1998).

81. *Id.* at 449.

standing in environmental law cases,⁸² but he regularly added or joined concurring opinions⁸³ that declined to restrict standing as much as other Justices wanted, particularly Justice Scalia.⁸⁴ In 2000, Justice Kennedy joined a seven-member majority in a decision holding that Congress could grant standing to users of a river to enforce permit limits under the Clean Water Act,⁸⁵ although he again added a concurring opinion.⁸⁶

Justice Kennedy has also adopted an influential centrist position in decisions regarding the power of the judiciary to review the detention and trial of alleged enemy combatants. He and Justice O'Connor both joined Justices Stevens, Souter, Ginsburg, and Breyer in ruling that federal courts have jurisdiction to consider habeas corpus petitions from alleged enemy combatants detained by the military at the United States naval base in Guantanamo Bay, Cuba.⁸⁷ However, Justice Kennedy concurred only in the judgment because he thought that Justice Steven's majority opinion failed to balance the relevant separation of powers concerns.⁸⁸ In a second case, Justice Kennedy joined Justice O'Connor's plurality opinion construing the Due Process Clause of the Fifth Amendment to require that a United

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82. See generally, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 105–10 (1998) (holding that the respondents lacked standing because the relief sought would not remedy the alleged injury in fact); *Lujan v. Defenders of Wildlife (Lujan II)*, 504 U.S. 555, 562–71 (1992) (holding that the respondents had not made the requisite demonstration of injury and redressability to have standing); *Lujan v. Nat'l Wildlife Fed'n (Lujan I)*, 497 U.S. 871, 898–99 (1990) (holding that the respondent failed to identify any “‘agency action’ that was the source of [the] injuries”).
83. See, e.g., *Steel Co.*, 523 U.S. at 110 (O'Connor, J., concurring joined by Kennedy, J.); *Lujan II*, 504 U.S. at 579 (Kennedy, J., concurring in part and concurring in the judgment); see generally Michael C. Blumm and Sherry L. Bosse, *Justice Kennedy and the Environment: Property, States' Rights, and a Persistent Search for Nexus*, 82 WASH. L. REV. 667, 669–73 (2007) (discussing Justice Kennedy's pivotal role in the environmental field, but also recognizing that he has only written twenty-one opinions in more than three decades that are within the broad definition of environmental law, including twelve majority opinions, eight concurring opinions, and one dissent).
84. See generally Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881–84, 887–90 (1983) (discussing how the “judicial doctrine of standing is a crucial and inseparable element of [separation of powers]” and failure to restrict standing in environmental cases allows “‘all who breathe [the country's] air’” to sue, whereas the courts should give more weight to the “traditional requirement that the plaintiff's alleged injury be a particularized one”) (second alteration in original).
85. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181–83 (2000).
86. *Id.* at 197 (Kennedy, J., concurring).
87. *Rasul v. Bush*, 542 U.S. 466, 468, 485 (2004).
88. *Id.* at 485–87 (Kennedy, J., concurring in the judgment).

States citizen being held as an “enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”⁸⁹ On the other hand, he along with Justices O’Connor, Scalia, and Thomas joined Chief Justice Rehnquist’s opinion requiring an alleged enemy combatant to file his habeas corpus petition in the district where he was incarcerated.⁹⁰

Most fundamentally, Justice Kennedy has consistently supported the expansion of the judicial role in constitutional law. This expansion has proceeded in two ways. Most obviously, the domain of constitutional law has expanded. Siding with Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas, Justice Kennedy supported the reinvigoration of federalism limits on congressional power⁹¹ and constitutional protections for property.⁹² He also supported strict scrutiny for race-based programs of affirmative action⁹³ and the appropriateness of the Court resolving the disputed presidential election of 2000.⁹⁴ At the same time, he joined Justices Stevens, Souter, Ginsburg, and Breyer, and sometimes Justice O’Connor, to allow standing in some environmental cases,⁹⁵ to provide broader protection under the Equal Protection Clause for women and homosexuals,⁹⁶ to expand some substantive due process claims,⁹⁷ and to invalidate some death penalty statutes.⁹⁸ The result has been an increase in both the number and complexity of constitutional doctrines. In addition, Justice Kennedy has vigorously supported the principle that the Supreme Court’s interpretation of the Constitution is final. Thus, he concurred in decisions that resisted congressional attempts to overrule or circumvent Supreme Court decisions involving the Commerce Clause,⁹⁹ the protections afforded criminal defendants,¹⁰⁰ and the guarantee of the free exercise of religion.¹⁰¹

89. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004).

90. *Rumsfeld v. Padilla*, 542 U.S. 426, 442–43 (2004).

91. *See supra* notes 45–57 and accompanying text.

92. *See infra* notes 105, 147–50 and accompanying text.

93. *See infra* text accompanying note 110.

94. *See infra* text accompanying note 111.

95. *See supra* notes 82–86 and accompanying text.

96. *See infra* notes 126, 140–41 and accompanying text.

97. *See infra* notes 124–28, 140–41 and accompanying text.

98. *See infra* notes 163–66 and accompanying text.

99. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 614–18 (2000).

100. *See, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 431–32 (2000).

101. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 511–18, 532–36 (1997) (Kennedy, J., authored the majority opinion). Following the Supreme Court decision in *City of Boerne*, Congress enacted a new statute that focused on state and local decisions

C. *Protection of Individual Rights*

Justice Kennedy's positions regarding rights claims of individuals are more difficult to characterize. In a number of important cases, the Court divided along the lines that predominate in federalism and separation of powers cases.¹⁰² However, in other cases involving individual rights, the Court's division crossed its normal ideological lines.¹⁰³ In both groups of cases, Justice Kennedy often provided a pivotal vote, and he frequently articulated a position that qualified the position of the majority he joined.

The Court's normal ideological division dominated abortion and equal protection cases¹⁰⁴ as well as the decisions reinvigorating the protections of the Takings Clause.¹⁰⁵ As Justice Kennedy promised in his confirmation hearing,¹⁰⁶ he has embraced the idea that due

affecting religious organizations and decisions regarding individuals who have been institutionalized. *See* Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to -5 (2006).

102. *See supra* Part I.A–B.

103. *See infra* notes 167–82 and accompanying text.

104. *See* *Gratz v. Bollinger*, 539 U.S. 244 (2003) (Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy, and Thomas, JJ.); *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam opinion by Rehnquist, C.J., and O'Connor, Scalia, Kennedy, and Thomas, JJ.); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (Breyer, J., joined by Stevens, O'Connor, Souter, and Ginsberg, JJ.); *Shaw v. Hunt*, 517 U.S. 899 (1996) (Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy, and Thomas, JJ.); *Miller v. Johnson*, 515 U.S. 900 (1995) (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, Scalia, and Thomas, JJ.); *Shaw v. Reno*, 509 U.S. 630 (1993) (O'Connor, J., joined by Rehnquist, C.J. and Scalia, Kennedy, and Thomas, JJ.); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (O'Connor, Kennedy, and Souter, JJ., joined in part by Stevens and Blackmun, JJ.) (finding that a statute requiring spousal notice of abortion violated the Due Process Clause).

105. *See* *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, Scalia, and Thomas, JJ., and joined in part by Stevens, J.); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy, and Thomas, JJ.); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (Scalia, J., joined by Rehnquist, C.J., and White, O'Connor, and Thomas, JJ.) (Kennedy, J., concurring).

106. *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearing Before the U.S. S. Comm. on the Judiciary*, 100th Cong. 85–86, 164–65, 179–80, *reprinted in* 15 THE SUPREME COURT OF THE UNITED STATES, 359–61, 438–39, 453–54 (Roy M. Mersky & Gary R. Hartman, eds., William S. Hein & Co., 1991), *available at* <http://www.gpoaccess.gov/congresssenate/judiciary/sh100-1037/browse.html>. I am grateful to Professor Lori Ringhand of the University of Georgia Law School for this reference. She used it in a presentation at the 2007 meeting of the Southeastern Association of Law Schools and later provided me with the specific page references. The context of these comments makes them particularly noteworthy. The Senate—with the Democrats again in majority after the 1986

process protects substantive rights beyond those enumerated in the Constitution.¹⁰⁷ He also recognized the woman's right to choose an abortion as one of those rights, although he joined opinions constricting the scope of that particular right.¹⁰⁸ Likewise, he broadly interpreted the Equal Protection Clause to provide expanded constitutional protection for women and homosexuals,¹⁰⁹ strict scrutiny for programs designed to aid racial and ethnic minorities,¹¹⁰ and Supreme Court review of state recount procedures in presidential elections.¹¹¹ In addition, he was a member of the majority in the one case in which the Court revived the Privileges or Immunities Clause.¹¹² When interpreting the Takings Clause, Justice Kennedy has steered a middle course, joining opinions finding some regulations to be takings, while allowing the government to condemn property for economic development and to establish a temporary moratorium on development.¹¹³ With respect to the rights of criminal defendants, Justice Kennedy generally sided with Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas, except in death penalty cases where he authored several important opinions finding the death penalty unconstitutional in specific circumstances.¹¹⁴ In free speech cases, he voted to invalidate both

congressional elections—confirmed Justice Kennedy after defeating the nomination of Robert Bork, who explicitly rejected the idea of unenumerated rights.

107. *See infra* notes 124–28 and accompanying text.

108. *See infra* notes 121–23 and accompanying text.

109. *See infra* notes 126, 140–41 and accompanying text.

110. *See Grutter v. Bollinger*, 539 U.S. 306, 387–88 (2003) (Kennedy, J., dissenting); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223–27 (1995).

111. *See Bush v. Gore*, 531 U.S. 98, 109–10 (2000) (per curiam) (holding that Florida's recount procedures in the 2000 election were unconstitutional under the Equal Protection Clause, thus halting the recount).

112. *Saenz v. Roe*, 526 U.S. 489, 491 (1999). The dissent notes that the Court has only relied on the Privileges or Immunities Clause in other decisions that were later overruled. *Id.* at 511 (Rehnquist, C.J., dissenting).

113. *See infra* notes 153–55 and accompanying text.

114. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 554, 578–79 (2005) (holding it unconstitutional to impose the death penalty on offenders who are under age eighteen at the time of the crime).

state¹¹⁵ and federal¹¹⁶ flag-burning statutes, but he has favored restricting protections available to public employees.¹¹⁷

Perhaps the most dramatic decision of the Rehnquist Court era was the 1992 case¹¹⁸ in which a majority of the Supreme Court refused to overturn *Roe v. Wade*.¹¹⁹ Justice Kennedy joined Justices O'Connor and Souter as authors of the joint plurality opinion; they combined with Justices Blackmun and Stevens to reaffirm *Roe's* "essential holding," which recognized a woman's right to choose an abortion as constitutionally protected.¹²⁰ Even as the Justices who authored the plurality reaffirmed the essential holding of *Roe*, they demonstrated that the Court would be considerably more willing to allow regulations of abortions so long as the regulations did not place an "undue burden" on the woman's right.¹²¹ Indeed, the Court sustained all but one of the regulations before it in the 1992 case.¹²² Eventually, however, Justice Kennedy split with Justices O'Connor and Souter over the scope of the state's power to regulate abortions. In 2000, Justice Kennedy, Chief Justice Rehnquist, and Justices Scalia and Thomas all dissented from a decision holding that a state ban on dilation and extraction abortions placed an undue burden on the woman's right to choose.¹²³

Justice Kennedy also has been willing to use the Due Process Clauses of the Fifth Amendment¹²⁴ and the Fourteenth Amendment¹²⁵ to protect other individual rights not specifically enumerated in the

115. *Texas v. Johnson*, 491 U.S. 397, 398, 415–20 (1989) (holding that Texas could not criminalize flag burning, as it is a form of protected expression).

116. *United States v. Eichman*, 496 U.S. 310, 311–12 (1990) (striking down the Flag Protection Act of 1989).

117. *See Waters v. Churchill*, 511 U.S. 661, 686 (1994) (Kennedy, J., joining concurring opinion of Scalia, J.) (criticizing the Court for granting the right of an investigation to a public employee before a speech-related dismissal).

118. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845–46 (1992) (plurality opinion) (reaffirming the essential holding of *Roe v. Wade*).

119. 410 U.S. 113 (1973).

120. *Planned Parenthood*, 505 U.S. at 843, 846.

121. *Id.* at 876–77.

122. *Id.* at 879. The Court upheld the statutory definition of emergency, the informed consent requirements, the twenty-four hour waiting period, the parental consent provision, and the reporting and record-keeping requirements. *Id.* at 879–80, 883, 887, 899–901. The only provision that the plurality found imposed an undue burden on women seeking abortions was the spousal notification provision. *Id.* at 894–95.

123. *Stenberg v. Carhart*, 530 U.S. 914, 919, 945–46 (2000) (Kennedy, J., dissenting).

124. U.S. CONST. amend. V (“[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . .”).

125. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”).

Constitution. He authored the opinion holding that the right of sexual intimacy extended to homosexuals,¹²⁶ and he consistently joined the majority that has limited the amount that injured parties can collect in punitive damages.¹²⁷ Justice Kennedy also provided the crucial vote to invalidate a statute imposing pension liability for former employees of coal companies, even though he was the only Justice who relied on substantive due process as the basis for the decision.¹²⁸

In cases involving equal protection claims, Justice Kennedy has generally been a member of the majority, although the makeup of the majority has varied.¹²⁹ In most cases where the Court was narrowly divided, Justice Kennedy formed a majority with the more conservative members of the Court.¹³⁰ In a few cases, however, he joined the more liberal members of the Court.¹³¹

Justices Kennedy and O'Connor generally sided with Chief Justice Rehnquist and Justices Scalia and Thomas to form a majority with respect to equal protection issues. That majority stopped Florida's attempt to recount ballots in the 2000 presidential election,¹³² as well as invalidated racially based voting districts¹³³ and affirmative action programs.¹³⁴ In the last two groups of cases, Justice Kennedy joined Justice O'Connor in refusing to forbid all uses of race,¹³⁵ but he was

126. *Lawrence v. Texas*, 539 U.S. 558, 562, 578 (2003).

127. *See, e.g., State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 412, 429 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 561, 585–86 (1996).

128. *See E. Enters. v. Apfel*, 524 U.S. 498, 538–39 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (arguing that the Court's reliance on the Takings Clause was unnecessary).

129. *See, e.g., United States v. Virginia*, 518 U.S. 515, 518–19 (1996) (holding that the Equal Protection Clause precludes Virginia from reserving the unique educational opportunities offered by Virginia Military Institute exclusively for men); *Shaw v. Hunt*, 517 U.S. 899, 900 (1996) (holding that the North Carolina voter redistricting plan violated the Equal Protection Clause) (emphasis omitted).

130. *See, e.g., Gratz v. Bollinger*, 539 U.S. 244, 247 (2003); *Shaw*, 517 U.S. at 900; *see supra* notes 26–27 and accompanying text (categorizing the conservative Justices as Chief Justice Roberts, and Justices Scalia, Thomas, and Alito).

131. *See, e.g., Romer v. Evans*, 517 U.S. 620, 621 (1996); *see supra* notes 26–27 and accompanying text (categorizing the more liberal Justices as Justice Stevens, Souter, Ginsberg, and Breyer).

132. *Bush v. Gore*, 531 U.S. 98, 100, 109–10, 135 (2000) (per curiam decision where Justices Stevens, Souter, Ginsberg, and Breyer dissented).

133. *See, e.g., Shaw*, 517 U.S. at 900, 902; *Miller v. Johnson*, 515 U.S. 900, 902, 917–20 (1995).

134. *See, e.g., Gratz*, 539 U.S. at 247, 275 (2003).

