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The Constitutional Jurisprudence of Justice Kennedy on Speech

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The Constitutional Jurisprudence of Justice Kennedy on Speech

CHARLES D. KELSO*
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TABLE OF CONTENTS

| | | |
|------|----------------------------------------------------------------------------------------|-----|
| I. | INTRODUCTION | 694 |
| II. | A SUMMARY OF JUSTICE KENNEDY'S ANALYSIS OF FREE SPEECH REVIEW | 696 |
| | A. <i>Basic Considerations: Three Basic Principles</i> | 696 |
| | B. <i>Doctrinal Issues Raised in Free Speech Cases</i> | 699 |
| III. | PUBLIC VERSUS NONPUBLIC FORUM ANALYSIS | 702 |
| IV. | CONTENT-BASED REGULATIONS | 705 |
| | A. <i>Opinions in Which Justice Kennedy Voted To Invalidate a Regulation</i> | 705 |
| | 1. <i>Political Speech</i> | 705 |
| | a. <i>Campaign Financing</i> | 706 |
| | b. <i>Elections</i> | 710 |
| | c. <i>Political Protest by Flag Burning</i> | 711 |
| | d. <i>Political Views of Independent Contractors</i> | 712 |
| | 2. <i>Sexually Oriented Materials</i> | 712 |
| | a. <i>Pornography</i> | 712 |
| | b. <i>Cable Television</i> | 713 |
| | 3. <i>Viewpoint Discrimination</i> | 714 |
| | 4. <i>Laws Involving Professional and Business Speech</i> | 715 |

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| | | |
|-----|-------------------------------------------------------------------------------|-----|
| B. | <i>Opinions in Which Justice Kennedy Voted To Uphold a Regulation</i> | 717 |
| 1. | <i>Elections</i> | 717 |
| 2. | <i>Retaliation for Speech by a Government Employee</i> | 717 |
| 3. | <i>Libel</i> | 718 |
| 4. | <i>Zoning of Adult Establishments</i> | 718 |
| V. | CONTENT-NEUTRAL REGULATIONS..... | 719 |
| A. | <i>Opinions in Which Justice Kennedy Voted To Uphold the Regulation</i> | 719 |
| 1. | <i>Elections</i> | 719 |
| 2. | <i>Student Regulations</i> | 719 |
| 3. | <i>Cable Television</i> | 720 |
| 4. | <i>Other Cases</i> | 721 |
| B. | <i>Opinions in Which Justice Kennedy Voted To Void the Regulation</i> | 722 |
| VI. | CONCLUSION..... | 722 |

I. INTRODUCTION

Anyone familiar with the Supreme Court’s work the last quarter century knows that Justice Anthony M. Kennedy has cast the decisive vote more often than any other Justice.¹ He has been in the middle of decisionmaking because he is not in the conservative bloc—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—or the liberal bloc—Justices Ginsburg, Breyer, Sotomayor, and Kagan.² For this reason, a number of scholars have analyzed his reasoning in various fields of law,³ and efforts have been made to find arguments that might attract his favor.⁴

1. See Erwin Chemerinsky, *The Kennedy Court: October Term 2005*, 9 GREEN BAG 2d 335, 335 (2006) (“Justice Anthony Kennedy is clearly the swing vote and likely will determine the outcome of most high profile cases so long as these remain the nine Justices”); R. Randall Kelso & Charles D. Kelso, *Swing Votes on the Current Supreme Court: The Joint Opinion in Casey and Its Progeny*, 29 PEPP. L. REV. 637, 638–39 (2002). Justice Kennedy has been in the majority in most recent cases decided by a 5–4 vote. See, e.g., Richard G. Wilkins et al., *Supreme Court Voting Behavior: 2007 Term*, 37 HASTINGS CONST. L.Q. 287, 299, 309 tbl.10 (2010); Richard G. Wilkins et al., *Supreme Court Voting Behavior: 2006 Term*, 36 HASTINGS CONST. L.Q. 51, 62, 72 tbl.10 (2008).

2. Of course, the seats of Justices Sotomayor and Kagan were until recently filled, respectively, by Justices Souter and Stevens, themselves members of the liberal bloc.

3. See, e.g., FRANK J. COLUCCI, *JUSTICE KENNEDY’S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY* (2009).

4. See, for example, David S. Cohen, *Justice Kennedy’s Gendered World*, 59 S.C. L. REV. 673 (2008), and sources cited therein.

Justice Kennedy has been in a position to cast many decisive votes because his style of deciding avoids the extremes of styles used by other Justices. At one extreme are the formalists, such as Justices Scalia, Thomas, and Alito, who give great weight to literal text.⁵ Near that view are Holmesians, who are characterized by deference to government action and concern for underlying purposes of the law.⁶ Currently this describes Chief Justice Roberts, as it did Chief Justice Rehnquist, and of course, Justice Holmes himself.⁷ At the other extreme are the instrumentalists, such as former Justices Douglas, Marshall, and Stevens, and current Justices Ginsburg, Breyer, Sotomayor, and Kagan.⁸ They pay close attention to alternative social policy consequences of decisions.⁹

In contrast, although Justice Kennedy bases his constitutional decisions on the traditional factors of judicial decisionmaking—constitutional text, history, legislative and executive practice, precedent, and analysis of consequences¹⁰—the foundation for his opinions is a set of basic principles he finds embodied in the Constitution. Under this view, Justices give great weight to these general principles underlying the law. This style may be called natural law, based on the eighteenth-century Enlightenment natural law belief that underlying general principles were a given part of the rule of law and the Constitution.¹¹ This was the style of interpretation of early Justices on the Supreme Court, including Chief Justice Marshall and Justice Story.¹² Modern Justices who have reasoned this way and

5. See generally CHARLES D. KELSO & R. RANDALL KELSO, *THE PATH OF CONSTITUTIONAL LAW* § 9 (2007 & Supp. 2011) [hereinafter KELSO & KELSO, PATH]; Charles D. Kelso & R. Randall Kelso, *Judicial Decision-Making and Judicial Review: The State of the Debate, Circa 2009*, 112 W. VA. L. REV. 351, 355 (2010) [hereinafter Kelso & Kelso, *Judicial Decision-Making*].

6. KELSO & KELSO, PATH, *supra* note 5, § 10.1.

7. *Id.* § 10; Kelso & Kelso, *Judicial Decision-Making*, *supra* note 5, at 355–56.

8. KELSO & KELSO, PATH, *supra* note 5, § 11.1.

9. *Id.* § 11; Kelso & Kelso, *Judicial Decision-Making*, *supra* note 5, at 354–55.

10. On these traditional factors, see PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991); Saikrishna B. Prakash, *Overcoming the Constitution*, 91 GEO. L.J. 407, 407–12 (2003) (reviewing RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001)).