135. *But see Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1985) (Kennedy, J., concurring in part and concurring in the judgment) (accepting that “[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause”).

less willing to find race-based programs constitutional.¹³⁶ These different views surfaced most clearly in the case challenging the affirmative action program at the University of Michigan Law School.¹³⁷ Justice O'Connor accepted the use of race as one of a number of factors in selecting applicants.¹³⁸ Justice Kennedy argued that the law school program was unconstitutional because it placed too much reliance on race in the admissions process.¹³⁹

In the October 1995 Term, both Justice Kennedy and Justice O'Connor joined Justices Stevens, Souter, Ginsburg, and Breyer in decisions expanding protections for women and homosexuals. Justice Ginsburg delivered the opinion for the majority in a case that provided enhanced protections against gender discrimination without explicitly making it a suspect classification.¹⁴⁰ Justice Kennedy himself authored the opinion that invalidated a state constitutional amendment because it reflected "animus" toward homosexuals.¹⁴¹

When the Court resurrected the Privileges or Immunities Clause of the Fourteenth Amendment¹⁴² in 1999, Justice Kennedy was a member of the seven-Justice majority.¹⁴³ He joined Justice Stevens's opinion that upheld the right of recent arrivals in a state to receive the same state welfare payments as other citizens of that state.¹⁴⁴

Justice Kennedy has also been a pivotal vote in defining the extent to which the Takings Clause limits governmental control of real property. He occasionally joined a majority holding that government regulations can constitute a taking for which compensation is

136. See *Grutter v. Bollinger*, 539 U.S. 306, 387, 389, 392–93 (2003) (Kennedy, J., dissenting); *Bush v. Vera*, 517 U.S. 952, 996, 999 (1999) (Kennedy, J., concurring) (joining in the plurality opinion that rejected the argument that all use of race to assign political districts was unconstitutional, an argument that Justice Thomas advanced in his opinion concurring in the judgment).

137. *Grutter*, 539 U.S. at 311.

138. See *id.* at 337.

139. *Id.* at 392–93 (Kennedy, J., dissenting) (arguing that the law school failed to show that race did not become a prominent factor in the admissions process and thus did not satisfy the strict scrutiny standard).

140. *United States v. Virginia*, 518 U.S. 515, 531–35 (1996) (proscribing a heightened review standard of an "exceedingly persuasive justification" for government based action, even though gender was not made a suspect classification).

141. See *Romer v. Evans*, 517 U.S. 620, 632 (1996) (explaining how the state amendment was unconstitutional because it targeted a single named group and lacked a rational relationship to a legitimate state interest).

142. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

143. *Saenz v. Roe*, 526 U.S. 489, 491 (1999).

144. *Id.* at 502–04 (citing *Slaughter-House Cases*, 83 U.S. 36 (1873)).

required.¹⁴⁵ On the other hand, he has been tolerant of temporary controls on development, and he has broadly defined the government's authority to condemn property.¹⁴⁶

Both Justices Kennedy and O'Connor (along with Justice White) were part of a six-member majority that held that a state coastal regulation was a taking if it denied an owner compensation of all economically viable uses of his property.¹⁴⁷ Justice Kennedy, however, qualified his support of that holding in a concurring opinion.¹⁴⁸ Subsequently, Justice Kennedy joined an opinion holding that a land use permit condition was a taking if it was not roughly proportional to the burden imposed by the permitted land use.¹⁴⁹ He also authored a 2001 opinion joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas, holding that a property owner could raise a takings claim to a regulation established prior to the owner's acquisition of the property.¹⁵⁰ In addition, Justice Kennedy provided the crucial fifth vote to invalidate a regulation imposing pension obligations on a company that formerly had coal mining operations,¹⁵¹ however, as noted above,¹⁵² he relied on the Due Process Clause rather than the Takings Clause.

On the other hand, Justice Kennedy joined Justices O'Connor, Stevens, Souter, Ginsburg, and Breyer in rejecting a claim that a temporary moratorium on development around Lake Tahoe was a taking.¹⁵³ Furthermore, in a controversial 2005 opinion holding that the Takings Clause did not preclude a local government from condemning land for an economic development project,¹⁵⁴ Justice Kennedy provided the crucial fifth vote and wrote a concurring opinion.¹⁵⁵

145. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019, 1035–36 (1992) (Kennedy, J., concurring in judgment) (reversing the judgment of the state supreme court that denied compensation to the property owner, noting the relevance of the owner's reasonable expectation and the regulation's effect on the value of the land).

146. *See infra* notes 153–55.

147. *Lucas*, 505 U.S. at 1020–22, 1031–32.

148. *Id.* at 1032, 1035–36 (Kennedy, J., concurring in the judgment).

149. *Dolan v. City of Tigard*, 512 U.S. 374, 384–85 (1994) (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

150. *Palazzolo v. Rhode Island*, 533 U.S. 606, 610, 632 (2001).

151. *See E. Enters. v. Apfel*, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in the judgment).

152. *See supra* note 119 and accompanying text.

153. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 305–06, 320 (2002).

154. *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005).

155. *See id.* at 490 (Kennedy, J., concurring) (Justice Kennedy joined Justices Stevens, Souter, Ginsburg, and Breyer in the majority vote).

In criminal cases, both Justice Kennedy and Justice O'Connor usually sided with Chief Justice Rehnquist and Justices Scalia and Thomas to support the narrow definition of the constitutional rights of criminal defendants,¹⁵⁶ although Justice O'Connor seems to have been more willing to break that pattern.¹⁵⁷ Insofar as Justice Kennedy is concerned, one can identify at least two important exceptions to the pattern. First, Justice Kennedy has been part of the group that has tried to limit the reach of an ideologically diverse majority's broad interpretation of the Sixth Amendment right to a jury trial in criminal cases.¹⁵⁸ Second, Justice Kennedy has sided with Justices Stevens, Souter, Ginsburg, and Breyer, and sometimes Justice O'Connor, to invalidate the death sentence in several important capital punishment cases.¹⁵⁹

Justice Kennedy has not generally supported the Court's expansion of the right to a jury trial for issues relating to the enhancement of criminal sentences. In the first two cases expanding the right, he dissented,¹⁶⁰ but he was part of the majority that applied those decisions to capital defendants.¹⁶¹ Subsequently, he provided the crucial fifth vote for Justice Breyer's majority opinion granting advisory status to the federal sentencing guidelines.¹⁶²

Justice Kennedy's most significant influence in criminal law cases has undoubtedly come in death penalty cases. Although he and Justice O'Connor sided with Chief Justice Rehnquist and Justices Scalia and Thomas to uphold death sentences in a number of cases,¹⁶³

156. See, e.g., *Lockyer v. Andrade*, 538 U.S. 63, 65, 67 (2003); *Illinois v. Rodriguez*, 497 U.S. 177, 178, 185–86 (1990).

157. See, e.g., *Stogner v. California*, 539 U.S. 607, 608–09 (2003) (finding invalid a California law that allowed prosecution of certain crimes beyond the previous statute of limitations for those crimes); *Alabama v. Shelton*, 535 U.S. 654, 656, 658 (2002) (holding that a defendant is entitled to be represented by counsel even in a case where the state seeks only a suspended sentence followed by probation); *Atwater v. City of Lago Vista*, 532 U.S. 318, 322–23 (2001) (Justice O'Connor did not join the opinion holding that the Fourth Amendment permits warrantless arrests for minor criminal offenses).

158. See *infra* notes 160–62 and accompanying text.

159. See *infra* notes 163–66 and accompanying text.

160. *Blakley v. Washington*, 542 U.S. 296, 297, 313–14 (2004) (holding that a sentencing enhancer based on a finding of deliberate cruelty was an issue that should have been decided by a jury); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that any fact that would increase the punishment beyond the statutory maximum must be examined by a jury, with the exception of prior convictions).

161. *Ring v. Arizona*, 536 U.S. 584, 587–89 (2002).

162. *United States v. Booker*, 543 U.S. 220, 225, 245 (2005).

163. See, e.g., *Jones v. United States*, 527 U.S. 373, 375, 379 (1999); *Romano v. Oklahoma*, 512 U.S. 1, 2–3 (1994); *Boyde v. California*, 494 U.S. 370, 372 (1990);

he has sometimes been a swing Justice in capital punishment cases. Justice Kennedy (and Justice O'Connor) occasionally joined Justices Stevens, Souter, Ginsburg, and Breyer in setting aside the death penalty on procedural grounds,¹⁶⁴ and in finding the death penalty unconstitutional for the mentally retarded.¹⁶⁵ He also authored an opinion finding the death penalty unconstitutional for juveniles over the age of fifteen.¹⁶⁶

Justices often divide differently from their usual ideological groupings in First Amendment cases, and Justice Kennedy's opinions in the vast doctrinal area of free speech claims defy easy characterization.¹⁶⁷ In several important areas, he supported the expansion of First Amendment claims. Perhaps most importantly, he has vigorously opposed limits on campaign contributions and spending,¹⁶⁸ and he has dissented from decisions upholding restrictions on speech-related conduct of abortion protestors.¹⁶⁹ He also supported the decisions requiring public institutions to grant equal access to religious groups,¹⁷⁰ and he was part of the majorities invalidating both state and federal statutes making it a crime to burn the United States flag.¹⁷¹ At the same time, he concurred with a majority narrowly construing the rights of public employees to

see also Johnson v. Texas, 509 U.S. 350, 352–53 (1993) (Justice Kennedy—but not Justice O'Connor—joining majority opinion holding that an instruction regarding future dangerousness allowed adequate consideration of defendant's youth).

164. *Tennard v. Dretke*, 542 U.S. 274, 289 (2004) (holding that the Fifth Circuit's "uniquely severe permanent handicap" and "nexus" tests as they relate to low IQ are debatably incorrect, thus allowing petitioner to pursue habeas relief); *Williams v. Taylor*, 529 U.S. 362, 399 (2000) (granting habeas relief for ineffective assistance of counsel based on a reasonable probability that sentence would have been different with effective counsel).
165. *Atkins v. Virginia*, 536 U.S. 304, 306, 321 (2002) (holding that the Eighth Amendment restricts a state's power to execute the mentally retarded).
166. *Roper v. Simmons*, 543 U.S. 551, 554, 578–79 (2005) (forbidding the death penalty for juveniles). Although Justice O'Connor joined the majority in *Atkins*, she dissented in *Roper*. *Id.* at 587–607 (O'Connor, J., dissenting).
167. For a recent attempt at a general explanation of Justice Kennedy's opinions, see Helen J. Knowles, *The Supreme Court as Civic Educator: Free Speech According to Justice Kennedy*, 6 FIRST AMEND. L. REV. 252, 252 (2008) (characterizing Justice Kennedy as a "free speech libertarian").
168. *See, e.g., McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 286–88 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 405 (2000) (Kennedy, J., dissenting).
169. *See, e.g., Hill v. Colorado*, 530 U.S. 703, 765 (2000) (Kennedy, J., dissenting).
170. *See, e.g., Good News Club v. Millford Cent. Sch.*, 533 U.S. 98, 101, 120 (2001); *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 822, 845–46 (1995).
171. *United States v. Eichman*, 496 U.S. 310, 311, 318 (1990); *Texas v. Johnson*, 491 U.S. 397, 420 (1989).

protest policies to which they object,¹⁷² and he wrote the opinion of the Court concluding that substantial truth rather than literal accuracy is the test for quotations in defamation actions.¹⁷³ In pornography cases, Justice Kennedy has again adopted a centrist position. He joined in the opinion allowing the government to criminalize possession of child pornography,¹⁷⁴ but authored an opinion that invalidated the federal statute extending that authority to pornography which used adult actors who appeared to be children.¹⁷⁵

Justice Kennedy has also carved out a distinctive position in cases regarding freedom of religion.¹⁷⁶ In Establishment Clause cases, he authored the opinion prohibiting an invocation at a secondary school graduation because of its coercive effect,¹⁷⁷ and he joined the majority that invalidated the use of invocations at high school football games.¹⁷⁸ At the same time, he has been willing to grant governments considerable discretion to display religious symbols.¹⁷⁹ In cases raising Free Exercise Clause claims, Justice Kennedy has been a consistent member of the majority. He concurred silently in a case rejecting strict scrutiny for laws of general applicability even when they imposed a burden on religious practices,¹⁸⁰ as well as in a case upholding a state decision to exclude theology students from a state scholarship program.¹⁸¹ In addition, he authored the opinion of the Court holding that a local ordinance restricting the animal sacrifices of the Santeria religion violated the Free Exercise Clause.¹⁸²

II. DECISIONS SINCE 2005

The decisions of the Supreme Court's first four Terms since John Roberts became Chief Justice confirm Justice Kennedy's crucial

172. *Waters v. Churchill*, 511 U.S. 661, 686 (1994) (Kennedy, J., joining concurring opinion of Scalia, J.).

173. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 498, 517 (1991).

174. *Osborne v. Ohio*, 495 U.S. 103, 106, 111 (1990).

175. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 239, 257–58 (2002).

176. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

177. *Lee v. Weisman*, 505 U.S. 577, 599 (1992).

178. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

179. *See, e.g., Van Orden v. Perry*, 545 U.S. 677 (2005) (Kennedy, J., joining plurality opinion of Chief Justice Rehnquist); *McCreary County v. ACLU*, 545 U.S. 844, 885 (2005) (Kennedy, J., joining in part the dissenting opinion of Justice Scalia); *Allegheny County v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

180. *Employment Div. v. Smith*, 494 U.S. 872, 873 (1990).

181. *Locke v. Davey*, 540 U.S. 712, 715 (2004).

182. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 523–24 (1993).

impact on a closely divided Court. They continue the basic trend of the last three decades, a gradual but consistent move to the right. At the same time, they demonstrate the considerable extent to which the views of Justice Kennedy define how far that trend extends and create some important exceptions to it.

A. 2005 Term

The 2005 Term was a transitional one. Although Chief Justice Roberts was confirmed before the Term began, Justice Alito did not take his seat until January 31, 2006.¹⁸³ Justice O'Connor continued to serve until Justice Alito was confirmed, so the Court's previous ideological division continued for about thirty percent of the decisions of the Term. Partially because of the transition, five-to-four divisions were relatively uncommon as compared to the last years of the Rehnquist Court.¹⁸⁴ Nonetheless, the decisions rendered after Justice Alito joined the Court began to show the increased importance of Justice Kennedy when the Court was closely divided.

Justice O'Connor was part of the Court for the first twenty-six opinions the Supreme Court issued during the 2005 Term, and her presence tended to hide Justice Kennedy's new influence on the Court. In the cases in which Justice O'Connor was part of the Court, she and Justice Kennedy continued to share the center when the Court was narrowly divided. Both joined Chief Justice Roberts and Justices Scalia and Thomas to form a five-member majority upholding a death penalty verdict even though the state appellate court set aside two of the "special circumstances" found by the jury.¹⁸⁵ Likewise, they both joined with Justices Stevens, Souter, Ginsburg, and Breyer in rejecting the power of the United States Attorney General to forbid physicians from prescribing drugs covered by the federal Controlled Substances Act for use in physician-assisted suicides authorized by state law.¹⁸⁶ On the other hand, Justice O'Connor broke with Justice Kennedy to join Justices Stevens, Souter, Ginsburg, and Breyer in holding that the state was not immune from liability in a proceeding initiated by a bankruptcy

183. See The Justices of the Supreme Court, *supra* note 5.

184. *Statistics for the Supreme Court's October Term 2005*, 75 U.S.L.W. 3029, 3029 (July 18, 2006) [hereinafter *2005 Term Statistics*]. See generally Lori A. Ringhand, *The Roberts Court: Year 1*, 73 TENN. L. REV. 607 (2006) (providing a detailed comparison of the Roberts Court and the Rehnquist Court).

185. *Brown v. Sanders*, 546 U.S. 212, 213–15 (2006).

186. *Gonzales v. Oregon*, 546 U.S. 243, 247 (2006).

trustee to set aside preferential transfers by the debtor to state agencies.¹⁸⁷

Other factors in the 2005 Term also tended to mask Justice Kennedy's increasing influence on the Court. Under Chief Justice Roberts, the Court produced more unanimous decisions than had been typical in the last years of the Rehnquist Court.¹⁸⁸ In a few cases, Justice Breyer joined the new Chief Justice and Justices Scalia, Kennedy, Thomas, and Alito to produce six-member majorities.¹⁸⁹ In one important case, Chief Justice Roberts broke with his normal ideological allies and sided with Justices Stevens, Souter, Ginsburg, and Breyer to set aside a property forfeiture because the state procedures did not require sufficient efforts to provide actual notice to the property owner.¹⁹⁰ Moreover, Justice Kennedy dissented nine times during the Term,¹⁹¹ more than either of the two new Justices and the same number of times as Justice Scalia.¹⁹²

Nonetheless, careful examination of the cases from the 2005 Term reveals Justice Kennedy's increasingly important role as the pivotal Justice. He sided with the majority in nine of the thirteen decisions¹⁹³

187. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 359 (2006).

188. *See 2005 Term Statistics*, *supra* note 184, at 3029.

189. *See, e.g.*, *Woodford v. Ngo*, 548 U.S. 81, 103 (2006) (Breyer, J., concurring in the judgment); *Randall v. Sorrell*, 548 U.S. 230 (2006); *Beard v. Banks*, 548 U.S. 521 (2006) (six-member majority with Alito not participating). Justice Kennedy concurred only in the judgment in *Randall v. Sorrell*. As he had done in the past, he argued for greater First Amendment protection for campaign contributions. *Randall*, 548 U.S. at 264 (Kennedy, J., concurring in the judgment).

190. *Jones v. Flowers*, 547 U.S. 220, 222 (2006). The dissenting Justices complained that *Jones* took a stricter view of notice requirements than the Court had adopted in *Dusenbury v. United States*, 534 U.S. 161 (2002). *See Jones*, 547 U.S. at 243–44.

191. *Clark v. Arizona*, 548 U.S. 735, 781 (2006) (Kennedy, J., dissenting); *United States v. Gonzales-Lopez*, 548 U.S. 140, 152 (2006) (Kennedy, J., joining dissenting opinion of Alito, J.); *Youngblood v. West Virginia*, 547 U.S. 867, 875 (2006) (Kennedy, J., dissenting); *Howard Delivery Servs., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 668 (2006) (Kennedy, J., dissenting); *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 702 (2006) (Kennedy, J., joining dissenting opinion of Breyer, J.); *Jones v. Flowers*, 547 U.S. 220, 239 (2006) (Kennedy, J., joining dissenting opinion of Thomas, J.); *Unitherm Food Sys., Inc. v. Swift-Edkrich, Inc.*, 546 U.S. 394, 407 (2006) (Kennedy, J., joining dissenting opinion of Stevens, J.); *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379 (2006) (Kennedy, J., joining dissenting opinion of Thomas, J.); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 116 (2005) (Kennedy, J., joining dissenting opinion of Ginsburg, J.).

192. *See 2005 Term Statistics*, *supra* note 184, at 3030. It should be noted that Justice Alito only participated in thirty-nine of the court's decisions. *Id.*

193. *Id.* at 3029.

in which the Court divided five to four or five to three.¹⁹⁴ As expected, he most often sided with Chief Justice Roberts and Justices Scalia, Thomas, and Alito,¹⁹⁵ but he joined Justices Stevens, Souter, Ginsburg, and Breyer three times¹⁹⁶ and an ideologically mixed majority once.¹⁹⁷ Although Justice Kennedy dissented in four cases in which the Court had a five-member majority,¹⁹⁸ the decisions did not reflect any general shift in the ideological makeup of the Court.¹⁹⁹ Only one of the cases was an important constitutional case, and it

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194. Omitted from the list of five–three majorities is *Lab. Corp. of Am. Holdings v. Metabolite Laboratories, Inc.*, 548 U.S. 124 (2006) (per curiam). Although the Court divided five to three with Chief Justice Roberts not participating, this Article omits the case because the Supreme Court dismissed the writ as improvidently granted rather than considering the case on the merits. *Id.* at 124. Justice Kennedy was part of the five-member majority with Justices Ginsburg, Scalia, Thomas, and Alito.
195. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Kansas v. Marsh*, 548 U.S. 163 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006); *Hudson v. Michigan*, 547 U.S. 586 (2006); *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Brown v. Sanders*, 546 U.S. 212 (2006). Justice O'Connor was part of the five-member majority in the *Brown* case. 546 U.S. at 213. As noted below, Justice Kennedy sided with Chief Justice Roberts and Justices Scalia, Thomas, and Alito on the broad challenge to the Texas reapportionment in *Perry*, but joined Justices Stevens, Souter, Ginsburg, and Breyer in finding that one district violated the Voting Rights Act. See *infra* note 218 and accompanying text.
196. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *House v. Bell*, 547 U.S. 518 (2006); *Georgia v. Randolph*, 547 U.S. 103 (2006). All three of these decisions had five to three divisions; Chief Justice Roberts did not participate in *Hamdan*, and Justice Alito did not participate in *House* or *Randolph*.
197. *Day v. McDonough*, 547 U.S. 198, 200 (2006).
198. *United States v. Gonzales-Lopez*, 548 U.S. 140, 152 (2006) (Kennedy, J., Roberts, C.J., and Thomas J., joining dissenting opinion of Alito, J.); *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 702 (2006) (Kennedy, Souter, and Alito, JJ., joining dissenting opinion of Breyer, J.); *Jones v. Flowers*, 547 U.S. 220, 239 (2006) (Kennedy, J., joining dissenting opinion of Thomas, J.); *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379 (2006) (Kennedy, J., joining dissenting opinion of Thomas, J.). This Article does not count *Clark v. Arizona*, 548 U.S. 735 (2006), as a five-member majority case, although it is admittedly a difficult case to classify. Joined by the Chief Justice and Justices Scalia, Thomas, and Alito, Justice Souter's majority opinion held that Arizona's rules regarding the insanity defense did not violate the Due Process Clause. *Id.* at 779. Justice Breyer concurred in that holding (creating a six-member majority on that issue), but he dissented from the Court's failure to remand the case to the state court to clarify whether the state court proceedings had been conducted in accordance with the Court's opinion. *Id.* at 781 (Kennedy, J., dissenting). Joined by Justices Stevens and Ginsburg, Justice Kennedy wrote an opinion dissenting to the majority's constitutional holding. *Id.*
199. See GEORGETOWN UNIV. LAW CTR. SUPREME COURT INST., SUPREME COURT OF THE UNITED STATES OCTOBER TERM 2005 OVERVIEW 9–10 (2006), available at http://www.law.georgetown.edu/sci/documents/gulcsupctinstitutefinalreport2005_30june06_001.pdf.

occurred before Justice O'Connor left the Court.²⁰⁰ In that decision, Justice O'Connor again joined Justices Stevens, Souter, Ginsburg, and Breyer to create another exception to the prohibition against congressional creation of private actions for damages against the state,²⁰¹ this time allowing Congress to subordinate a state entity to other creditors in a federal bankruptcy proceeding.²⁰²

Justice Kennedy wrote the crucial opinion in four of the six cases in which he formed a five-member majority with the Chief Justice, Justices Scalia and Thomas, and either Justice O'Connor or Justice Alito. He wrote two majority opinions²⁰³ and two concurring opinions that significantly qualified the position of the other Justices in the majority.²⁰⁴

Three of the cases were criminal prosecutions.²⁰⁵ Two involved the death penalty.²⁰⁶ In one, Justice Kennedy joined Justice Scalia's opinion upholding a death sentence even though the state appellate court set aside two of the "special circumstances" on which the jury based its sentencing recommendation.²⁰⁷ In the other, he joined Justice Thomas's opinion that rejected a challenge to the Kansas capital statute, which required the death penalty if the aggravating circumstances of the crime were not outweighed by the mitigating circumstances.²⁰⁸ The third criminal justice decision declined to exclude evidence from all searches in which the police violated the "knock and announce" procedures for executing warrants.²⁰⁹ In this case, however, Justice Kennedy filed an opinion concurring in part and concurring in the judgment.²¹⁰

Justice Kennedy wrote the opinion for a five-member majority in a case restricting the First Amendment rights of public employees.²¹¹

200. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006).

201. *Id.*

202. *Id.* at 364.

203. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

204. *Rapanos v. United States*, 547 U.S. 715, 759 (2006) (Kennedy, J., concurring); *Hudson v. Michigan*, 547 U.S. 586, 602 (2006) (Kennedy, J., concurring).

205. *Kansas v. Marsh*, 548 U.S. 163 (2006); *Hudson*, 547 U.S. 586; *Brown v. Sanders*, 546 U.S. 212 (2006).

206. *Marsh*, 548 U.S. 163; *Brown*, 546 U.S. 212.

207. *Brown*, 546 U.S. at 212. Justice O'Connor was part of the five-member majority in this case. *Id.* at 213.

208. *Marsh*, 548 U.S. at 170–71.

209. *Hudson*, 547 U.S. at 586.

210. *Id.* at 602 (Kennedy, J., concurring in part and concurring in the judgment).

211. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

That opinion concluded that an employee has no First Amendment protection for speech made as part of his or her official duties.²¹²

Finally, Justice Kennedy sided with the Chief Justice and Justices Scalia, Thomas, and Alito in two important cases involving issues of statutory construction, but he articulated a unique position in both cases.²¹³ Although he agreed to a remand to determine whether a wetland fell within the coverage of the Clean Water Act,²¹⁴ his concurring opinion²¹⁵ articulated a materially different test for determining the extent of the “waters of the United States” than the one suggested in Justice Scalia’s plurality opinion.²¹⁶ In a challenge to a reapportionment of the Texas legislature, Justice Kennedy wrote the opinion of the Court.²¹⁷ He sided with Chief Justice Roberts and Justices Scalia, Thomas, and Alito with respect to the challenge to the entire redistricting statute, but he joined the other four Justices to form a five-member majority finding that the creation of one district violated the Voting Rights Act.²¹⁸

Justice Kennedy joined Justices Stevens, Souter, Ginsburg, and Breyer to form five-member majorities in three cases. As noted above, Justice Kennedy also authored an important administrative law opinion that was joined by Justice O’Connor as well as Justices Stevens, Souter, Ginsburg, and Breyer.²¹⁹ That decision denied the Attorney General the power to forbid the dispensing of drugs covered by the Controlled Substances Act.²²⁰

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

212. *Id.* at 410.

213. *Rapanos v. United States*, 547 U.S. 715, 759 (2006) (Kennedy, J., concurring); *Hudson*, 547 U.S. at 602 (Kennedy, J., concurring in part and concurring in the judgment).

214. *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring). *See generally* Robin Kundis Craig, *Justice Kennedy and Ecosystem Services: A Functional Approach to Clean Water Act Jurisdiction After Rapanos*, 38 ENVTL. L. 605 (2008); Brandee Ketchum, Note, *Like the Swamp Thing: Something Ambiguous Rises from the Hidden Depths of Murky Waters—The Supreme Court’s Treatment of Murky Wet Land in Rapanos v. United States*, 68 LA. L. REV. 983 (2008).

215. *Rapanos*, 547 U.S. at 759.

216. *Id.* at 739 (plurality opinion).

217. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 408 (2006).

218. *See id.* at 408, 423–25, 442–43, 446–47.

219. *See supra* note 186 and accompanying text.

220. *Gonzales v. Oregon*, 546 U.S. 243, 247, 274–75 (2006).

present and expressly refused to consent.²²¹ In the other, Justice Kennedy wrote the majority opinion allowing a habeas corpus claim based on the alleged innocence of the petitioner.²²²

The final case of the 2005 Term in which Justice Kennedy joined Justices Stevens, Souter, Ginsburg, and Breyer, concerned the procedures for trying detainees at Guantanamo Bay, Cuba, and was one of the most controversial decisions of the Term.²²³ The majority ruled that the President had no inherent authority to create military commissions to try alleged enemy combatants being detained at Guantanamo Bay.²²⁴ Justice Kennedy, however, wrote a separate opinion concurring in part.²²⁵

Justice Kennedy also joined a five-member majority that formed along less predictable lines in a case involving a relatively narrow issue.²²⁶ Along with Chief Justice Roberts and Justices Souter and Alito, Justice Kennedy joined Justice Ginsburg's opinion upholding the dismissal of a habeas corpus petition as untimely.²²⁷

B. 2006 Term

If anyone had lingering doubts, the October 2006 Term confirmed that Justice Kennedy is now the decisional fulcrum of the Supreme Court. He was almost always part of the majority, and each time the Court divided five to four, he was one of the five.²²⁸ Moreover, his opinion was crucial in defining the parameters of rulings when the Court was closely divided because he was the member of the majority most likely to form a new majority with the dissenters.

During the October 2006 Term, Justice Kennedy dissented in only two cases, and he wrote only one dissenting opinion.²²⁹ That record made him a member of the majority in more than ninety-seven

221. *Georgia v. Randolph*, 547 U.S. 103, 105–06 (2006). This decision had a five to three majority because Justice Alito did not participate in the decision. *Id.*

222. *House v. Bell*, 547 U.S. 518, 520–22 (2006). This decision had a five to three majority because Justice Alito did not participate in the decision. *Id.*

223. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 564, 636 (2006).

224. *Id.* at 564, 590–95. This decision had a five to three majority because Chief Justice Roberts did not participate in the decision. *Id.* at 564.

225. *Id.* at 636.

226. *Day v. McDonough*, 547 U.S. 198, 200 (2006).

227. *Id.* at 202 (Kennedy, J., Roberts, C.J., and Souter and Alito, JJ., joining majority opinion of Justice Ginsburg).

228. *See, e.g., Bowles v. Russel*, 551 U.S. 205 (2007); *Brewer v. Quarterman*, 550 U.S. 286 (2007); *Gonzales v. Carhart*, 550 U.S. 124 (2007).

229. *United Hauler's Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 332 (2007) (Kennedy, J., joining in dissent by Justice Alito); *Cunningham v. California*, 549 U.S. 270, 295 (2007) (Kennedy, J., dissenting).

percent of the sixty-eight cases that the Court decided by signed opinion after argument.²³⁰ The other Justices dissented in eight to twenty-six cases.²³¹

In twenty-four cases, the Court had a five-member majority, and Justice Kennedy was part of the majority in each of the cases.²³² As in the 2005 Term, he sided most frequently with Chief Justice Roberts and Justices Scalia, Thomas, and Alito.²³³ However, he joined Justices Stevens, Souter, Ginsberg, and Breyer in twenty-five percent of the closely divided cases.²³⁴ Perhaps most interestingly, the Court decided five cases with a five-member majority that crossed the Court's normal ideological divisions.²³⁵ Although those cases produced four different majorities, Justice Kennedy was one of the five in each of them.²³⁶

The nine decisions of the 2006 Term involving capital punishment and standing issues provided the strongest confirmation of Justice Kennedy's new influence. In the cases in both areas, the remainder of the Court consistently broke into its typical ideological

230. *Statistics for the Supreme Court's October 2006 Term*, 76 U.S.L.W. 3052, 3053 (Aug. 8, 2007) [hereinafter *2006 Term Statistics*]. In one of these cases, *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007), the Court divided five to three because Justice Thomas did not participate.

231. Chief Justice Roberts dissented in eight cases, Justice Alito in ten, Justice Scalia in fourteen, Justices Souter and Thomas in sixteen, Justice Breyer in seventeen, Justice Ginsburg in twenty, and Justice Stevens in twenty-six. *2006 Term Statistics*, *supra* note 230, at 3053.

232. *Id.*

233. *See* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Leegin Creative Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Morse v. Frederick*, 551 U.S. 393 (2007); *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007); *National Ass'n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644 (2007); *Bowles v. Russell*, 551 U.S. 205 (2007); *Uttecht v. Brown*, 551 U.S. 1 (2007); *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007); *Schriro v. Landrigan*, 550 U.S. 465 (2007); *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Lawrence v. Florida*, 549 U.S. 327 (2007); *Ayers v. Belmontes*, 549 U.S. 7 (2006).

234. *See* *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Brewer v. Quarterman*, 550 U.S. 286 (2007); *Smith v. Texas*, 550 U.S. 297 (2007); *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007).

235. *James v. United States*, 550 U.S. 192 (2007); *Watters*, 550 U.S. 1 (five to three decision, Justice Thomas not participating); *Limtiaco v. Camacho*, 549 U.S. 483 (2007); *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *Osborn v. Haley*, 549 U.S. 225 (2007).