11. See generally Terry Brennan, *Natural Rights and the Constitution: The Original “Original Intent,”* 15 HARV. J.L. & PUB. POL’Y 965 (1992); Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law* (pts. 1 & 2), 42 HARV. L. REV. 149, 365 (1928–1929); Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

12. See JAMES MCCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT* 65, 85–86, 92–98 (1971); David M. O’Brien,

who have at one time or another been regarded as swing votes are Justices Powell, O'Connor, Souter, and Kennedy.¹³

Because Justice Kennedy has often been the controlling vote on the Court, these principles have led him to have had particular impact on the Court's development of constitutional doctrine in three areas of the law: aspects of personal liberty, freedom of speech, and structural issues of federalism and separation of powers. In a previous article, we discussed Justice Kennedy's opinions relating to liberty.¹⁴ A forthcoming article discusses Justice Kennedy's opinions on structural issues.¹⁵ In this Article, we discuss the constitutional jurisprudence of Justice Kennedy with respect to freedom of speech. This Article identifies the basic principles that have led Justice Kennedy to take a very protective stance toward freedom of speech, as weighed against the various government interests put forward as justifications for regulating speech. We then discuss Justice Kennedy's most significant majority, concurring, and dissenting opinions regarding freedom of speech.

II. A SUMMARY OF JUSTICE KENNEDY'S ANALYSIS OF FREE SPEECH REVIEW

A. *Basic Considerations: Three Basic Principles*

By our count, Justice Kennedy has written twenty significant free speech opinions for the Court, fifteen significant concurring opinions, and seven significant dissents. From these opinions, three general principles emerge—supporting political freedom, supporting individual autonomy, and protecting freedom to teach, learn, and innovate. Based on eighteenth-century Enlightenment philosophy,¹⁶ these three principles explain why Justice Kennedy believes that freedom of speech was intended to receive and deserves much protection from action by all branches of state and federal government.

The Framers' Muse on Republicanism, the Supreme Court, and Pragmatic Constitutional Interpretivism, 53 REV. POL. 251, 279 (1991).

13. See generally KELSO & KELSO, PATH, *supra* note 5, § 12.1; Kelso & Kelso, *Judicial Decision-Making*, *supra* note 5, at 356; Kelso & Kelso, *supra* note 1, at 638–39.

14. Charles D. Kelso & Randall Kelso, *The Constitutional Jurisprudence of Justice Kennedy on Liberty*, 9 DARTMOUTH L.J. 29 (2011).

15. Charles D. Kelso & R. Randall Kelso, *The Constitutional Jurisprudence of Justice Kennedy on Federalism and Separation of Powers* (2012) (unpublished manuscript) (on file with authors).

16. See generally ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 92–95 (1985) (discussing eighteenth-century liberalism and the freedom of speech in terms of “freedom of conscience,” which was used to support “personal liberty” and “intellectual progress,” as well as the “political function” of freedom of speech to expose the “[m]ischief” of politicians).

Justice Kennedy's most speech-protective language appears in *Republican Party of Minnesota v. White*.¹⁷ In *White*, he said in a concurring opinion that "content-based speech restrictions . . . should be invalidated without inquiry into narrow tailoring or compelling interests" unless they "fall within any traditional exception" to free speech doctrine, such as obscenity, defamation, words tantamount to an act otherwise criminal, speech impairing some other constitutional right, an incitement to lawless action, or speech calculated to bring about imminent harm that the state has power to regulate.¹⁸ The basis for this was identified as "the principle that unabridged speech is the foundation of political freedom."¹⁹

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

- (1) "The First Amendment guarantees our citizens the right to judge for themselves the most effective means for the expression of political views and to decide for themselves which entities to trust as reliable speakers."²⁰
- (2) "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."²¹
- (3) "Political speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'"²²
- (4) "The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views."²³
- (5) "Political parties advance a shared political belief, [and] to do so they often must speak through their candidates."²⁴

17. *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

18. *Id.* (quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring)).

19. *Id.* at 794.

20. *McConnell v. FEC*, 540 U.S. 93, 286 (2003) (Kennedy, J., concurring in part and dissenting in part), *overruled in part by Citizens United v. FEC*, 130 S. Ct. 876 (2010).

21. *Citizens United*, 130 S. Ct. at 898.

22. *Id.* at 904 (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978)).

23. *Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000).

24. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 587 (2000) (Kennedy, J., concurring).

- (6) “[T]he right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs.”²⁵
- (7) “[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.”²⁶

In addition to supporting political freedom, free speech gives protection in various circumstances, according to Justice Kennedy, because of its relation to personal autonomy. The importance of autonomy to Justice Kennedy was made clear in the notable joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, where he joined with Justices O’Connor and Souter to emphasize that personal autonomy is an important constitutional value.²⁷ The opinion said, “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”²⁸ Justice Kennedy elaborated on that idea in *Turner Broadcasting System, Inc. v. FCC*.²⁹ There, he said, “At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal.”³⁰

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

Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.³¹

Again, referring to attempts by the government to control a person’s private thoughts, he wrote, “First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for

25. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011).

26. *Nev. Comm’n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2353 (2011) (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)).

27. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 843, 851 (1992) (joint opinion of O’Connor, Kennedy, & Souter, JJ.).

28. *Id.* at 851.

29. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

30. *Id.*

31. *Id.*

that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”³² As a result, he has affirmed, “As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear.”³³

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

The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.³⁴

B. Doctrinal Issues Raised in Free Speech Cases

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

One doctrinal aspect of free speech cases is whether the speech being regulated occurs on private property, in a public forum, or in a nonpublic forum owned by the government. Naturally, government attempts to regulate speech on individuals’ private property or in public forums are much more difficult to justify and typically trigger a more heightened standard of scrutiny than government regulations on property owned by the government that is generally not open to the public. The leading case on what standard of review to apply in nonpublic forums is *Perry Education Ass’n v. Perry Local Educators’ Ass’n*.³⁵ Decided in 1983, *Perry* held that a school could reserve access to an interschool mail system and teacher mailboxes for the union certified as the exclusive representative of the teachers.³⁶ After summarizing and organizing the precedents, Justice White pointed out that strict scrutiny applied to

32. Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002).

33. *Id.* at 245.

34. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 835 (1995).

35. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983).

36. *Id.* at 47–54.

content-based exclusions from a public forum or from public property that the state has opened for use by the public as a place for expressive activity, and to government attempts to regulate individual speech on an individual's own *nonpublic* private property.³⁷ However, with regard to non-public-forum property owned by the government, the state can impose time, place, and manner restrictions, and also may reserve the forum for its intended purposes, "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's views."³⁸ As discussed in Part III of this Article, Justice Kennedy's approach to whether a forum is public or nonpublic is more protective of free speech than that of many conservatives.³⁹

A second doctrinal issue is whether a regulation is content-based or content-neutral. If a law is content-based and does not deal with one of the exceptional situations where a reduced standard of review applies, such as advocacy of illegal action likely to occur, true threats, fighting words, obscenity, child pornography, or defamation,⁴⁰ Justice Kennedy has called for automatic invalidation, or at least for strict scrutiny. For example, in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, the Court adopted a strict scrutiny approach to content-based regulations of speech.⁴¹ Concurring in the case, Justice Kennedy noted that this adoption of the equal protection strict scrutiny approach in a First Amendment case was not required by prior precedents and that although "the compelling interest inquiry has found its way into our First Amendment jurisprudence of late . . . the Court appears to have adopted this formulation in First Amendment cases by accident rather than as the result of a considered judgment."⁴² In contrast to the Court's strict scrutiny approach, Justice Kennedy preferred an absolutist approach, which would prevent the state from any content-based regulation of fully protected speech, without regard to a compelling-governmental-interest analysis.⁴³

This perspective has led to his support for invalidating many laws or their application or for requiring the government to supply more justification in terms of a substantial or compelling objective, or closer tailoring considering available alternatives. The possibility of satisfying

37. *Id.* at 45–46.

38. *Id.* at 46 (citing *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 131 n.7 (1981)).

39. *See infra* Part III.

40. On these exceptions, see generally G. STONE ET AL., *THE FIRST AMENDMENT* 19–108, 135–282 (3d ed. 2008).

41. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

42. *Id.* at 125 (Kennedy, J., concurring).

43. *Id.* at 126–27.

strict scrutiny depends on the identification of compelling government interests to support the government regulation, whether the government regulation is directly related to advancing that end, and whether the government has used the least restrictive—or as it is sometimes phrased, the least burdensome—effective alternative to regulate the speech.⁴⁴ Cases involving content-based regulations are discussed in Part IV of this Article.⁴⁵

In other cases, the Court has noted that the regulations are content-neutral. In these cases, the Court applies intermediate review. The use of intermediate scrutiny for content-neutral regulations of speech or reasonable time, place, and manner regulations of speech is best illustrated in the 1989 case of *Ward v. Rock Against Racism*.⁴⁶ The Court held in *Ward* that New York City did not deprive musicians of First Amendment rights by insisting that bandshell performers in Central Park use sound amplification equipment and a sound technician provided by the city.⁴⁷ For the Court, Justice Kennedy first held that the regulation was content-neutral because two of its justifications, controlling noise in the park and avoiding undue intrusion into residential areas, had nothing to do with content.⁴⁸ Regarding the third justification, the city's interest in ensuring the quality of sound at park events, the challengers argued that the city was "seeking to assert artistic control."⁴⁹ Justice Kennedy replied that "the city requires its technician to defer to the wishes of event sponsors concerning sound mix," and the record indicated that "the city's equipment and its sound technician could meet all of the standards requested by the performers."⁵⁰ In most cases of content neutrality, the issue discussed by Justice Kennedy was the way in which the intermediate standard of review applied to the facts, and in most cases he upheld the regulation. These cases are discussed in Part V of this Article.⁵¹

44. As the Court stated in *Simon & Schuster*, to justify its "content-based" regulation of speech "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Id.* at 117–18 (quoting *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987)).

45. See *infra* Part IV.

46. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

47. *Id.* at 789–90.

48. *Id.* at 792.

49. *Id.*

50. *Id.* at 792–93.

51. See *infra* Part V.

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

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

III. PUBLIC VERSUS NONPUBLIC FORUM ANALYSIS

In *International Society for Krishna Consciousness, Inc. v. Lee*, Justice Kennedy concurred with the judgment allowing an airport to bar solicitation for the immediate payment of money on its premises.⁵² However, he disagreed with the majority's view that the airport was not a public forum simply because the airport authority considered the purpose of its terminals to be the facilitation of air travel.⁵³ As discussed below, because of changes in Court membership since the *Lee* case was decided, Justice Kennedy's approach to determining a public versus nonpublic forum is likely the majority approach on the Court today.

In *Lee*, Chief Justice Rehnquist wrote for the majority that a public airport terminal was not a public forum and could reasonably ban the repetitive solicitation of money within its terminals.⁵⁴ With respect to the nature of the forum, Chief Justice Rehnquist said that the decision to create a public forum is "made 'by intentionally opening a nontraditional forum for public discourse.'"⁵⁵ He further commented that "the tradition of airport activity does not demonstrate that airports have historically been [opened] for speech activity," and that airport operators have frequently objected in litigation to such activity.⁵⁶ It was not persuasive that speech activity has "occurred at various 'transportation nodes' such as rail stations" because those nodes have traditionally had private

52. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 693 (1992) (Kennedy, J., concurring).

53. *Id.* at 696–97.

54. *Id.* at 679, 684–85 (majority opinion).

55. *Id.* at 680 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)).

56. *Id.* at 680–81.

ownership, and the relevant unit in the case was the airport, not nodes generally.⁵⁷ Airports are commercial enterprises whose management considered their purpose “to be the facilitation of passenger air travel.”⁵⁸ Therefore, only a reasonableness standard applicable to nonpublic fora needed to be applied.⁵⁹ Viewing the case against a background of substantial congestion, Chief Justice Rehnquist, with Justices White, Scalia, and Thomas, upheld both a ban on solicitation and a ban on literature distribution, including leafletting.⁶⁰ Chief Justice Rehnquist noted that allowing solicitation on outside sidewalks, as provided by the airport managers, gives sufficient access to an area universally traveled.⁶¹

Justice O’Connor agreed that the airport was not a public forum because no intent had been expressed to open airports to the types of expression there involved.⁶² She said, however, that the reasonableness inquiry is whether the restrictions are consistent with the multipurpose environment deliberately created.⁶³ She further wrote that the solicitation of money impedes the normal flow of travel and risks confrontation with a person asking for money.⁶⁴ Thus, that ban was reasonable.⁶⁵ However, she said the ban on leafletting was not reasonable given the minimal disruption caused by a person giving out information.⁶⁶

Justice Kennedy, joined by Justices Blackmun, Stevens, and Souter, said that an airport is a public forum.⁶⁷ Focusing more on the objective characteristics of the property, Justice Kennedy concluded that public forum status should be given to property if its “physical characteristics . . . and . . . actual public access and uses . . . permitted by the government indicate that expressive activity would be appropriate and compatible with those uses.”⁶⁸ Under this test, airport terminals are a public forum because their “public spaces . . . are broad, public thoroughfares full of people and lined with stores and other commercial activities.”⁶⁹ Further,

57. *Id.* at 681.