236. *James*, 550 U.S. 192; *Watters*, 550 U.S. 1 (five to three decision, Justice Thomas not participating); *Limtiaco*, 549 U.S. 483; *Philip Morris USA*, 549 U.S. 346; *Osborn*, 549 U.S. 225.

groupings.²³⁷ Justice Kennedy adopted middle positions that decided with one group in five cases and the other in four.²³⁸

Seven of the twenty-four cases with a five-member majority involved challenges to the imposition of capital punishment.²³⁹ Chief Justice Roberts and Justices Scalia, Thomas, and Alito voted to reject the challenges in all seven cases, and Justices Stevens, Souter, Ginsberg, and Breyer voted to set aside the sentences in all seven cases.²⁴⁰ Justice Kennedy voted to affirm the death sentences in three cases²⁴¹ and to reverse them in four.²⁴² Moreover, he authored four of the seven opinions in the capital punishment cases, rejecting challenges to the death penalty in two,²⁴³ and ruling in favor of the challenges in two.²⁴⁴

Each of the three capital punishment decisions in which Justice Kennedy sided with Chief Justice Roberts and Justices Scalia, Thomas, and Alito, involved a case in which the Ninth Circuit had reversed a district court decision and granted habeas corpus relief to a defendant who had been sentenced to death.²⁴⁵ Justice Kennedy authored the majority opinion in the first and third of these decisions.²⁴⁶ In the first, Justice Kennedy's opinion upheld a jury instruction on mitigation.²⁴⁷ The instruction directed the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."²⁴⁸ That language was sufficient, he concluded, to inform the jury that it should consider evidence that the defendant would live a constructive life if incarcerated because of the religious conversion he had experienced during a previous incarceration.²⁴⁹ In the third of the

237. See *Panetti*, 551 U.S. 930; *Hein*, 551 U.S. 587; *Uttecht*, 551 U.S. 1; *Schriro*, 550 U.S. 465; *Smith*, 550 U.S. 297; *Brewer*, 550 U.S. 286; *Abdul-Kabir*, 550 U.S. 233; *Massachusetts v. EPA*, 549 U.S. 497; *Ayers*, 549 U.S. 7.

238. *Panetti*, 551 U.S. 930; *Uttecht*, 551 U.S. 1; *Schriro*, 550 U.S. 465; *Smith*, 550 U.S. 297; *Brewer*, 550 U.S. 286; *Abdul-Kabir*, 550 U.S. 233; *Ayers*, 549 U.S. 7.

239. *Panetti*, 551 U.S. 930; *Uttecht*, 551 U.S. 1; *Schriro*, 550 U.S. 465; *Smith*, 550 U.S. 297; *Brewer*, 550 U.S. 286; *Abdul-Kabir*, 550 U.S. 233; *Ayers*, 549 U.S. 7.

240. *Panetti*, 551 U.S. 930; *Uttecht*, 551 U.S. 1; *Schriro*, 550 U.S. 465; *Smith*, 550 U.S. 297; *Brewer*, 550 U.S. 286; *Abdul-Kabir*, 550 U.S. 233; *Ayers*, 549 U.S. 7.

241. *Uttecht*, 551 U.S. 1; *Schriro*, 550 U.S. 465; *Ayers*, 549 U.S. 7.

242. *Panetti*, 551 U.S. 930; *Smith*, 550 U.S. 297; *Brewer*, 550 U.S. 286; *Abdul-Kabir*, 550 U.S. 233.

243. *Uttecht*, 551 U.S. 1; *Ayers*, 549 U.S. 7.

244. *Panetti*, 551 U.S. 930; *Smith*, 550 U.S. 297.

245. *Uttecht*, 551 U.S. at 4–5; *Schriro*, 550 U.S. at 472; *Ayers*, 549 U.S. at 9–11.

246. *Uttecht*, 551 U.S. 1; *Ayers*, 549 U.S. 7.

247. *Ayers*, 549 U.S. at 9–11.

248. *Id.* at 10 (alterations in original).

249. *Id.* at 18.

Ninth Circuit cases, Justice Kennedy concluded that the court of appeals should have deferred to the trial court's determination regarding whether a prosecution challenge for cause should be sustained.²⁵⁰ Justice Thomas authored the remaining opinion in a capital punishment case reversing the Ninth Circuit.²⁵¹ His opinion rejected the claim that the district court's failure to investigate mitigating evidence denied the defendant his right to effective counsel in a case when the defendant directed his counsel not to present any mitigating evidence.²⁵²

The four cases in which Justice Kennedy joined with Justices Stevens, Souter, Ginsberg, and Breyer to grant habeas relief all involved death penalty cases from Texas. Two of the cases turned on a Texas statute²⁵³ that required the death sentence if the defendant engaged in conduct deliberately, with the reasonable expectation that the conduct would result in his victim's death, and if it was probable that the defendant would commit future violent acts constituting a continuing threat to society.²⁵⁴ In both cases, Justice Stevens authored opinions finding a reasonable likelihood that the instructions prevented jurors from giving meaningful consideration to constitutionally relevant mitigating evidence.²⁵⁵ The first case involved the testimony of family members describing the defendant's unhappy childhood as well as expert testimony that explained the defendant's violent propensities as attributable to neurological damage and childhood neglect and abandonment.²⁵⁶ In the second case, the defendant introduced mitigating evidence of his mental illness, his father's extensive abuse of him and his mother, and his substance abuse.²⁵⁷ Justice Kennedy wrote the opinions in the other two cases in which he formed a majority that granted habeas relief in capital punishment cases.²⁵⁸ One of Justice Kennedy's opinions concluded that a capital defendant was not required to show egregious harm from the use of a jury instruction when the Supreme Court determined that an instruction was constitutionally invalid after

250. *Uttecht*, 551 U.S. at 9–10.

251. *Schriro v. Landrigan*, 550 U.S. 465 (2007).

252. *Id.* at 475–76.

253. See TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1) (Vernon 2006), amended by 2009 Tex. Sess. Law Serv. Ch. 87 (West).

254. *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Brewer v. Quartermen*, 550 U.S. 286 (2007).

255. *Abdul-Kabir*, 550 U.S. at 237–38; *Brewer*, 550 U.S. at 288–89.

256. *Abdul-Kabir*, 550 U.S. at 239–41.

257. *Brewer*, 550 U.S. at 289–90.

258. *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Smith v. Texas*, 550 U.S. 297 (2007).

the defendant's trial.²⁵⁹ In the remaining case, Justice Kennedy authored an opinion finding that the Fifth Circuit standard for mental competency was overly restrictive.²⁶⁰

The Court decided two standing cases in the 2006 Term, and Justice Kennedy was the decisive vote to grant standing in one case and to deny it in the other.²⁶¹ In April 2007, he joined Justices Stevens, Souter, Ginsburg, and Breyer in a ruling that allowed Massachusetts to challenge the Environmental Protection Agency's finding that carbon dioxide was not an air pollutant.²⁶² Two months later, he sided with the dissenters from the Massachusetts case, in a majority ruling that disallowed an organization of individuals opposed to the endorsement of religion to challenge the creation of a White House office to coordinate faith-based initiatives.²⁶³ However, in the second case, Justice Kennedy rejected Justice Scalia's opinion arguing that a 1968 decision²⁶⁴ allowing taxpayers standing to challenge federal appropriations on the ground that they violated the Establishment Clause of the First Amendment,²⁶⁵ should be overruled.²⁶⁶ His concurring opinion defended the earlier decision as "correct."²⁶⁷

In thirteen of the twenty-four cases with a five-member majority, Justice Kennedy sided with Chief Justice Roberts and Justices Scalia, Thomas, and Alito.²⁶⁸ As noted in the preceding paragraphs, four of

259. *Smith*, 550 U.S. at 315–16.

260. *Panetti*, 551 U.S. at 956. Justice Kennedy concluded that the standard was too restrictive, because it ignored the possibility that delusions might put the defendant's awareness of the connections between his crime and sentence in a context so far removed from reality that the punishment can serve no proper purpose. *Id.* at 957–59.

261. *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007); *Massachusetts v. EPA*, 549 U.S. 497 (2007).

262. *Massachusetts v. EPA*, 549 U.S. 497. See generally Andrew Long, *Standing & Consensus: Globalism in Massachusetts v. EPA*, 23 J. ENVTL. L. & LITIG. 73 (2008); Robert V. Percival, *Massachusetts v. EPA: Escaping the Common Law's Growing Shadow*, 2007 SUP. CT. REV. 111 (2008).

263. *Hein*, 551 U.S. 587. For an argument that *Hein* suggests a changing substance of First Amendment law, see Carl H. Esbeck, *What the Hein Decision Can Tell Us About the Roberts Court and the Establishment Clause*, 78 MISS. L.J. 199 (2008); Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication*, 2008 BYUL REV. 115 (2008).

264. *Flast v. Cohen*, 392 U.S. 83 (1968).

265. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

266. *Hein*, 551 U.S. at 618–19 (Scalia, J., concurring in the judgment) (arguing that *Flast v. Cohen* should be overruled).

267. *Id.* at 616 (Kennedy, J., concurring).

268. See *supra* note 233 and accompanying text.

the thirteen involved capital punishment and standing issues.²⁶⁹ The remainder involved an assortment of constitutional questions, issues relating to time limits to file suit or to appeal,²⁷⁰ and problems of statutory construction.²⁷¹

The decisions in which Justice Kennedy sided with Justices Scalia and Thomas and the new members of the Court included four important constitutional decisions, in addition to the capital punishment and standing decisions. Justice Kennedy provided the crucial vote to expand congressional control over a woman's right to choose an abortion²⁷² and to limit congressional authority over campaign finance.²⁷³ At the same time, his vote expanded state power to control speech by students in secondary schools²⁷⁴ and restricted the ability of states to adopt race-based affirmative action programs.²⁷⁵

269. See *supra* notes 239–42, 261–63 and accompanying text.

270. See *Bowles v. Russell*, 551 U.S. 205, 206 (2007); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007); *Lawrence v. Florida*, 549 U.S. 327, 329 (2007).

271. See *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 881–82 (2007); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 649 (2007).

272. See *Gonzales v. Carhart*, 550 U.S. 124, 132–33 (2007); see also Helen J. Knowles, *Clerkish Control of Recent Supreme Court Opinions?: A Case Study of Justice Kennedy's Opinion in Gonzales v. Carhart*, 10 *GEO. J. GENDER & L.* 63, 63 (2009) (arguing that the paternalistic view of abortion manifested in *Gonzales* is likely the product of a clerk's influence). See generally Reva Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 *DUKE L.J.* 1641 (2008) (arguing the significance of the gender-based antiabortion argument through its appearance in *Gonzales v. Carhart*); Ronald Turner, *Gonzales v. Carhart and the Court's "Women's Regret" Rationale*, 43 *WAKE FOREST L. REV.* 1 (2008) (discussing the Court's attention to the emotional aspect of abortion).

273. See *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007). See generally Michael Anthony Lawrence, *Reading Tea Leaves in Federal Election Commission v. Wisconsin Right to Life: Hope for a Buckley Evolution?*, 43 *TULSA L. REV.* 697 (2008) (analyzing the effect of *Federal Election Commission* on campaign finance and its relation to the *Buckley v. Valeo* decision).

274. See *Morse v. Frederick*, 551 U.S. 393, 396 (2007). See generally Symposium, *Schools After Morse v. Frederick*, 12 *LEWIS & CLARK L. REV.* 1 (2008) (discussing the effect of *Morse*).

275. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709–11 (2007). See generally Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 *B.U. L. REV.* 937 (2008) (arguing that *Parents Involved* curtailed previous decisions upholding affirmative action programs); Kevin Brown, *Reflections on Justice Kennedy's Opinion in Parents Involved: Why Fifty Years of Experience Shows Kennedy Is Right*, 59 *S.C. L. REV.* 735 (2008) (analyzing Justice Kennedy's opinion in relation to race and public schools); Jonathan L. Entin, *Parents Involved and the Meaning of Brown: An Old Debate Renewed*, 31 *SEATTLE U. L. REV.* 923 (2008)

Justice Kennedy carved distinctive positions in all four cases. He authored opinions in two²⁷⁶ and joined concurring opinions in the other two.²⁷⁷ He authored the opinion for the Court in the abortion case,²⁷⁸ which retreated from the 2000 decision that had invalidated a similar state law.²⁷⁹ Justice Kennedy concluded that the failure to include an exception for preservation of the pregnant woman's health did not impose an unconstitutional burden on the woman's right to choose an abortion.²⁸⁰ Although conceding that the statute would be unconstitutional if it subjected women to significant health risks, Justice Kennedy concluded that the conflicting medical evidence on that issue was sufficient for the statute to survive a facial attack.²⁸¹ In the affirmative-action case, Justice Kennedy joined Chief Justice Roberts's majority opinion that the race-based programs before the Court were unconstitutional,²⁸² but he authored a concurring opinion indicating that race-based programs might be permissible in some cases.²⁸³ In the two First Amendment cases, Justice Kennedy joined concurring opinions by other Justices. One was a campaign finance case in which he joined Justice Scalia's concurring opinion, which

(discussing the history of racial discrimination and the newest developments in the Supreme Court in interpreting the Constitution); Ronald Turner, *The Voluntary School Integration Cases and the Contextual Equal Protection Clause*, 51 HOW. L.J. 251 (2008) (discussing *Parents Involved*, race, and the Equal Protection Clause); Heather Gerken, Comment, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007) (discussing Justice Kennedy's views on race and their relation to the Court's opinions); Michelle Renee Shamblin, Note, *Silencing Chicken Little: Options for School Districts After Parents Involved*, 69 LA. L. REV. 219 (2008) (critiquing *Parents Involved* and proposing alternate options for schools in Louisiana); Ivan E. Bodensteiner, *Benign Race-Conscious Actions Are Necessary to End Race Discrimination and Achieve Actual Equality*, in VALPARISO UNIVERSITY LEGAL STUDIES RESEARCH REPORT NO. 08-11 (2008), available at <http://ssrn.com/abstract=1284461> (arguing that race-based programs can pass Supreme Court standards of review); Nelson Lund, *Justice Kennedy's Stricter Scrutiny and the Future of Racial Diversity Promotion*, 9 ENGAGE 20 (2008), available at <http://www.fed-soc.org> (follow "Publications" hyperlink) (arguing that the Court should not uphold government imposed racial classifications).

276. *Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring); *Gonzales*, 550 U.S. 124.
 277. *Wis. Right to Life*, 551 U.S. at 483 (Kennedy, J., joining Scalia, J., concurring in part and concurring in the judgment); *Morse*, 551 U.S. at 422 (Kennedy, J., joining Alito, J., concurring).
 278. *Gonzales*, 550 U.S. 124.
 279. *See Stenberg v. Carhart*, 530 U.S. 914, 920–22 (2000).
 280. *Gonzales*, 550 U.S. at 168.
 281. *Id.* at 161, 164.
 282. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 708–11 (2007).
 283. *Id.* at 782, 797–98 (Kennedy, J., concurring in part and concurring in the judgment).

took a very narrow view of Congress's power to regulate the financing of political campaigns.²⁸⁴ In the case limiting the free speech rights of high school students,²⁸⁵ Justice Kennedy joined Justice Alito's concurring opinion describing the Court's holding as a narrow one that "provide[d] no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue"²⁸⁶

The procedural cases reflected the current Court's willingness to limit access to the courts and to appeals.²⁸⁷ In all three cases, Justice Kennedy joined the conservative majority without amplifying his views. Justice Alito's opinion in the first case concluded that subsequent effects of past discrimination do not restart the clock for an equal employment charge.²⁸⁸ Justice Thomas authored the majority opinion in the other two cases. One opinion ruled that an application for a writ of certiorari from a denial of a state habeas corpus petition does not toll the one-year statute of limitations for filing a federal petition.²⁸⁹ The other opinion refused to extend the fourteen-day period to file a notice of appeal for a denial of a habeas corpus application even though the district court had signed an order allowing seventeen days for the filing.²⁹⁰

The last two five to four decisions in which Justice Kennedy sided with Chief Justice Roberts and Justices Scalia, Thomas, and Alito, involved issues of statutory construction. Rejecting a long-standing precedent in antitrust law,²⁹¹ Justice Kennedy authored an opinion that subjected vertical price restraints to the rule of reason normally used in antitrust cases.²⁹² He also joined an opinion by Justice Alito holding that the Endangered Species Act²⁹³ requirement that federal agencies consult with the Fish and Wildlife Service regarding any proposed federal action that might jeopardize an endangered

284. *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 483, 502–03 (2007) (Kennedy, J., joining Scalia, J., concurring in part and concurring in the judgment).

285. *Morse v. Frederick*, 551 U.S. 393, 410 (2007).

286. *Id.* at 422 (Alito, J., concurring).

287. See Charles Whitebread, *The Conservative Kennedy Court—What a Difference a Single Justice Can Make: The 2006-2007 Term of the United States Supreme Court*, 29 WHITTIER L. REV. 1, 5 (2007).

288. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (amending 42 U.S.C. 2000e-5(e)).

289. *Lawrence v. Florida*, 549 U.S. 327, 329 (2007).

290. *Bowles v. Russell*, 551 U.S. 205, 206–07 (2007).

291. See *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

292. See *Leegin Creative Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 880–82 (2007).

293. 16 U.S.C. § 1536(a)(2) (2000).

species,²⁹⁴ did not apply to federal approval of a state permit program under the Clean Water Act.²⁹⁵

All but one of the cases in which Justice Kennedy joined with Justices Stevens, Souter, Ginsburg, and Breyer involved the standing and capital punishment issues described above.²⁹⁶ The remaining decision concerned the Bankruptcy Code. The majority opinion by Justice Stevens concluded that a bankruptcy judge could deny a petition to convert a liquidation to a reorganization when the debtor misrepresented the value of property in the bankruptcy estate.²⁹⁷

The majority did not form along the Court's normal ideological divisions in the five remaining cases with only a five-member majority.²⁹⁸ In each of these cases, Justice Kennedy joined a majority opinion written by another Justice without a separate amplification of his views.²⁹⁹

The Court produced the same majority – Chief Justice Roberts and Justices Kennedy, Souter, Breyer, and Alito—in only two of these cases that crossed the usual ideological divide.³⁰⁰ The most significant was undoubtedly Justice Breyer's opinion concluding that a punitive damages award based, in part, on the jury's desire to punish a defendant for harming nonparties was a denial of due process.³⁰¹ In the other decision from this majority, Justice Alito's majority opinion concluded that attempted burglary was a "violent felony" under a federal sentencing statute.³⁰²

The remaining three decisions involved different majorities on relatively narrow issues. Justice Kennedy, Chief Justice Roberts, and Justices Stevens and Alito joined Justice Ginsburg's opinion allowing

294. See generally *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (prohibiting completion of a dam where operation of the dam placed endangered species at risk). See MURCHISON, *supra* note 3, at 126–35, for a detailed description of the *Tenn. Valley Auth. v. Hill* opinion.

295. *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 664, 649–50 (2007).

296. See *supra* pp. 30–33.

297. *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 374–75 (2007).

298. See, e.g., *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007) (five to three decision, Justice Thomas not participating).

299. *James v. United States*, 550 U.S. 192 (2007); *Watters*, 550 U.S. 1; *Limtiaco v. Camacho*, 549 U.S. 483 (2007); *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *Osborn v. Haley*, 549 U.S. 225 (2007).

300. *James*, 550 U.S. 192; *Philip Morris USA*, 549 U.S. 346.

301. *Philip Morris USA*, 549 U.S. at 349. See generally Thomas Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392 (2008) (criticizing the rationale in *Philip Morris USA*, but concluding that the Court correctly held punitive damages must only punish harm done to an individual rather than the general public).

302. *James*, 550 U.S. at 195.

the United States to remove a tort suit against a federal employee to federal court.³⁰³ Justice Kennedy, Chief Justice Roberts, and Justices Scalia and Breyer joined Justice Thomas in holding that the debt limitation for the Territory of Guam must be calculated using the assessed valuation of property in the territory rather than the appraised value of the property.³⁰⁴ Finally, Justices Kennedy, Souter, Breyer, and Alito joined Justice Ginsburg's opinion holding that a state could not regulate the mortgage subsidiary of a national bank.³⁰⁵

C. 2007 Term

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

Justice Kennedy was less consistently a member of the majority in the 2007 Term than he was in the 2006 Term. He dissented ten times,³⁰⁶ and he wrote four dissenting opinions.³⁰⁷ More significantly, he was a member of the minority in four of sixteen cases in which the

303. *Osborn*, 549 U.S. at 231.

304. *Limtiaco*, 549 U.S. at 484–85.

305. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 4, 7 (2007).

306. *Giles v. California*, 128 S. Ct. 2678, 2695 (2008) (Kennedy, J., joining the dissent of Breyer, J.); *Ky. Ret. Sys. v. EEOC*, 128 S. Ct. 2361, 2371 (2008) (Kennedy, J., dissenting); *Metro. Life Ins. v. Glenn*, 128 S. Ct. 2343, 2355 (2008) (Kennedy, J., concurring in part and dissenting in part); *Irizarry v. United States*, 128 S. Ct. 2198, 2204 (2008) (Kennedy, J., joining dissent of Breyer, J.); *United States v. Santos*, 128 S. Ct. 2020, 2035 (2008) (Kennedy, J., joining dissent of Alito, J.); *Dep't of Revenue of Ky. v. Davis*, 128 S. Ct. 1822 (2008) (Kennedy, J., dissenting); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1408 (2008) (Kennedy, J., joining dissent of Stevens, J.); *Wash. State Grange v. Wash. Republican Party*, 128 S. Ct. 1184, 1197 (2008) (Kennedy, J., joining the dissent of Scalia, J.); *Danforth v. Minnesota*, 128 S. Ct. 1029, 1047 (2008) (Kennedy, J., joining dissent of Roberts, C.J.); *Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 841 (2008) (Kennedy, J., dissenting). Chief Justice Roberts dissented only eight times, however, the dissents of the other Justices ranged from twelve (Justice Alito) to seventeen (Justices Stevens, Thomas, and Ginsburg). *Statistics for the Supreme Court's October Term 2007*, 77 U.S.L.W. 3063 (August 5, 2008).

307. *Ky. Ret. Sys.*, 128 S. Ct. at 2371 (Kennedy, J., dissenting); *Metro. Life Ins.*, 128 S. Ct. at 2355 (Kennedy, J., concurring in part and dissenting in part); *Davis*, 128 S. Ct. at 1822 (Kennedy, J., dissenting); *Ali*, 128 S. Ct. at 841 (Kennedy, J., dissenting).

Court had only a five-member majority,³⁰⁸ and he authored dissenting opinions in two of those cases.³⁰⁹

More careful analysis of the 2007 cases reveals that the dissents summarized above do not alter Justice Kennedy's position as the decisional fulcrum of the current Supreme Court when it is closely divided on constitutional issues. Four of his ten dissents concerned questions of statutory construction.³¹⁰ The constitutional cases involved the dormant Commerce Clause³¹¹ and the Confrontation Clause,³¹² issues where the Court's recent decisions cross its more typical ideological divide; a facial challenge to Washington's open primary,³¹³ and, the narrow question of whether states can give Supreme Court decisions greater retroactive effect than the Court itself gives them in federal litigation.³¹⁴ On most of the major constitutional decisions, Justice Kennedy sided with the majority, and his views are likely to define the contours of future doctrine. In addition, he is likely to provide the crucial vote in resolving the issues that were raised in the two cases that were affirmed by an equally divided Court.³¹⁵

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308. *Ky. Ret. Sys.*, 128 S. Ct. at 2371 (Kennedy, J., dissenting); *Irizarry*, 128 S. Ct. at 2204 (Kennedy, J., joining dissent of Breyer, J.); *Santos*, 128 S. Ct. at 2035 (Kennedy, J., joining dissent of Alito, J.); *Ali*, 128 S. Ct. at 841 (Kennedy, J., dissenting).
309. *Ky. Ret. Sys.*, 128 S. Ct. at 2371 (Kennedy, J., dissenting); *Ali*, 128 S. Ct. at 841 (Kennedy, J., dissenting).
310. *See Metro. Life Ins.*, 128 S. Ct. at 2355 (Kennedy, J., concurring in part and dissenting in part); *Santos*, 128 S. Ct. at 2035 (Kennedy, J., joining dissenting opinion of Alito, J.); *Hall Street Assocs.*, 128 S. Ct. at 1408 (Kennedy, J., joining dissent of Stevens, J.); *Ali*, 128 S. Ct. at 841 (Kennedy, J., dissenting).
311. *Davis*, 128 S. Ct. at 1822 (Kennedy, J., dissenting).
312. *Giles v. California*, 128 S. Ct. 2678, 2695 (2008) (Kennedy, J., joining dissenting opinion of Breyer, J.).
313. *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1203 (2008) (Kennedy, J., joining dissent of Scalia, J.).
314. *Danforth v. Minnesota*, 128 S. Ct. 1029, 1047, 1058 (2008) (Kennedy, J., joining dissenting opinion of Roberts, C.J.).
315. *Warner-Lambert Co. v. Kent*, 128 S. Ct. 1168 (2008) (Roberts, C.J., not participating), *aff'g by an equally divided court* *Desiano v. Warner-Lambert Co.*, 467 F.3d 85 (2d Cir. 2007) (holding that federal drug law does not preempt a state law that recognizes approval of the drug by the Food and Drug Administration as a defense to a product liability claim only if the manufacturer of the drug did not intentionally withhold or misrepresent information required to be submitted to the federal agency); *Bd. of Educ. v. Tom F. ex rel Gilbert F.*, 552 U.S. 1 (2007) (Kennedy, J., not participating), *aff'g by an equally divided court* 193 Fed. Appx. 26 (2d Cir. 2006), *vacated*, No. 01 Civ. 6845 (S.D.N.Y. Jan. 4, 2005) (holding that parents could obtain reimbursement for private school tuition under the Individuals with Educational Disabilities Act even if their child was not enrolled in a public school at the time the parents rejected the public school placement).

In the 2007 Term, Justice Kennedy formed a majority with Chief Justice Roberts and Justices Scalia, Thomas, and Alito in five of the sixteen cases that had only a five-member majority,³¹⁶ and three of those decisions involved important constitutional issues. In the first of these decisions, an opinion by Chief Justice Roberts concluded that neither a judgment of the International Court of Justice nor a presidential memorandum stating that the United States would satisfy its international obligation by having state courts give effect to the international decision required state courts to follow the decision rather than the state's generally applicable rules governing successive filing of petitions for habeas corpus.³¹⁷ In the second of the constitutional decisions, Justice Scalia authored an opinion recognizing that the Second Amendment created a personal right to possess handguns for self-defense.³¹⁸ That opinion is an unusual one for Justice Scalia because it narrowly defines the new right and leaves many important questions unresolved; an approach that suggests Justice Kennedy's individualized balancing approach is likely to have considerable influence in defining the future extent of

316. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008); *Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759 (2008); *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008); *Medellin v. Texas*, 128 S. Ct. 1346 (2008); *Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008). See *infra* notes 323 and 329 for the other eleven cases that had a five-member majority.

317. *Medellin*, 128 S. Ct. at 1356, 1358, 1372 (holding that International Court of Justice decisions are not directly enforceable under domestic federal law and therefore the Order did not preempt state limitations on filing of successive habeas corpus petitions). See also *Medellin v. Texas*, 129 U.S. 360, 361–62 (2008) (denying a stay of execution to give Congress time to order compliance with the decision of the International Court of Justice). See generally Valerie Epps, *The Medellin v. Texas Symposium: A Case Worthy of Comment*, 31 SUFFOLK TRANSNATIONAL L. REV. 209 (2007) (discussing *Medellin v. Texas* and the federal government's lack of inclination to comply with the International Court of Justice orders).

318. *Heller*, 128 S. Ct. at 2787, 2822. *Heller* quickly generated a flood of commentary. See, e.g., Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009); Glenn H. Reynolds & Brandon P. Denning, *Heller's Future in the Lower Courts*, 102 NW. U. L. REV. 2035 (2008); Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1 (2009); Richard C. Schragger, *The Last Progressive Justice: Justice Breyer, Heller and "Judicial Judgment"*, 59 SYRACUSE L. REV. 283 (2009); Cass R. Sunstein, *Second Amendment Minimalism: Heller As Griswold*, 122 HARV. L. REV. 246 (2008); Anders Walker, *From Ballot to Bullets: District of Columbia v. Heller and the New Civil Rights*, 69 LA. L. REV. 509 (2009); J. Harvie Wilkinson, III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009).

the doctrine.³¹⁹ The third constitutional case in which Justice Kennedy sided with Chief Justice Roberts and Justices Scalia, Thomas, and Alito, involved campaign financing.³²⁰ Not surprisingly, Justice Kennedy concurred in the Court's holding that campaign financing provisions, which allowed a candidate to accept larger contributions when facing an opponent who provided more than \$350,000 to his or her campaign from personal funds, were unconstitutional.³²¹ However, Justice Kennedy would have gone further than the majority. He joined Justice Scalia's concurrence which urged the Court to reverse its earlier decision upholding the campaign finance law against a facial challenge.³²²

Justice Kennedy also joined the Chief Justice and Justices Scalia, Thomas, and Alito in two additional cases. He authored an opinion narrowly defining when Section 10(b) of the Securities Exchange Act³²³ authorizes private actions for damages.³²⁴ Additionally, Justice Kennedy joined another opinion by Chief Justice Roberts. That opinion denied an Indian tribal court jurisdiction over a claim that a bank had discriminated against tribal members who defaulted on their loan secured by land on the reservation.³²⁵

In four cases, Justice Kennedy formed five-member majorities with Justices Stevens, Souter, Ginsberg, and Breyer.³²⁶ Two involved significant constitutional questions, and Justice Kennedy authored the

319. See *Heller*, 128 S. Ct. at 2816, 2822. See also Ilya Somin, *Locked Liberties*, XXXI, No. 30, *Legal Times*, 42, 43 (2008) (discussing the narrowly defined new right in *Heller*). The campaign finance cases form an important exception to this pattern. See, e.g., *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 485–86, 489 (2007) (Kennedy, J., joining concurring opinion of Scalia, J.); *Randall v. Sorrell*, 548 U.S. 230, 264–65 (2006) (Kennedy, J., concurring in the judgment); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 286–87 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part); *Nixon v. Shrink Mo. Gov't. PAC*, 528 U.S. 377, 405, 409–10 (2000) (Kennedy, J., dissenting).

320. *Wis. Right to Life*, 551 U.S. at 449.

321. *Id.* at 457; see *supra* text accompanying note 168.

322. See *Wis. Right to Life*, 551 U.S. at 483–85, 489–99 (Kennedy, J., and Thomas, JJ, joining concurring opinion of Scalia, J.); see also *McConnell*, 540 U.S. 93 (Kennedy concurred in the holding which upheld the campaign finance law, but later urged the Court to overrule its decision following the holding in *Fed. Election Comm'n v. Wis. Right to Life, Inc.* as the two holdings were no longer consistent with one another).

323. 15 U.S.C. § 78j(b) (2000).

324. *Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 769 (2008).

325. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008).

326. See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2645 (2008); *Sprint Comm. Co. v. APCC Servs., Inc.*, 128 S. Ct. 2531, 2533 (2008); *Boumediene v. Bush*, 128 S. Ct. 2229, 2239 (2008).

majority opinions in both.³²⁷ One upheld the availability of habeas corpus review for Guantanamo Bay detainees who are being tried by military commissions authorized by Congress.³²⁸ The other ruled that the death penalty was an unconstitutional punishment for the crime of raping a minor.³²⁹ Justice Kennedy also wrote the opinion in a nonconstitutional case in which the Court concluded that an alien facing deportation must be permitted an opportunity to withdraw a motion for voluntary departure from the United States, provided the request is made before the departure period ends.³³⁰ In the other nonconstitutional case, Justice Kennedy joined Justice Breyer's opinion holding that the assignee of a legal claim for money has standing to litigate the underlying claim in federal court.³³¹

The Supreme Court divided along atypical lines in seven of the sixteen cases with a five-member majority.³³² The seven cases produced seven different majorities, although both Chief Justice Roberts and Justice Thomas were members of the majority in six of the cases.³³³ Most of the cases involved issues of statutory construction.³³⁴ The only constitutional issue concerned the respective rights of states over boundary waters.³³⁵

327. *See Kennedy*, 128 S. Ct. at 2645–46; *Boumediene*, 128 S. Ct. at 2240.

328. *Boumediene*, 128 S. Ct. 2229.

329. *Kennedy*, 128 S. Ct. at 2645–46 (holding that under the Eighth Amendment, the death penalty was unconstitutional when the crime of raping a minor did not result or intend to result in the death of the victim).

330. *Dada v. Mukasey*, 128 S. Ct. 2307, 2310–11 (2008) (holding that under the Immigration Reform and Immigration Responsibility Act of 1996, every alien ordered to be removed from the United States has a right to file one motion to reopen his or her removal proceeding).

331. *Sprint*, 128 S. Ct. at 2533.