58. *Id.* at 682.

59. *Id.* at 683.

60. *Id.* at 683–84.

61. *Id.* at 684–85.

62. *Id.* at 686 (O’Connor, J., concurring in part and concurring in the judgment).

63. *Id.* at 687.

64. *Id.* at 689.

65. *Id.* at 689–90.

66. *Id.* at 690–92.

67. *Id.* at 693 (Kennedy, J., concurring in the judgment).

68. *Id.* at 698.

69. *Id.* at 700.

there had been no showing that any real impediments to the airport's use could not be cured with reasonable time, place, and manner regulations.⁷⁰ Given the current membership on the Court, this approach would likely be adopted by a majority of Justices, composed of Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan.⁷¹

Applying intermediate scrutiny appropriate for content-neutral regulations in a public forum, Justice Kennedy concluded that the ban on solicitation for the receipt of money was valid as a time, place, and manner restriction.⁷² This behavior creates a risk of fraud and duress, and there are ample alternatives because the solicitor can give a preaddressed envelope.⁷³ However, the ban on distributing or selling literature was invalid.⁷⁴ The government had less interest in regulation, and the danger of fraud was more limited.⁷⁵

Justices Souter, Blackmun, and Stevens thought that both bans were invalid.⁷⁶ Regarding solicitation of money for immediate payment, the claim for duress was weak, and there was no evidence of coercive conduct.⁷⁷ There was almost no evidence of fraud.⁷⁸ Ample alternative channels for solicitation did not exist because the "distribution of preaddressed envelopes [was] unlikely to be much of an alternative."⁷⁹

Reflecting more the "objective" characteristics of the property approach found in Justice Kennedy's concurrence in *Lee*, lower federal courts since *Lee* have held that a private sidewalk encircling a privately owned sports arena complex that appears like any public sidewalk and that is used as a public thoroughfare is a public forum.⁸⁰ Using the same approach, lower federal courts have also held that a mass transit agency's acceptance of advertisements on a wide range of topics under contracts for display in its stations and vehicles for the purpose of raising revenue made such areas designated public fora and triggered public forum review.⁸¹

70. *Id.* at 701.

71. This prediction is based on the fact that liberal Justices have tended to adopt the broader view of public forum doctrine, as Justices Blackmun, Stevens, and Souter did in *Lee*, see *supra* text accompanying notes 67–70, and that Justices Ginsburg, Breyer, Sotomayor, and Kagan would likely adopt a similar liberal view.

72. *Lee*, 505 U.S. at 703 (Kennedy, J., concurring).

73. *Id.* at 705–08.

74. *Id.* at 708.

75. *Id.*

76. *Id.* at 709–11 (Souter, J., concurring in the judgment in part and dissenting in part).

77. *Id.* at 713.

78. *Id.* at 713–14.

79. *Id.* at 715.

80. *United Church of Christ v. Gateway Econ. Dev. Corp.*, 383 F.3d 449, 451–53 (6th Cir. 2004).

81. *Christ's Bride Ministries, Inc. v. Se. Pa. Trans. Auth.*, 148 F.3d 242, 247–55 (3d Cir. 1998).

Justice Kennedy elaborated on public and nonpublic forum analysis in *Arkansas Educational Television Commission v. Forbes*.⁸² In *Forbes*, Justice Kennedy noted in his majority opinion that the Court had recognized three types of fora: the traditional public forum; the public forum created by government designation, which may be for the general public or for a particular class of speakers; and the nonpublic forum.⁸³ He pointed out that a public forum is not created where the government does nothing more “than reserve eligibility for access to the forum to a particular class of speakers.”⁸⁴ Thus, a candidate debate sponsored by a state-owned public television station was a nonpublic forum where the station had extended invitations only to candidates who had substantial support.⁸⁵ For this reason, there was no violation of the First Amendment in limiting the debate to such candidates where that was a reasonable viewpoint-neutral exercise of journalistic judgment.⁸⁶

IV. CONTENT-BASED REGULATIONS

A. *Opinions in Which Justice Kennedy Voted To Invalidate a Regulation*

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

1. *Political Speech*

Justice Kennedy has written more opinions on political speech than on any other free speech area. He has voted to invalidate the challenged law, its application, or both in all but two of these cases. The cases on political speech in which Justice Kennedy has written a majority or concurring opinion in opposition to a government regulation deal with campaign financing; election procedures, including limits on access to the ballot and limits on candidates’ speech; political protests such as burning flags

82. Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666 (1998).

83. *Id.* at 677–78.

84. *Id.* at 679.

85. *Id.* at 680.

86. *Id.* at 682–83.

as a form of political speech; and political affiliations of government employees.

a. Campaign Financing

In *Austin v. Michigan Chamber of Commerce*, a 6–3 majority held that Congress could regulate corporate contributions to political campaigns.⁸⁷ Justice Kennedy dissented, saying that limits on electioneering because of the speaker’s corporate identity should not be upheld.⁸⁸ Twenty years later he was able to write for the Court, in *Citizens United v. FEC*, that *Austin* was overruled.⁸⁹ In *Citizens United*, the most important case in which Justice Kennedy has penned a First Amendment opinion for the Court, there was a clash between the interests of corporations in free speech related to elections and the government’s interest in avoiding the distorting influence of wealth, preventing corruption, and protecting shareholders.⁹⁰ A federal statute barred corporations from making independent expenditures that referred to a clearly identified candidate within thirty days of a primary election or within sixty days of a general election for public office.⁹¹ In his opinion for a 5–4 Court, Justice Kennedy said that the proper standard of review was strict scrutiny, which required the government to prove that the restriction furthered a compelling interest and was narrowly tailored to achieve that interest.⁹² At this level of review, deference is not given to legislative judgments on the existence of facts. Here the government had not identified a compelling interest, said Justice Kennedy, because “First Amendment protection[] do[es] not depend on the speaker’s ‘financial ability to engage in public discussion’[;] . . . independent expenditures . . . do not give rise to corruption or the appearance of corruption,” and if a shareholder protection theory were adopted it would give the government power to restrict the political speech of media corporations.⁹³ Further, there was “little evidence of abuse that cannot be [protected against] by shareholders ‘through the procedures of corporate democracy.’”⁹⁴

87. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660–61 (1990), *overruled by Citizens United v. FEC*, 130 S. Ct. 876 (2010).

88. *Id.* at 695–96, 699 (Kennedy, J., dissenting).

89. *Citizens United*, 130 S. Ct. 876.

90. *Id.* at 903.

91. *Id.* at 887 (citing 2 U.S.C. § 441b (2000)).

92. *Id.* at 911.

93. *Id.* at 883–84 (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976)).

94. *Id.* at 911 (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)); see Matthew Lambert, *Beyond Corporate Speech: Corporate Powers in a Federalist System*, 37 RUTGERS L. REC. 20 (2010) (quoting *Citizens United*, 130 S. Ct. at 889) (explaining that the Court in *Citizens United* rejected the argument that political speech of corporations or other associations should be treated differently under the First

The background of principles for Justice Kennedy's rejection of the government's theories on compelling interests appears in several of Justice Kennedy's general observations in the case. With respect to judgments on the accuracy and implementations of the proposed corporately supported distribution of a video about Hillary Clinton, which had given rise to the cases, Justice Kennedy said,

The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it.⁹⁵

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

Modern day movies, television comedies, or skits on Youtube.com might portray public officials or public policies in unflattering ways. Yet if a covered transmission during the blackout period creates the background for candidate endorsement or opposition, a felony occurs solely because a corporation, other than an exempt media corporation, has made the "purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value" in order to engage in political speech. 2 U.S.C. § 431(9)(A)(i). Speech would be suppressed in the realm where its necessity is most evident: in the public dialogue preceding a real election. Governments are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute's purpose and design.⁹⁶

In addition to *Austin*,⁹⁷ Justice Kennedy's *Citizens United* decision overruled *McConnell v. FEC*.⁹⁸ Those cases had upheld limits on electioneering communications because of the speaker's corporate identity.⁹⁹ In each of them, Justice Kennedy had penned a dissent.¹⁰⁰ He said in *Citizens United* that stare decisis did not require continued

Amendment); Stephan Stohler, *One Person, One Vote, One Dollar? Campaign Finance, Elections, and Elite Democratic Theory*, 12 U. PA. J. CONST. L. 1257, 1276 n.105 (2010) ("[R]esources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas." (quoting *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 258 (1986))).

95. *Citizens United*, 130 S. Ct. at 917 (quoting *McConnell v. FEC*, 540 U.S. 93, 341 (2003) (Kennedy, J., concurring in part and dissenting in part), *overruled by Citizens United*, 130 S. Ct. 876).

96. *Id.*

97. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by Citizens United*, 130 S. Ct. 876.

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

99. *Austin*, 494 U.S. at 666; *McConnell*, 540 U.S. at 230.

100. *Austin*, 494 U.S. at 695; *McConnell*, 540 U.S. at 286.

acceptance of the earlier cases because they were not well-reasoned in abandoning free speech principles and had been undermined by various circumventions, and because no serious reliance interests were at stake.¹⁰¹

The statutes at issue in *Citizens United* included 2 U.S.C. § 441d, a disclaimer requirement to indicate who is responsible for the content of any advertisement.¹⁰² A related section, 2 U.S.C. § 434(f)(1), also included a disclosure requirement for any person spending more than \$10,000 on electioneering communications within a calendar year.¹⁰³ Justice Kennedy found “no constitutional impediment to the application of [those content-neutral requirements even] to a movie broadcast via video-on-demand [because] there [had] been no showing that . . . these requirements would impose a chill on speech or expression.”¹⁰⁴

As frequently occurs, Justice Kennedy’s view was in the middle of extremes. Justice Thomas joined all but Part IV of Justice Kennedy’s opinion, where the Court upheld disclosure, disclaimer, and reporting requirements.¹⁰⁵ Thomas pointed to a number of examples where persons whose names and addresses were disclosed, as required by law, were subjected to attacks and left vulnerable to retaliation from elected officials.¹⁰⁶ He said that persons should have a right to anonymous speech and the possibility of bringing an as-applied action would require substantial litigation over an extended time during which there would be

101. *Citizens United*, 130 S. Ct. at 911–13. For Justice Kennedy, factors that weigh toward overruling a case include the following: (1) the precedent is unworkable in practice; (2) the precedent creates an inconsistency or incoherence in the law; (3) a changed understanding of facts has undermined the factual basis of the precedent; (4) the precedent represents a substantially wrong or substantially unjust interpretation of the Constitution, often because the opinion represents unsound reasoning; or (5) the precedent raises concerns about a commitment to the “rule of law.” See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855–69 (1992) (joint opinion of O’Connor, Kennedy, & Souter, JJ.); see also *Arizona v. Gant*, 556 U.S. 332, 358–63 (2009) (Alito, J., dissenting) (articulating the factors that support overturning precedent in a dissent joined by Justice Kennedy). Factors that favor following a precedent include: (1) the precedent is “settled law,” or (2) there has been “substantial reliance” on the precedent. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 233–34 (1995) (“It is worth pointing out the difference between the applications of *stare decisis* in this case and in *Planned Parenthood of Southeastern Pa. v. Casey*. *Casey* explained how considerations of *stare decisis* inform the decision whether to overrule a long-established precedent that has become integrated into the fabric of the law [settled law]. Overruling precedent of that kind naturally may have consequences for ‘the ideal of the rule of law.’ In addition, such precedent is likely to have engendered substantial reliance, as was true in *Casey* itself.” (citations omitted) (quoting and citing *Casey*, 505 U.S. at 854, 856)). See generally R. Randall Kelso & Charles D. Kelso, *How the Supreme Court Is Dealing with Precedents in Constitutional Cases*, 62 *BROOK. L. REV.* 973, 990–96 (1996).

102. 2 U.S.C. § 441d(a) (2006).

103. *Id.* § 434(f)(1).

104. *Citizens United*, 130 S. Ct. at 916.

105. *Id.* at 979 (Thomas, J., concurring in part and dissenting in part).

106. *Id.* at 980–81.

a risk of chilling speech. He also noted the need for prompt judicial action was increasing with the ability of the Internet to give wide publicity to revealed individuals.¹⁰⁷ Justice Thomas added, “I cannot endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or preemptive and threatening warning letters as the price for engaging in core political speech, the primary object of First Amendment protection.”¹⁰⁸

Justice Stevens, joined by Justices Ginsburg, Breyer, and Sotomayor, dissented from the Court’s conclusion regarding 2 U.S.C. § 441b.¹⁰⁹ Justice Stevens claimed that stare decisis had been inappropriately departed from because *Austin* had long been relied upon by state legislatures, and the case had not been proved unworkable.¹¹⁰ Regarding consequences, Justice Stevens insisted that there was plenty of evidence supporting the reasonableness of Congress’s concern to deal with corruption, distortion, and shareholder protection.¹¹¹ Justice Stevens said the fact that corporations “have no consciences, no beliefs, no feelings, [and] no thoughts [or] desires” is a reminder that they themselves are not “‘We the People’ by whom and for whom our Constitution was established.”¹¹² He also noted that the majority view was contrary to long recognition by the people of the need to prevent corporations from undermining self-government.¹¹³ However, these four dissenting Justices did agree with Justice Kennedy that the disclaimer and disclosure requirements were constitutional.¹¹⁴

In *Colorado Republican Federal Campaign Committee v. FEC*, the Court held that the First Amendment prohibited application of the Federal Election Campaign Act of 1971 to campaign contribution limits on expenditures a political party makes “independently, without coordination with any candidate.”¹¹⁵ Justice Kennedy added that a political party’s spending in cooperation with a candidate was “indistinguishable in substance from expenditures by the candidate or [the candidate’s]

107. *Id.*

108. *Id.* (internal quotation marks omitted) (quoting *McConnell v. FEC*, 540 U.S. 93, 264 (2003) (Thomas, J., concurring in part and dissenting in part)).