332. *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008); *Ky. Ret. Sys. v. EEOC*, 128 S. Ct. 2361 (2008); *Irizarry v. United States*, 128 S. Ct. 2198 (2008); *United States v. Santos*, 128 S. Ct. 2020 (2008); *Begay v. United States*, 128 S. Ct. 1581 (2008); *New Jersey v. Delaware*, 128 S. Ct. 1410 (2008); *Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831 (2008).

333. *See Exxon*, 128 S. Ct. at 2605; *Ky. Ret. Sys.*, 128 S. Ct. at 2361; *Irizarry*, 128 S. Ct. at 2020; *New Jersey v. Delaware*, 128 S. Ct. at 1410; *Ali*, 128 S. Ct. at 831.

334. *See, e.g., Irizarry*, 128 S. Ct. at 2202–04 (determining the meaning of “variances” as used in the sentencing and judgment statute of the Federal Sentencing Guidelines); *Santos*, 128 S. Ct. at 2023–27 (determining the meaning of “proceeds” as used in the federal money-laundering statute); *Begay*, 128 S. Ct. at 1583–88 (determining the meaning of “violent felony” as used in the Armed Career Criminal Act); *Ali*, 128 S. Ct. at 835–41 (determining the meaning of “law enforcement officer” as used in the Federal Tort Claims Act).

335. *New Jersey v. Delaware*, 128 S. Ct. at 1427 (Court exercised original jurisdiction under the Constitution because the controversy arose between two states).

Justice Kennedy was a member of the majority in only three cases with atypical majorities, and he did not author any of the majority opinions in those cases.³³⁶ Justice Kennedy, the Chief Justice, and Justices Stevens and Ginsberg joined Justice Breyer's opinion holding that driving under the influence was not a "violent felony" for purposes of a federal sentence-enhancement provision.³³⁷ Along with the Chief Justice and Justices Scalia and Thomas, Justice Kennedy joined Justice Souter's opinion limiting punitive damages to an amount equal to compensatory damages in admiralty cases.³³⁸ Finally, Justice Kennedy together with the Chief Justice, and Justices Souter and Thomas joined Justice Ginsberg's opinion upholding Delaware's refusal to grant permission for construction of a liquefied natural gas unloading terminal that would extend some 2,000 feet from New Jersey's shore into territory of Delaware.³³⁹

Justice Kennedy wrote dissenting opinions in two of the cases with atypical, five-member majorities. One dissenting opinion came in a case in which Justice Thomas wrote for a majority including himself, the Chief Justice, and Justices Scalia, Ginsburg, and Alito.³⁴⁰ The majority opinion concluded that the grant of tort immunity in a federal statute extended to all federal law enforcement officers, not just officers enforcing customs and excise laws.³⁴¹ Justice Kennedy's other dissenting opinion involved the provision in Kentucky's retirement system governing disability retirement for hazardous positions.³⁴² Justice Breyer, speaking for a majority including himself, the Chief Justice, and Justices Stevens, Souter, and Thomas, concluded that the provisions did not discriminate on the basis of age.³⁴³

336. Only Justices Breyer and Alito, each of whom was a member of the majority in two cases, were less frequent members of the majority in these cases than Justice Kennedy; but, both Justice Breyer and Justice Alito participated in just six of the seven decisions. *Exxon*, 128 S. Ct. at 2634 (Alito, J., not participating); *New Jersey v. Delaware*, 128 S. Ct. at 1427 (Breyer, J., not participating).

337. *Begay*, 128 S. Ct. at 1588.

338. *Exxon*, 128 S. Ct. at 2633. Justice Alito did not participate in *Exxon*, and the result might well have been different if he had participated. Before reaching the issue of the amount of damages, an equally divided Court affirmed the Ninth Circuit ruling that a corporation could be liable in punitive damages for the acts of its managerial employees. *Id.* at 2616. Had Justice Alito voted to reverse the lower court on that issue, the Supreme Court would never have reached the question of the amount of punitive damages.

339. *New Jersey v. Delaware*, 128 S. Ct. at 1427.

340. *Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 841 (2008) (Kennedy, J., dissenting).

341. *Id.* at 834 (majority opinion).

342. *Ky. Ret. Sys. v. EEOC*, 128 S. Ct. 2361, 2371 (2008) (Kennedy, J., dissenting).

343. *Id.* at 2364 (majority opinion).

In the final two cases, Justice Kennedy joined dissenting opinions written by other Justices. In one, Justice Stevens wrote for a majority including himself, the Chief Justice, and Justices Scalia, Thomas, and Alito,³⁴⁴ but Justice Kennedy joined Justice Breyer's dissent.³⁴⁵ The majority ruled that a trial judge had no duty to notify a defendant before issuing a sentence that varied from the federal sentencing guidelines.³⁴⁶ In the final case, Justice Scalia authored a plurality opinion for himself and Justices Souter, Thomas, and Ginsburg in a case in which the Court ruled that "proceeds" of an illegal gambling operation meant profits, not gross receipts.³⁴⁷ Justice Stevens concurred only in the judgment,³⁴⁸ and Justice Kennedy joined Justice Alito's dissent.³⁴⁹

D. 2008 Term

The general pattern of the decisions since 2005 continued in the 2008 Term, although the Court's constitutional decisions were less remarkable.³⁵⁰ Justice Kennedy's six dissents for the 2008 Term were the fewest of any Justice and less than half the total for Justice Scalia, who had the next lowest number of dissents.³⁵¹ Although five of Justice Kennedy's dissents came in cases in which the Supreme Court divided five to four,³⁵² that total was also the lowest of the

344. *Irizarry v. United States*, 128 S. Ct. 2198 (2008).

345. *Id.* at 2204 (Breyer, J., dissenting).

346. *See id.* at 2201–02 (majority opinion) (affirming the appellate court's determination that the notice rule did not apply because the sentence was a variance, rather than a departure from sentencing guidelines).

347. *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion).

348. *Id.* at 2031 (Stevens, J., concurring in the judgment).

349. *Id.* at 2035 (Alito, J., dissenting).

350. In three cases, the Court had a five-member majority. In each of the decisions, Justice Kennedy sided with Chief Justice Roberts and Justices Scalia, Thomas, and Alito. *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009) (Breyer, J., concurring in part and dissenting in part, and Stevens, Souter, and Ginsburg, JJ., dissenting); *Pac. Bell Tel. Co. v. Linkline Comm., Inc.*, 129 S. Ct. 1109 (2009) (Stevens, Souter, Ginsburg, and Breyer, JJ., concurring in the judgment); *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008) (Breyer and Stevens, JJ., concurring in part and dissenting in part, and Souter and Ginsburg, JJ., dissenting).

351. Posting of Kristina Moore to SCOTUSblog, <http://www.scotusblog.com/wp/wp-content/uploads/2009/06/summary-tally.pdf> (June 29, 2009, 16:34 EST) (Justice Scalia's total number of dissents for the 2008 Term was thirteen).

352. *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710 (2009) (Thomas, J., concurring in part and dissenting in part, with whom Roberts, C.J., Kennedy and Alito, JJ., joined); *Atl. Sounding Co. v. Townsend*, 129 S. Ct. 2561 (2009) (Alito, J., dissenting, with whom Roberts, C.J., Scalia and Kennedy, JJ., joined); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (Kennedy, J., dissenting, with whom Roberts,

Term for any Justice,³⁵³ and the dissents all involved criminal justice issues or questions of statutory construction.

In the 2008 Term, the Court decided twenty-three cases with a five-member majority, and Justice Kennedy was a member of the majority in eighteen of them.³⁵⁴ He joined Chief Justice Roberts and Justices Scalia, Thomas, and Alito in almost half of the five to four decisions;³⁵⁵ he sided with Justices Stevens, Souter, Ginsburg, and Breyer in five of them;³⁵⁶ and he was a member of the majority in two of the seven decisions in which the Court did not follow its normal ideological division.³⁵⁷

Perhaps the most important decision of the 2008 Term involved an order rather than an opinion. At the end of the Term, the Court issued an order providing for reargument in a campaign finance case.³⁵⁸ The order directed the parties to brief and argue the question of whether the Court should reconsider its opinion upholding the constitutionality of the federal campaign finance law against a facial challenge.³⁵⁹

The eleven cases in which Justice Kennedy joined opinions to form a majority with the Chief Justice and Justices Scalia, Thomas, and Alito, covered a wide variety of issues. This group of decisions

C.J., Breyer and Alito, JJ., joined); *Arizona v. Gant*, 129 S. Ct. 1710 (2009) (Breyer, J., dissenting and Alito, J., with whom Roberts, C.J., Kennedy, J., join dissenting, and with whom Breyer, J., joins dissenting, except as to Part II-E); *Spears v. United States*, 129 S. Ct. 840 (2009) (per curiam decision where Kennedy, J., would have granted the petition for a writ of certiorari, Thomas, J., dissenting and Roberts, C.J., with whom Alito, J., joined dissenting).

353. Moore, *supra* note 351.

354. Moore, *supra* note 351.

355. *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); *Home v. Flores*, 129 S. Ct. 2579 (2009); *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009); *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308 (2009); *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009); *14 Penn Plaza L.L.C. v. Pyett*, 129 S. Ct. 1456 (2009); *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009); *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009); *Herring v. United States*, 129 S. Ct. 695 (2009).

356. *Caperton v. A. T. Masey Coal Co.*, 129 S. Ct. 2252 (2009); *United States v. Denedo*, 129 S. Ct. 2213 (2009); *Haywood v. Drown*, 129 S. Ct. 2108 (2009); *Corley v. United States*, 129 S. Ct. 1558 (2009); *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008).

357. *See Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009) (Ginsburg, J., delivered the opinion of the Court, in which Scalia, Kennedy, Souter, and Thomas, JJ., joined); *Oregon v. Ice*, 129 S. Ct. 711 (2009) (Ginsburg, J., delivered the opinion of the Court, in which Stevens, Kennedy, Breyer, and Alito, JJ., joined).

358. *Citizens United v. Fed. Election Comm'n*, 129 S. Ct. 2893, 2893 (2009).

359. *Id.*

included constitutional questions, problems of statutory construction, and procedural issues.³⁶⁰

Justice Kennedy formed a majority with the right-leaning Justices in five constitutional decisions. He joined an opinion by Justice Scalia denying an environmental organization the right to challenge Forest Service regulations without a current dispute over the application of the regulations,³⁶¹ but he added a concurring opinion,³⁶² as he has frequently done in standing cases. He also wrote the majority opinion in a decision holding that to establish a constitutional tort claim, a plaintiff has to plead sufficient facts to show that the government official had adopted and implemented a policy for the purpose of discriminating on account of race, religion, or national origin.³⁶³ The three remaining constitutional decisions narrowed the rights of individuals accused of crimes. One decision overturned the judicially created rule forbidding interrogation of a suspect after the suspect has retained counsel.³⁶⁴ The second decision held that the exclusionary rule does not apply to an unconstitutional search that results from isolated negligence attenuated from the search,³⁶⁵ and the third decision rejected the claim that a defendant who has been convicted has a constitutional right to obtain post-conviction access to the state's evidence for DNA testing.³⁶⁶ Justice Kennedy concurred silently in the last two decisions, but in the case allowing interrogation of a suspect who has requested counsel, he joined Justice Alito's concurring opinion, adding to Justice Scalia's majority opinion. Justice Alito's concurrence is significant because it argued for a broad authority to overrule decisions that a new majority thinks were wrongly decided.³⁶⁷

The statutory construction cases raised a diverse set of issues. One of the most important of these cases used statutory grounds to narrow, once again, the ability of governments to use race-based

360. See, e.g., *Herring*, 129 S. Ct. at 704 (holding that the exclusionary rule for the suppression of evidence would not apply for police recording errors); *14 Penn Plaza L.L.C.*, 129 S. Ct. at 1460 (holding that a provision in a collective bargaining agreement requires union members to arbitrate Age Discrimination in Employment Act of 1967 claims); *Ashcroft*, 129 S. Ct. at 1946 (holding that the Court of Appeals had jurisdiction to hear the petitioner's appeal).

361. See *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009).

362. *Id.* at 1153 (Kennedy, J., concurring).

363. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942, 1952 (2009).

364. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2086–87 (2009).

365. *Herring v. United States*, 129 S. Ct. 695, 698 (2009).

366. *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2312 (2009).

367. See *Montejo*, 129 S. Ct. at 2092–93 (Alito, J., concurring).

affirmative action programs.³⁶⁸ The majority held that the decision of a city not to use a civil service test for promotions because of its racially disparate effects violated the Civil Rights Act.³⁶⁹ As he did when the Court reached a similar result on constitutional grounds in *Parents Involved*,³⁷⁰ Justice Kennedy added a concurring opinion.³⁷¹ The other statutory construction cases involved the Voting Rights Act,³⁷² employment law,³⁷³ and the Federal Communications Commission.³⁷⁴ Justice Kennedy concurred silently in the employment decisions, but he authored the plurality opinion in the voting rights case³⁷⁵ and added a concurring opinion in the case involving the Federal Communications Commission.³⁷⁶

The last decision in which Justice Kennedy joined the right-leaning majority involved a procedural issue. He was a silent member of the majority when the Court broadly defined the ability of state officials to seek relief from a prior injunction.³⁷⁷

Three of the five cases in which Justice Kennedy sided with Justices Stevens, Souter, Ginsburg, and Breyer involved constitutional issues. He authored the opinion concluding that the Due Process Clause of the Fourteenth Amendment required recusal of a judge who had received very large campaign contributions from one of the litigants before the Court³⁷⁸ and was a silent member of the majority in two preemption cases. In one of the preemption cases, the Court held that the Federal Cigarette Labeling Act did not preempt a state unfair practice law.³⁷⁹ In the second case, the Court ruled that 42 U.S.C. § 1983 preempted a state statute that required prisoner claims to be filed in the state court of claims.³⁸⁰

368. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664 (2009).

369. *Id.*

370. See *supra* note 275 and accompanying text.

371. *Ricci*, 129 S. Ct. at 2664.

372. *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009) (plurality opinion).

373. *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009); *14 Penn Plaza L.L.C. v. Pyett*, 129 S. Ct. 1456 (2009).

374. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009).

375. *Bartlett*, 129 S. Ct. at 1238. The plurality opinion held that Section Two only authorizes a vote dilution claim when a racial minority would constitute a majority of the voting age population in a district. See *id.* at 1243. Justices Thomas and Scalia concurred on the ground that Section Two never authorizes a vote dilution claim. *Id.* at 1250 (Thomas, J., concurring in the judgment).

376. *Fox Television Stations*, 129 S. Ct. at 1822 (Kennedy, J., concurring).

377. *Home v. Fores*, 129 S. Ct. 2579, 2607 (2009) (holding that a state may challenge the statewide extension of an injunction originally granted to a specific school district).

378. *Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252, 2263–64 (2009).

379. *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 551 (2008).

380. *Haywood v. Drown*, 129 S. Ct. 2108, 2117–18 (2009).

The other two cases in which Justice Kennedy formed a majority with Justices Stevens, Souter, Ginsburg, and Breyer, involved statutory issues. In one case, Justice Kennedy joined Justice Souter's majority opinion holding that 18 U.S.C. § 3501 narrowed, but did not overrule, the judicial rule that a confession is inadmissible if obtained during an unreasonably long period of detention between arrest and preliminary hearing.³⁸¹ In the other case, Justice Kennedy authored the majority opinion concluding that the All Writs Act granted military courts the authority to issue writs of coram nobis to correct errors in their judgments.³⁸²

Four of the seven decisions decided by a majority that crossed the Court's normal ideological lines raised criminal justice issues. Together with Justices Breyer and Alito, Justice Kennedy joined Justice Stevens's opinion allowing judges rather than juries to decide whether sentences should be consecutive or concurrent.³⁸³ However, he dissented in the other three opinions, each of which had a different majority. In the case of a per curiam reversal that allowed a sentencing court to ignore the sentencing guidelines for crack cocaine,³⁸⁴ Justice Kennedy would have granted the petition for certiorari and set the case for oral argument.³⁸⁵ In the other cases, he dissented on the merits. When the Court limited the authority of police officers to search the passenger compartment of a vehicle,³⁸⁶ he joined Justice Alito's dissent.³⁸⁷ When a majority ruled that the Confrontation Clause applied to certificates from state laboratories,³⁸⁸ he wrote a dissenting opinion that the Chief Justice and Justices Breyer and Alito joined.³⁸⁹

Two cases decided by majorities that crossed ideological lines involved issues of statutory construction. Justice Kennedy was a silent member of the majority in a decision involving the Federal Arbitration Act.³⁹⁰ When the Court held that the National Banking Act did not preclude a state attorney general from enforcing the state

381. *Corley v. United States*, 129 S. Ct. 1558, 1571 (2009).