109. *Citizens United*, 130 S. Ct. at 929 (Stevens, J., dissenting).

110. *Id.* at 938–40.

111. *Id.* at 960–79.

112. *Id.* at 972.

113. *Id.* at 948–53.

114. *Id.* at 886, 913–16 (majority opinion).

115. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 608 (1996).

campaign committee,” and for that reason should be protected by the First Amendment.¹¹⁶

In *Randall v. Sorrell*, a plurality opinion said that Vermont’s expenditure limits for state office candidates were invalid under *Buckley v. Valeo*.¹¹⁷ Justice Kennedy, concurring in the judgment, said that the primary justifications for the expenditure limits were not significantly different from Congress’s rationale for the *Buckley* limits, and reiterated his own “skepticism regarding that system and its operation.”¹¹⁸

b. Elections

The Court held in *California Democratic Party v. Jones* that creating a blanket primary violated the freedom of speech and freedom of association by depriving members of a political party the right to choose its nominees.¹¹⁹ Concurring, Justice Kennedy added that “[p]olitical parties advance a shared political belief [and] to do so they . . . must speak through their candidates.”¹²⁰

In *Cook v. Gralike*, the Court struck down a state law that sought to establish on ballots for federal offices whether a candidate opposed term limits.¹²¹ Justice Kennedy added that the basic principle was that the Constitution was established by the people themselves and that the states may not act as intermediaries between the people and the federal government.¹²² This decision thus protected the right of a candidate to decide what speech to make to voters on the issue of term limits, rather than having the state compel speech on that topic.

In *Republican Party of Minnesota v. White*, the Court held that a law that barred candidates for judicial office from announcing their views on disputed legal and political issues did not pass strict scrutiny and thus violated the First Amendment.¹²³ Justice Kennedy agreed but added in a concurrence that “content-based speech restrictions that do not fall within any traditional exception should be invalidated without [even] inquir[ing] into narrow tailoring or compelling government interests.”¹²⁴ It is not clear whether he intended this statement to be limited to election

116. *Id.* at 630 (Kennedy, J., concurring in part and dissenting in part).

117. *Randall v. Sorrell*, 548 U.S. 230, 236 (2006).

118. *Id.* at 264–65 (Kennedy, J., concurring).

119. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 585–86 (2000).

120. *Id.* at 587 (Kennedy, J., concurring).

121. *Cook v. Gralike*, 531 U.S. 510, 525–26 (2001) (holding that disclosure of a candidate’s position on term limits violated the Elections Clause).

122. *Id.* at 528 (Kennedy, J., concurring).

123. *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002).

124. *Id.* at 793 (Kennedy, J., concurring).

cases or whether, as it literally appears, he was announcing a general principle for all content-based speech restrictions.

In two election cases where the majority upheld a state election regulation, Justice Kennedy did not find himself in the majority. In *Burdick v. Takushi*, the Court upheld Hawaii's ban on write-in voting.¹²⁵ Justice Kennedy, dissenting, said this imposed a "significant burden on the right of voters . . . to vote for the candidates of their choice."¹²⁶

In *Nixon v. Shrink Missouri Government PAC*, the Court held that the approval in *Buckley* of contribution limits respecting candidates for federal office should extend to such limits on candidates for state offices.¹²⁷ Justice Kennedy, dissenting, said that respect for the First Amendment, plus unfortunate results following *Buckley*, should bar this extension.¹²⁸

c. Political Protest by Flag Burning

In *Texas v. Johnson*, Justice Kennedy concurred in a 5–4 refusal to allow Texas to convict a political protester for desecrating a U.S. flag by burning it.¹²⁹ Justice Kennedy said that the decision was not easy for him in view of the sacrifices made in the name of the flag, but "the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution."¹³⁰ Justice Kennedy further explained his position:

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. . . . Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt.¹³¹

Congress reacted to *Texas v. Johnson* by enacting a statute that provided criminal penalties for "[w]hoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples

125. *Burdick v. Takushi*, 504 U.S. 428, 441–42 (1992).

126. *Id.* at 442 (Kennedy, J., dissenting).

127. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 381–82 (2000).

128. *Id.* at 405–06 (Kennedy, J., dissenting).

129. *Texas v. Johnson*, 491 U.S. 397, 420–21 (1989) (Kennedy, J., concurring).

130. *Id.* at 421.

131. *Id.* at 420–21.

upon any flag of the United States.”¹³² This law was struck down on its face in *United States v. Eichman* by the same 5–4 vote that was recorded in *Johnson*.¹³³ The Court again concluded that the new federal law, although wider in scope than the Texas law, still “suppresses expression out of concern for its likely communicative impact.”¹³⁴

d. Political Views of Independent Contractors

In *O’Hare Truck Service, Inc. v. City of Northlake*, the Court, per Justice Kennedy, held that an independent contractor or a government employee cannot be discriminated against by a government official or agency because of the individual’s failure to hold certain political views.¹³⁵

2. Sexually Oriented Materials

Justice Kennedy has written several opinions limiting government power to suppress speech by content-based prohibitions of sexually oriented material, often finding that the government could advance its regulation by less burdensome means, and thus the government was not using the least burdensome effective alternative as required by strict scrutiny review.

a. Pornography

Pornography produced by using persons under eighteen has long been restricted. But what of pornography that simply appears to be using minors? In *Ashcroft v. Free Speech Coalition*, a majority opinion by Justice Kennedy held that the Child Pornography Prevention Act of 1996 (CPPA) was invalid under the First Amendment because its punishment for dealing in any way with depictions of sexually explicit conduct that appeared to be by persons under eighteen was not supported by a sufficient connection with discouraging pedophiles from engaging in illegal conduct.¹³⁶ Justice Kennedy wrote, “First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the

132. 18 U.S.C. § 700(a)(1) (2006), *invalidated by* *United States v. Eichman*, 496 U.S. 310 (1990).

133. *Eichman*, 496 U.S. 310.

134. *Id.* at 317.

135. *O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714–15 (1996).

136. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 258 (2002).

beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”¹³⁷

In *United States v. American Library Ass’n*, the Court upheld on its face the Children’s Internet Protection Act (CIPA).¹³⁸ The CIPA required public libraries receiving federal funds to block obscene or pornographic computer images and to employ filters to prevent minors from accessing such material, except when otherwise prohibited websites were being used for bona fide research or other lawful purposes.¹³⁹ Justice Kennedy added that there might be an as-applied challenge if a library could not disable the filter or burdened adult users’ choice to view constitutionally protected material.¹⁴⁰

In *Reno v. ACLU*, the Court—including Justice Kennedy—held that a congressional bar on placing sexually explicit materials on the Internet to protect minors violated the First Amendment because it had not been shown that Congress had no adequate alternatives to this content-based regulation.¹⁴¹ Thus, the law was invalid as not being the least burdensome effective alternative, which is required under strict scrutiny review.¹⁴²

b. Cable Television

In *United States v. Playboy Entertainment Group*, Justice Kennedy wrote for a 5–4 Court that the First Amendment was violated by requiring cable television operators whose channels were “‘primarily dedicated to sexually-oriented programming’ . . . to ‘fully scramble or otherwise fully block’ those channels or to limit their transmission to hours when children [were] unlikely to be viewing,” which is what most operators did.¹⁴³ Strict scrutiny applied to this content-based rule, and the government had not met its requirements.¹⁴⁴ Justice Kennedy explained, “When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government’s obligation to prove that

137. *Id.* at 253.

138. *United States v. Am. Library Ass’n*, 539 U.S. 194, 214 (2003).

139. *Id.* at 201.

140. *Id.* at 215 (Kennedy, J., concurring).

141. *Reno v. ACLU*, 521 U.S. 844, 874–79 (1997).

142. *Id.*

143. *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 806, 827 (2000) (quoting 47 U.S.C. § 561 (1994 & Supp. 1996)).

144. *Id.* at 816.

the alternative will be ineffective to achieve its goals. The Government has not met that burden here.”¹⁴⁵

In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, the Court upheld an FCC rule, against a First Amendment challenge, that permitted cable system operators to prohibit indecent programming transmitted over leased access channels.¹⁴⁶ On this point, Justice Kennedy dissented, arguing that strict scrutiny should have been applied but was not.¹⁴⁷

3. Viewpoint Discrimination

A third area where Justice Kennedy’s approach has been significant involves determining whether a particular government regulation involves viewpoint discrimination. In two important viewpoint discrimination cases, Justice Kennedy was the only Justice in the majority in both cases, providing protection for free speech in each case.

In *Rosenberger v. Rector & Visitors of University of Virginia*, Justice Kennedy wrote for the majority that a university that was paying the printing costs of student publications violated the First Amendment when it refused to fund a student magazine because it had a religious editorial viewpoint.¹⁴⁸ Justice Kennedy said that the university had created a limited public forum, even though it existed “more in a metaphysical [way] than in a spatial or geographic sense.”¹⁴⁹ “Content discrimination,” said Justice Kennedy, “may be permissible to preserve the purposes of [a] limited public forum,” but “viewpoint discrimination . . . is presumed impermissible” and triggers strict scrutiny review.¹⁵⁰ Here the university did not “exclude religion as a subject matter but [instead] select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints,” which “were otherwise within the approved category of publications.”¹⁵¹ The refusal to fund could not be considered university speech or merely a delimitation of its program because the university was spending funds to encourage a diversity of views from private speakers.¹⁵² Justice Kennedy explained:

Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for

145. *Id.*

146. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 753 (1996).

147. *Id.* at 803–05 (Kennedy, J., concurring in part and dissenting in part).

148. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845–46 (1995).

149. *Id.* at 830.

150. *Id.*

151. *Id.* at 831.

152. *Id.* at 834.

the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.¹⁵³

Justice Kennedy also wrote the majority opinion in *Legal Services Corp. v. Velasquez*.¹⁵⁴ In *Velasquez*, the Court held that where the government funds lawyers who are to speak on behalf of their clients, the government may not foreclose advice or legal assistance questioning the validity of statutes under the Constitution.¹⁵⁵ Justice Kennedy explained that a restriction operating to insulate current welfare laws from constitutional scrutiny implicates central First Amendment concerns and distorts the legal system.¹⁵⁶ The government could not defend this as a mere definition of its funding program.¹⁵⁷

4. Laws Involving Professional and Business Speech

In cases involving professional or business speech, Justice Kennedy has consistently supported freedom of speech concerns. For example, in *Gentile v. State Bar of Nevada*, Justice Kennedy announced the judgment of the Court and wrote that although states may restrict attorney speech that has a likelihood of prejudicing pending legal proceedings, Nevada Supreme Court Rule 177 was void for vagueness in tending to mislead attorneys into believing that a general discussion of a criminal defense would not subject them to discipline.¹⁵⁸

In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Review Board*, the Court applied strict scrutiny to the “Son of Sam” law, which required a turnover of profits from books written under

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

154. *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 536 (2001).

155. *Id.* at 549.

156. *Id.* at 547.

157. *Id.* at 547–48. Chief Justice Rehnquist and Justices Scalia, O’Connor, and Thomas dissented, viewing the government’s action as involving government spending of its own funds, not regulating another person’s speech, and thus subject only to minimum rationality review. *Id.* at 549–50 (Scalia, J., dissenting).

158. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048–51 (1991).

contract with a criminally accused or convicted person.¹⁵⁹ The Court struck down the law as not narrowly tailored to ensuring crime victims were compensated from fruits of the crime.¹⁶⁰ Justice Kennedy, concurring, said that the fact the law was content-based was a sufficient reason to find it invalid.¹⁶¹

Justice Kennedy wrote for the Court in *Edenfield v. Fane* that Florida's ban on solicitation by certified public accountants was unsupported by evidence that such solicitations were likely to lead to oppressive conduct or to the false or misleading claims that the State was pursuing.¹⁶² Thus, the content-based regulation did not satisfy the test applicable to commercial speech regulation articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.¹⁶³ Similarly, in *Lorillard Tobacco Co. v. Reilly*, the Court held that a state's bar on tobacco advertising outdoors and at the point of sale failed the *Central Hudson* analysis.¹⁶⁴ Justice Kennedy, concurring, said that in his view the *Central Hudson* test "gives insufficient protection to truthful, nonmisleading commercial speech," and that strict scrutiny should be applied in these cases and not the intermediate *Central Hudson* test.¹⁶⁵ In *Sorrell v. IMS Health Inc.*, Justice Kennedy nonetheless applied the *Central Hudson* test to hold a state statute unconstitutional that barred the sale of pharmacy records that revealed the prescribing practices of individual doctors.¹⁶⁶ Justice Kennedy said that the state has a substantial goal of improving the health of individuals seeking health care, but that this goal could not be regarded as being directly advanced by placing limits on the ability of interested parties to gain information that would enable them to communicate more effectively with doctors.¹⁶⁷

In *United States v. United Foods, Inc.*, Justice Kennedy wrote for the Court that fundamental First Amendment rights of mushroom growers were violated by federal assessments for general ads about mushrooms where the ads were not part of some broader regulatory scheme.¹⁶⁸

159. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Review Bd.*, 502 U.S. 105, 123 (1991).