382. *United States v. Denedo*, 129 S. Ct. 2213, 2224 (2009).

383. *Oregon v. Ice*, 129 S. Ct. 711, 712 (2009).

384. *Spears v. United States*, 129 S. Ct. 840, 843–44 (2009) (per curiam).

385. *Id.* at 845 (Kennedy, J., dissenting).

386. *Arizona v. Gant*, 129 S. Ct. 1710, 1712–13 (2009).

387. *Id.* at 1726 (Alito, J., dissenting).

388. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009).

389. *Id.* at 2543 (Kennedy, J., dissenting).

390. *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1267 (2009).

fair-lending laws through judicial proceedings,³⁹¹ he joined the dissent of Justice Thomas.³⁹²

Justice Kennedy was also a member of the minority when Justice Thomas joined the more liberal Justices in a maritime case at the end of the Term. Justice Thomas's majority opinion held that general maritime law permitted the recovery of punitive damages for a ship owner's willful and wanton disregard of the maintenance and cure obligations.³⁹³ Together with the Chief Justice and Justice Scalia, Justice Kennedy joined the dissent of Justice Alito.³⁹⁴

III. FUTURE INFLUENCE

The decisions of the first four Terms since Chief Justice Roberts and Justice Alito joined the Supreme Court confirm that Justice Kennedy is the crucial Justice in closely divided constitutional cases. He most commonly sides with Chief Justice Roberts and Justices Scalia, Thomas, and Alito, but he has joined Justices Stevens, Souter, Ginsburg, and Breyer in some cases, and with majorities that cross normal ideological lines in others. Taken as a group, the cases since 2005 demonstrate the likely shape of constitutional doctrine under the current Supreme Court. Moreover, they indicate that whether significant change occurs in particular areas depends largely on the vote of Justice Kennedy.

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

By contrast, significant modifications are more likely to occur in those types of cases where Justice Kennedy dissented and where Justice O'Connor joined with Justices Stevens, Souter, Ginsburg, and Breyer to form a majority. Once again, Justice Kennedy's views are likely to dominate those areas in the future because he often

391. *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710, 2721 (2009).

392. *Id.* at 2722 (Thomas, J., dissenting).

393. *Atl. Sounding Co. v. Townsend*, 129 S. Ct. 2561, 2575 (2009).

394. *Id.* at 2575 (Alito, J., dissenting).

distinguishes his opinion from the more absolute views of Justices Scalia and Thomas. Justice Kennedy's views are also likely to be important in cases involving economic due process, even though the Court has tended to split along non-ideological lines. Finally, Justice Kennedy's views are likely to be crucial in future litigation regarding the newly-recognized right under the Second Amendment. The paragraphs that follow summarize some of these areas where Justice Kennedy's views are likely to be influential in the future.

A. *Federalism Issues*

As noted above, Justice Kennedy and Justice O'Connor both joined with Chief Justice Rehnquist and Justices Scalia and Thomas in using principles of federalism to impose new limits to congressional power.³⁹⁵ One can, however, detect subtle differences in the doctrines Justices Kennedy and O'Connor articulated. On issues of congressional power, Justice Kennedy was more willing than Justice O'Connor to uphold the authority of Congress to use comprehensive statutes to regulate interstate commerce.³⁹⁶ He was, however, less willing to allow Congress to grant private individuals damage remedies against states either by grounding the statute in Congress's power to enforce the Fourteenth Amendment or by creating exceptions to the prohibition against private damage actions in statutes based on congressional powers enumerated in Article I.³⁹⁷

Cases before and after Justice O'Connor left the Court show that Justice Kennedy's view of the Commerce Clause is somewhat broader than the views of the other members of the new federalism majority. He joined Justice Stevens's majority opinion holding that comprehensive federal statutes did not have to create exceptions for noneconomic activities that do not substantially affect interstate commerce.³⁹⁸ More recently, he wrote a concurring opinion that effectively modified the narrow definition of the reach of the Clean Water Act announced in Justice Scalia's plurality opinion.³⁹⁹

On the other hand, Justice Kennedy has consistently supported the Court's 1996 decision holding that the Commerce Clause does not authorize Congress to create damage remedies against the states.⁴⁰⁰

395. *See supra* Part I.A.

396. *See supra* notes 51–52 and accompanying text.

397. *See supra* notes 58–62, 67–73 and accompanying text.

398. *Gonzales v. Raich*, 545 U.S. 1, 17–18 (2005).

399. *See Rapanos v. United States*, 547 U.S. 715, 759 (2006) (Kennedy, J., concurring).

400. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996).

He concurred in decisions reaffirming the principle,⁴⁰¹ and he authored the opinion holding that this immunity applied to suits in state court as well as claims filed in federal court.⁴⁰² He also supported extending Commerce Clause immunity to federal power under the Patent and Copyright Clause,⁴⁰³ as well as to administrative adjudications.⁴⁰⁴ Most significantly, he voted with Chief Justice Roberts and Justices Scalia and Thomas in dissent in 2006 when Justice O'Connor joined the majority holding that Congress could subject states to bankruptcy claims.⁴⁰⁵ Justice Kennedy has also regularly opposed congressional attempts to use its power to enforce the Fourteenth Amendment to circumvent state immunity against damage actions.⁴⁰⁶ He adhered to his position even when Chief Justice Rehnquist authored a majority opinion⁴⁰⁷ upholding Congress's power to subject states to private actions for violations of the Family Medical Leave Act,⁴⁰⁸ and when Justice O'Connor abandoned the federalism majority to allow private actions for damages when a state denied a disabled individual access to the courts.⁴⁰⁹

As far as federalism limits on state power are concerned, the Supreme Court has continued since 2005 to address preemption claims regarding both state regulations⁴¹⁰ and private claims for

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401. *See, e.g.*, *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 99 (2000) (Kennedy, J., concurring).
 402. *Alden v. Maine*, 527 U.S. 706 (1999).
 403. U.S. CONST. art. I, § 8, cl. 8; *see* *Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank*, 527 U.S. 627, 630 (1999).
 404. *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 747 (2002).
 405. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379 (2006) (Kennedy, J., dissenting).
 406. *See Garrett*, 531 U.S. at 374 (Kennedy, J., concurring); *Kimel*, 528 U.S. at 82–90 (Kennedy J., dissenting).
 407. *See Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 744 (2003) (Kennedy, J., dissenting).
 408. 29 U.S.C. §§ 2601–2608 (2000).
 409. *See Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004).
 410. *See Haywood v. Drown*, 129 S. Ct. 2108, 2117 (2009) (holding that 42 U.S.C. § 1983 preempts a state statute that required prisoner claims to be filed in the state court of claims); *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 551 (2008) (holding that the Federal Cigarette Labeling Act does not preempt a state unfair practice law); *Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2412 (2008) (finding that the National Labor Relations Act preempts state statute that prevented funding of grants meant to “assist, promote, or deter union organizing”); *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 989, 991 (2008) (finding that the Federal Aviation Administration Authorization Act preempts state statutes governing the delivery of tobacco products); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 7 (2007) (finding that the National Banking Act

damages under state law,⁴¹¹ as well as dormant Commerce Clause issues when no federal statute covers the area.⁴¹² As was true prior to 2005, the Court has not generally been narrowly divided in the preemption cases.⁴¹³ However, in three cases with a five-member majority, Justice Kennedy was a part of the majority.⁴¹⁴ By contrast, Justice Kennedy was a member of the minority in both cases involving the dormant Commerce Clause.⁴¹⁵

B. *Separation of Powers Questions*

Standing doctrine is the area in which Justice Kennedy has most clearly articulated a distinctive view of separation of powers, and the cases since 2005 confirm that his views are likely to remain pivotal now that Chief Justice Roberts and Justice Alito have joined the Court. Although he frequently joined the decisions limiting standing, he has articulated two particular positions that are likely to prove influential on the new Court. He joined opinions allowing Congress to permit private enforcement of environmental statutes by persons who use the resource that the violator has polluted⁴¹⁶ and holding that

precludes application of state mortgage lending regulations to subsidiaries of a national bank).

411. See *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1006 (2008) (holding that the Food and Drug Act preapproval of a balloon catheter preempted claims of negligence, strict liability, and implied warranty against the manufacturer); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 74 (2006) (holding that the Security Litigation Uniform Standards Act preempts claims by holders of securities alleging fraudulent manipulation of stock prices).
412. See *Dep't of Revenue of Ky. v. Davis*, 128 S. Ct. 1801, 1817 (2008) (holding that the income tax structure, which exempted interest on bonds issued by Kentucky or its subdivisions from state income tax, but taxed interest income on bonds from other states and their subdivisions, did not violate the dormant Commerce Clause); *United Hauler's Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007) (holding that county flow control ordinances that required businesses hauling waste in counties to bring waste to facilities owned and operated by publicly owned corporation did not violate the dormant Commerce Clause).
413. See *Chamber of Commerce*, 128 S. Ct. at 2408; *Rowe*, 128 S. Ct. at 989; *Riegel*, 128 S. Ct. at 999; *Dabit*, 547 U.S. at 71.
414. *Haywood*, 129 S. Ct. at 2108; *Altria Group*, 129 S. Ct. at 538; *Watters*, 550 U.S. at 1. Justice Kennedy was part of a four-member minority when the Court held that the National Banking Act did not preclude judicial enforcement of state fair lending laws against national banks. *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710, 2721 (2009) (Kennedy, J., joining Thomas, J., concurring in part and dissenting in part).
415. *Davis*, 128 S. Ct. at 1801; *United Hauler's Ass'n*, 550 U.S. at 330.
416. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 173–74 (2000). See generally William W. Buzbee, *The Story of Laidlaw: Standing and Citizen Enforcement*, in ENVIRONMENTAL LAW STORIES 201 (Oliver A. Houck & Richard J. Lazarus eds., 2004).

states have even broader powers to seek judicial redress under environmental statutes.⁴¹⁷ Both positions reject the narrow interpretation of injury that Justice Scalia has articulated in several cases denying standing in environmental cases.⁴¹⁸

Justice Kennedy has also articulated a centrist position with respect to detainees in the so-called “war on terrorism.” He allowed detainees to challenge their detentions at Guantanamo Bay, Cuba;⁴¹⁹ refused to allow the President to try detainees by military commission without express congressional authorization;⁴²⁰ and recognized the right of detainees to appeal convictions by military commissions to civilian courts even when the military commissions had been authorized by Congress.⁴²¹ On the other hand, he was willing to imply presidential authority to detain suspected terrorists,⁴²² and he concurred in the dismissal of a petition for habeas corpus because it was not filed in the district where the individual was being held by military authorities.⁴²³

As the decisions discussed in this section indicate, Justice Kennedy has continued to support a broad view of the judicial function. He joined the right-leaning majority to recognize judicially enforceable rights under the Second Amendment,⁴²⁴ but also supported expanding limits on the death penalty,⁴²⁵ and refused to agree that all uses of race in affirmative action programs was unconstitutional.⁴²⁶

C. *Protection of Individual Rights*

The recent Terms confirm that Justice Kennedy’s views have already significantly altered constitutional doctrine with respect to several individual rights. In the first four Terms since Justice O’Connor retired, the Court has issued important decisions regarding a woman’s right to choose an abortion,⁴²⁷ the use of race in affirmative action programs,⁴²⁸ free speech,⁴²⁹ the death penalty,⁴³⁰

417. *Massachusetts v. EPA*, 549 U.S. 497, 518–19 (2007).

418. See *Lujan v. Defenders of Wildlife (Lujan II)*, 504 U.S. 555, 560 (1992); *Lujan v. Nat’l Wildlife Fed’n (Lujan I)*, 497 U.S. 871 (1990).

419. *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (Kennedy, J., concurring).

420. *Hamdan v. Rumsfeld*, 548 U.S. 557, 653 (2006) (Kennedy, J., concurring).

421. *Boumediene v. Bush*, 128 S. Ct. 2229, 2261–62 (2008).

422. *Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004).

423. *Rumsfeld v. Padilla*, 542 U.S. 426, 453–55 (2004) (Kennedy, J., concurring).

424. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008).

425. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2646 (2008).

426. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789–90 (2007) (Kennedy, J., concurring).

427. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

428. *Parents Involved*, 551 U.S. 701.

and the Second Amendment.⁴³¹ In all of these areas, Justice Kennedy was an essential member of the majority.

The abortion and affirmative action cases marked the triumph of positions that Justice Kennedy had previously urged in dissent. Although Justice Kennedy ostensibly applied the “undue burden” test⁴³² in the most recent abortion case, his articulation of the test gave significantly greater weight to the state’s desire to protect the potential of human life and allowed the statute to survive a facial challenge even though it lacked an exception to protect the health of the pregnant woman.⁴³³ Similarly, Justice Kennedy refused to forbid all uses of race in affirmative action programs in the secondary school case that the Court decided in 2007.⁴³⁴ He continued, however, to examine race-based classifications with great suspicion, as he had done when dissenting in the case involving the admissions program at the University of Michigan Law School.⁴³⁵ One can, therefore, anticipate that the Court will be less willing to uphold race-based programs now that Justice Kennedy, rather than Justice O’Connor, is the determinative Justice on this issue. Indeed, supporters of affirmative action might fear that the new composition of the Court will lead the Court to overrule the Michigan Law School case if it decides to review another affirmative action program involving university admissions.

With respect to the First Amendment, the recent opinions go in conflicting directions. The Court expanded the protections for those financing political campaigns,⁴³⁶ but narrowed them for public employers and students.⁴³⁷

On campaign financing, Justice Kennedy had previously advocated greater First Amendment protection than the Court’s majority had

429. *Morse v. Frederick*, 551 U.S. 393 (2007); *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

430. *Kennedy*, 128 S. Ct. 2641; *Schriro v. Landrigan*, 550 U.S. 465 (2007); *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Brewer v. Quarterman*, 550 U.S. 286 (2007); *Smith v. Texas*, 550 U.S. 297 (2007).

431. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

432. *See Stenberg v. Carhart*, 530 U.S. 914, 948–51 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876–79 (1992).

433. *Gonzales v. Carhart*, 550 U.S. 124, 147, 161 (2007). Justice Kennedy dissented in the earlier case. *See Stenberg*, 530 U.S. at 956 (Kennedy, J., dissenting).

434. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787–88 (2007) (Kennedy, J., concurring in part).

435. *See Grutter v. Bollinger*, 539 U.S. 306, 387 (2003) (Kennedy, J., dissenting).

436. *Davis v. Fed. Election Comm’n*, 128 S. Ct. 2759, 2771–73 (2008); *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 481 (2007).

437. *Morse v. Frederick*, 551 U.S. 393, 397 (2007); *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

recognized.⁴³⁸ Thus, one can hardly find it surprising that Justice Kennedy joined the 2007 decision that invalidated the federal prohibition against “issue ads” in political campaigns as applied to particular advertisements⁴³⁹ and the 2008 decision invalidating the federal provision allowing candidates to accept larger contributions when they faced an opponent personally financing his or her campaign.⁴⁴⁰ However, his decision in 2007 to join Justice Scalia’s concurring opinion⁴⁴¹ that would have reversed the 2003 decision upholding the federal prohibition against a facial challenge is noteworthy.⁴⁴² Indeed, the June 2009 order directing the parties to address the constitutional issue in a special September reargument of a campaign finance case suggests that the reversal Justices Scalia and Kennedy sought may come sooner rather than later.⁴⁴³

On the other hand, the decisions involving speech by a student and a public employee both restricted free speech rights.⁴⁴⁴ The case involving the student was Justice Kennedy’s first case involving free speech in the public school context, but he had previously joined an opinion narrowly defining First Amendment rights in the public employment context.⁴⁴⁵

The Court’s death penalty cases provide clear confirmation of Justice Kennedy’s enhanced position as the pivotal Justice on the Court in cases involving individual rights. On the procedural issues that arise with some regularity, his vote ordinarily determines whether the death sentence will be affirmed or reversed.⁴⁴⁶ He also provided the crucial vote and wrote the opinion in the case declaring the death penalty unconstitutional for the rape of a child.⁴⁴⁷

Beyond these cases, the addition of Chief Justice Roberts and Justice Alito is likely to give Justice Kennedy’s position new importance in at least three other areas involving individual rights: establishment of religion, procedural due process for terrorism

438. See *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 286–87 (2003) (Kennedy, J., concurring).

439. *Wis. Right to Life*, 551 U.S. at 452.

440. *Davis*, 128 S. Ct. 2759.

441. *Wis. Right to Life*, 551 U.S. at 483 (Scalia, J., concurring).

442. *McConnell*, 540 U.S. 93.

443. *Citizens United v. Fed. Election Comm’n*, 129 S. Ct. 2893 (June 29, 2009) (mem.), *prob juris. noted*, 129 S. Ct. 594 (2008).

444. *Morse v. Frederick*, 551 U.S. 393, 397 (2007); *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

445. See *Waters v. Churchill*, 511 U.S. 661, 686 (1994) (Kennedy, J., joining concurring opinion of Scalia, J.).

446. See *supra* notes 164, 207–08 and accompanying text.

447. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2645 (2008).

detainees, and the Second Amendment. In the religion cases, Justice Kennedy's subtle differences from Justice O'Connor⁴⁴⁸ are significant now that he is the pivotal Justice. The outcome of the detainee cases remains one of the most uncertain issues before the Court,⁴⁴⁹ and Justice Kennedy's balancing approach is likely to be determinative. The recognition of an individual right to self-defense under the Second Amendment⁴⁵⁰ is likely to produce a flood of litigation. Once again, Justice Kennedy's views will be crucial in defining the reach of the new right.

IV. THREE CAVEATS

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

A. *Stare Decisis*

At first glance, the doctrine of *stare decisis* seems to have the potential to impose a substantial limit on how much Justice Kennedy might change constitutional doctrine in the immediate future.⁴⁵¹ After all, *stare decisis* was a principal ground on which Justices Kennedy, O'Connor, and Souter defended their decision to preserve the "essential holding" of *Roe v. Wade*.⁴⁵² One might, therefore, expect that a similar commitment to the doctrine will preclude Justice Kennedy from reversing other recent decisions where he was previously a member of the minority now that another Justice more aligned with his views has replaced Justice O'Connor.

When one looks more generally at Justice Kennedy's opinions, however, *stare decisis* does not appear to have significantly limited his positions as a member of the Supreme Court. As the abortion case itself reveals, the refusal to overrule a decision does not preclude substantial modification of the doctrines articulated in the case that is

448. See, e.g., *McCreary County v. ACLU*, 545 U.S. 844 (2005); *Lee v. Weisman*, 505 U.S. 577 (1992).

449. See *supra* notes 87–90, 328 and accompanying text.

450. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2822 (2008).

451. For recent articles analyzing the role of precedent in constitutional adjudication, see Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 NOTRE DAME L. REV. 1173 (2008); David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929 (2008).

452. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–69 (1992).

reaffirmed. In addition, Justice Kennedy has not been bashful in reversing prior opinions in other cases when he agrees with a new majority position that the earlier decision was wrong.

Modification of doctrine is a powerful mechanism for changing the law. As noted above, the reaffirmation of *Roe v. Wade* did not preclude the Court from upholding most of the state regulations challenged in the 1992 case,⁴⁵³ and decisions in the 2006 Term reflect Justice Kennedy's continued willingness to modify doctrines significantly without overruling them.⁴⁵⁴ For instance, by modifying the meaning of the "undue burden" test that defines the limits of governmental power to regulate abortions, his opinion for the Court⁴⁵⁵ sustained a federal statute⁴⁵⁶ that would almost certainly have been invalid under Justice O'Connor's previous application of the same test.⁴⁵⁷ Similarly, his concurring opinion in the recent school desegregation case⁴⁵⁸ showed greater willingness to overturn race-based affirmative action programs than Justice O'Connor had demonstrated when she was the pivotal Justice in the University of Michigan Law School case.⁴⁵⁹

Justice Kennedy has also been willing to reverse prior holdings when a new majority will join him. During the Rehnquist Court era, three of the most notable examples of this were decisions involving the death penalty for the mentally retarded,⁴⁶⁰ juveniles⁴⁶¹ and criminal prosecutions for homosexual conduct.⁴⁶² In the 2006 Term, two of the five to four decisions confirmed Justice Kennedy's willingness to overrule precedents that he believed were incorrectly decided. In the antitrust case, his opinion for the Court replaced the per se rule established in a 1911 decision⁴⁶³ with a rule of reason for evaluating the legality of vertical price restraints.⁴⁶⁴ Similarly, he joined Justice Scalia's concurring opinion in the campaign finance

453. *Planned Parenthood*, 505 U.S. 833 (upholding all but one of the abortion restrictions challenged in the case).

454. *See supra* Part II.B.

455. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

456. *Partial-Birth Abortion Ban of 2003*, 18 U.S.C. § 1531 (Supp. IV 2000).

457. *See Stenberg v. Carhart*, 530 U.S. 914, 947 (2000) (O'Connor, J., concurring).

458. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

459. *Gutter v. Bollinger*, 539 U.S. 306 (2003); *see also id.* at 387 (Kennedy, J., dissenting).

460. *Atkins v. Virginia*, 536 U.S. 304, 305–07 (2002).

461. *Roper v. Simmons*, 543 U.S. 551, 554–56 (2005).

462. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

463. *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

464. *See Leegin Creative Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007).

case.⁴⁶⁵ Rather than simply distinguishing the Court's opinion upholding the 2002 campaign finance law against a facial challenge from the case before the Court,⁴⁶⁶ Justice Scalia advocated abandoning the earlier precedent.⁴⁶⁷ In the 2008 Term, Justice Kennedy provided the crucial vote in a decision overturning the rule forbidding interrogation of a suspect after the suspect has requested counsel.⁴⁶⁸

Taken together, these opinions indicate that precedents are not likely to be a significant obstacle when Justice Kennedy wants to reshape constitutional doctrine. The cases discussed above suggest that Justice Kennedy will generally prefer to modify doctrines to achieve the result he prefers. However, they also demonstrate that he will not hesitate to reverse decisions in which he was a member of the minority when he regards the decisions as having wrongly decided important issues.

B. The Possibility of Future Changes in Justice Kennedy's Thought

Because Supreme Court Justices hold tenure during good behavior,⁴⁶⁹ a change in a Justice's views while he or she is a member of the Court can modify constitutional law significantly.⁴⁷⁰ Indeed, a recent article documents that Justice Kennedy's views have drifted to the left, especially during his first decade on the Court,⁴⁷¹ and one can certainly identify areas, such as capital punishment, where he has changed his position.⁴⁷² Nonetheless, dramatic changes in the future

465. Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 483 (2007).

466. McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

467. *Wis. Right to Life*, 551 U.S. 449 (Scalia, J., concurring).

468. *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009). In *Montejo*, Justice Kennedy also joined Justice Alito's concurring opinion that strongly affirmed the right of a new majority to overrule any decision that it believes was wrongly decided. *Id.* at 2092 (Alito, J., concurring).

469. U.S. CONST. art. III, § 1.

470. See generally Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483 (2007) (discussing the substantial doctrinal changes resulting from the ideologies of Justices).

471. *Id.* at 1505–09.

472. *Compare Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the Eighth Amendment prohibits the imposition of capital punishment for offenders who were minors at the time their crimes were committed), with *Stanford v. Kentucky*, 492 U.S. 361 (1989) (holding that the Eighth Amendment does not forbid the imposition of capital punishment for offenders who were minors at the time their crimes were committed), and *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the Eighth Amendment restricts a state's power to impose capital punishment on a mentally retarded offender), with *Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding that the

seem less likely. For one thing, Justice Kennedy's centrist ideological position has been relatively constant for the last decade.⁴⁷³ Moreover, he has been a member of the Court for more than twenty years and has articulated positions in the most important areas of constitutional law. The likelihood that he will decide that any of those positions are fundamentally mistaken in the future seems small.

To suggest that Justice Kennedy's constitutional thought is firmly established does not mean that his vote will always be easy to predict. In a variety of areas, Justice Kennedy has articulated positions that require individualized consideration of the facts in the particular case. This individualized approach extends to many important areas including standing,⁴⁷⁴ abortion regulation,⁴⁷⁵ affirmative action,⁴⁷⁶ protections for homosexuals,⁴⁷⁷ and the due process rights of individuals detained on charges of supporting terrorism.⁴⁷⁸ In all of those areas, commentators may frequently find it difficult to predict how Justice Kennedy will analyze the particular facts before the Court in specific cases.

C. *Future Changes in the Court*

Most obviously, new Supreme Court appointments could change the significance of Justice Kennedy's position on the Court. This qualification is an important one because it is likely that President Barack Obama will make several appointments. The recent stability of the Court's membership for a decade is unusual in United States history, and it is unlikely to repeat in the next decade. Justice Souter retired from the Court at the end of the 2008 Term,⁴⁷⁹ Justice John Paul Stevens will be eighty-nine years old in 2009,⁴⁸⁰ and Justice Ginsburg, who will be seventy-six, is reported to have health

Eighth Amendment does not preclude imposition of capital punishment for mentally retarded offenders).

473. See Epstein, *supra* note 471, at 1509, 1536 fig.19.

474. See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 110 (1998) (O'Connor, J., concurring joined by Kennedy, J.); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 579 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

475. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124 (2007).

476. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

477. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

478. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

479. Adam Liptak, *Poetry, As Souter Takes Leave*, N.Y. TIMES, June 30, 2009, at A.13.

480. Robert Barnes, *From Justice Stevens, No Exit Signs; As Obama Term Nears, Court Watcher's Eyes Are on Oldest Member*, WASH. POST, Nov. 18, 2008, at A.25.

problems that might incline her to retire.⁴⁸¹ Thus, President Obama may well have as many as two appointments to make.

Although President Ronald Reagan appointed Justice Kennedy, his influence is likely to continue unabated because a Democrat was elected President. As the recent nomination of Justice Sotomayor has revealed, anyone President Obama appoints to replace Justice Stevens or Justice Ginsburg will almost certainly be more closely allied with Justice Breyer than with the Chief Justice and Justices Scalia, Thomas, and Alito. Indeed, one of the issues most discussed at Justice Sotomayor's confirmation hearing was her joining the affirmative action decision that was reversed in the 2008 Term by a five-member majority consisting of Justice Kennedy together with the Chief Justice and Justices Scalia, Thomas, and Alito.⁴⁸² Thus, Justice Kennedy is likely to remain the decisive vote when the Court divides five to four.

A Republican president would have been likely to appoint either centrists in the mold of Justices O'Connor and Kennedy or, more likely, conservatives like Chief Justice Roberts and Justice Alito. Either type of appointment would reduce the significance of Justice Kennedy's vote. For example, if two or three centrists were appointed to the Court, the Chief Justice and Justices Scalia, Thomas, and Alito would have a majority whenever one of the centrists joined with them. By contrast, all of the centrists would have to join the left-leaning Justices to produce a majority. Justice Kennedy's influence would decline even further if a Republican president had been elected and had appointed additional conservatives in the Roberts-Alito model. Even one more conservative would create a conservative majority that could overrule the decisions where Justice Kennedy joined with Justices Stevens, Souter, Ginsburg, and Breyer to form a majority.

V. CONCLUSION

For the foreseeable future, one may appropriately describe the present Supreme Court as the Kennedy Court because Justice Kennedy's opinion will generally define the Supreme Court's

481. Adam Liptak, *Justice Ginsberg Undergoes Surgery for Pancreatic Cancer*, *Court SAYS*, N.Y. TIMES, Feb. 6, 2009, at A.12.

482. *Ricci v. DeStefano*, 264 F. App'x 106, 107 (2d Cir. 2008), *rev'd*, No. 07-428, slip op. (U.S. 2009). See also Dana Milbank, *Firefighters But No Brimstone*, WASH. POST, Jul. 17, 2009, at A.2 (discussing *Ricci* and its' effect on Justice Sotomayor's confirmation hearing).

position in cases where the Court is closely divided.⁴⁸³ As a result, the Supreme Court is likely to adhere to doctrines established when he has been in the majority in the past and to modify or to overrule doctrines where he previously joined Chief Justice Rehnquist and Justices Scalia and Thomas in dissent.

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

By contrast, constitutional doctrine is less likely to remain stable in cases in which Justice Kennedy has previously been a member of the minority because Justice O'Connor previously formed a majority with Justices Stevens, Souter, Ginsburg, and Breyer. Because Justice Alito is less likely to remain with that majority, Justice Kennedy is likely to be the swing Justice, and his views are likely to define the extent of the shift in constitutional doctrine. Important areas of constitutional doctrine that are subject to this potential shift include the prohibition against federal statutes granting private remedies against states, regulations of abortions, limits on campaign financing, race-based affirmative action programs, free speech rights of students

483. For other analyses of the direction of the Court's decisions since John Roberts became Chief Justice, see Erwin Chermersky, *The Kennedy Court*, 9 GREEN BAG 2d 335, 335-36 (2006); Erwin Chermersky, *When It Matters Most, It Is Still the Kennedy Court*, 11 GREEN BAG 2d 427, 427-28 (2008); Erwin Chermersky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 947-48 (2008); Julie M. Cheslik, Andrea McMurtry, & Kristin Underwood, *Supreme Court Report 2006-2007: Closing of the Courthouse Doors?*, 39 URB. LAW. 739, 741 (2007). For the argument that the future direction of constitutional doctrine is likely to be significantly influenced by the overwhelmingly conservative leanings of the judges on the courts of appeal, see Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 975-76 (2008).

and public employees, the protections afforded by the Establishment and Free Exercise Clauses of the First Amendment, and the scope of the Second Amendment.

Justice Kennedy's influence is unlikely to wane over the next several Terms. Despite his joining the plurality opinion in *Casey*,⁴⁸⁴ *stare decisis* will not substantially limit his ability to change existing constitutional doctrine. In the past, he has been willing to distinguish or overrule Rehnquist precedents with which he disagreed,⁴⁸⁵ and he continued both practices in the recent Terms.⁴⁸⁶ Given the length of Justice Kennedy's service on the Court, fundamental changes in his views seem unlikely. Nonetheless, commentators may find it hard to predict his vote in close cases because he tends to favor doctrines that require individualized consideration of the facts. If his influence diminishes, it will most likely occur because of changes in the Court; however, the election of Barack Obama will limit the significance of those changes.⁴⁸⁷ Ironically, Justice Kennedy's influence is likely to remain pivotal because the country elected a Democratic President.

The general direction of a Court in which Justice Kennedy is the pivotal Justice will be a continuation of the past three decades. The Supreme Court will continue to accept an activist approach that sees the Court as the ultimate arbiter of nearly all constitutional issues.⁴⁸⁸ Generally speaking, the Court will modestly limit the powers of Congress and the states, expand the powers of the President, and limit the ability of individuals to challenge governmental actions not directed specifically at them. It will also contract the reach of individual rights protecting minorities and criminal defendants while expanding them modestly for women, capital defendants, homosexuals, and beneficiaries of affirmative action programs. Finally, it will perhaps expand rights more broadly for property

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

485. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 562–64 (2005) (quoting *Stafford v. Kentucky*, 429 U.S. 361, 377–78 (1989)); *Atkins v. Virginia*, 536 U.S. 304, 310 (2002) (citing *Atkins v. Commonwealth*, 534 S.E.2d 312, 319 (Va. 2000)); *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (citing *Bowers v. Hardwick*, 478 U.S. 186, 188, 196 (1986)); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 858 (1992) (citing *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 521 (1989)).

486. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 792 (2007) (citing *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003)); *Gonzales v. Carhart*, 550 U.S. 124, 164–65 (2007) (citing *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 77–79 (1976)); *Leegin Creative Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 901 (2007) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 n.7 (1984)).

487. RICHARD WOLFFE, *RENEGADE: THE MAKING OF A PRESIDENT* 17–18 (2009).

488. See generally KECK, *supra* note 14.

owners, contributors to political campaigns, and gun owners. In nearly all of these cases, Justice Kennedy's views are likely to be pivotal in setting the parameters of the Court's doctrine, and he is likely to resist some of the more absolute formulations of doctrines urged by Justices Scalia and Thomas.