160. *Id.* at 123.

161. *Id.* at 124 (Kennedy, J., concurring).

162. *Edenfield v. Fane*, 507 U.S. 761, 771–73 (1993).

163. *Id.* at 768–73 (citing *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980)).

164. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561, 567 (2001).

165. *Id.* at 571–72 (Kennedy, J., concurring).

166. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011).

167. *Id.* at 2670–72.

168. *United States v. United Foods, Inc.*, 533 U.S. 405, 410–16 (2001).

Instead, the ads had the effect of coercing individuals to join in messages with which they might not agree.¹⁶⁹

In *Johanns v. Livestock Marketing Ass'n*, the Court held that a beef promotion ad was government speech, and beef producers whose assessments were used to finance the ad had no First Amendment protection.¹⁷⁰ Justice Kennedy, dissenting, said the speech was not clearly identified as by the government, and the government could not justifiably use a compelled subsidy to fund speech unless it put that speech forward as its own.¹⁷¹

B. Opinions in Which Justice Kennedy Voted To Uphold a Regulation

1. Elections

In *Burson v. Freeman*, the Court held that on election day, a state could “prohibit[] the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place.”¹⁷² Concurring, Justice Kennedy said that this was one of the narrow areas where a content-based proscription of speech in a public forum could be justified because “[v]oting is one of the most fundamental and cherished liberties in our democratic system,” and in this case the state is not trying to “suppress legitimate expression.”¹⁷³

2. Retaliation for Speech by a Government Employee

In *Garcetti v. Ceballos*, Justice Kennedy wrote a majority opinion that refused to give First Amendment protection from retaliatory employment action for what a government employee said in a memorandum prepared as part of his duties.¹⁷⁴ Justice Kennedy explained that “[s]o long as [government] employees are speaking as citizens [on] matters of public [interest], they . . . face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.”¹⁷⁵ But they

169. *Id.* at 410–11.

170. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 566–67 (2005).

171. *Id.* at 570 (Kennedy, J., dissenting).

172. *Burson v. Freeman*, 504 U.S. 191, 193, 211 (1992).

173. *Id.* at 214 (Kennedy, J., concurring).

174. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

175. *Id.* at 419.

give up some First Amendment protection when they agree to be employed by the government, and they are not speaking as citizens on matters of public interest when they are carrying out their job duties.¹⁷⁶ In *Borough of Duryea v. Guarnieri*, Justice Kennedy wrote for the Court that the same standard of First Amendment review applies to a grievance filed by a government worker under the Petition Clause of the First Amendment as in a standard First Amendment free speech case.¹⁷⁷

3. Libel

In *Masson v. New Yorker Magazine, Inc.*, Justice Kennedy wrote for the Court that an author, who was the plaintiff in a libel action, was not entitled to a summary judgment in his action against a magazine.¹⁷⁸ Justice Kennedy said there was an issue of whether the defendant's publication was false for the purpose of proving the actual malice needed to overcome the protection given to writers by the First Amendment.¹⁷⁹ Here, although the plaintiff was not entitled to a summary judgment, a reasonable jury could find that there was evidence of deliberate or reckless falsification since the quotations attributed to the plaintiff differed materially from the plaintiff's tape-recorded statements.¹⁸⁰

4. Zoning of Adult Establishments

In *City of Los Angeles v. Alameda Books, Inc.*, the Court held that an ordinance that barred more than one adult entertainment business in the same building could survive a motion for summary judgment filed by challengers.¹⁸¹ Concurring in the judgment, Justice Kennedy reacted to an indication that the Court might apply less than strict scrutiny in reviewing the ordinance.¹⁸² He insisted that the Court should use intermediate scrutiny only if the government could "advance some basis to show that its regulation ha[d] the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact."¹⁸³

176. *Id.* at 418–21.

177. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011).

178. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 499 (1991).

179. *Id.*

180. *Id.* at 520–25.

181. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 443 (2002).

182. *Id.* at 447 (Kennedy, J., concurring).

183. *Id.* at 449.

V. CONTENT-NEUTRAL REGULATIONS

A. *Opinions in Which Justice Kennedy Voted To Uphold the Regulation*

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

These cases indicate that where content-based regulations are not involved, Justice Kennedy is willing to let the government regulate for non-content-based reasons. However, his concern for free speech values are indicated in a number of these cases where Justice Kennedy has written to limit the Court's holding.

1. *Elections*

In *New York State Board of Elections v. Lopez Torres*, the Court upheld New York's content-neutral convention system for nominating state supreme court justices, saying it gave potential candidates a fair shot.¹⁸⁴ Justice Kennedy, concurring, said it was important that New York had "a second mechanism for placement on the final election ballot," which involved qualifying by a reasonable petition process.¹⁸⁵

2. *Student Regulations*

In *Board of Regents v. Southworth*, Justice Kennedy wrote for the Court that "[t]he First Amendment permits a public university to charge its students an activity fee [to be] used to fund . . . extracurricular student speech," but only because the program was viewpoint neutral in its allocations.¹⁸⁶

In *Morse v. Frederick*, the Supreme Court indicated that minimum rationality review would be applied to student speech made in the context of the nonpublic forum of a "school-sanctioned and school-supervised

184. *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208–09 (2008).

185. *Id.* at 210 (Kennedy, J., concurring).

186. *Bd. of Regents v. Southworth*, 529 U.S. 217, 221 (2000).

event,” and the school had a legitimate interest in regulating speech that could rationally be viewed as promoting illegal drug use.¹⁸⁷ A concurrence by Justice Alito, joined by Justice Kennedy, whose votes were critical to make up the majority, indicated that where the speech is not connected to the school curriculum and is student generated, even if in conflict with the “educational mission” of the school—however broadly defined—then the *Tinker v. Des Moines Independent Community School District* test would apply.¹⁸⁸ *Tinker* reflects an intermediate standard of review for content-neutral regulations in a public forum.¹⁸⁹

3. Cable Television

Must-carry provisions regarding cable television were ruled content-neutral in *Turner Broadcasting System, Inc. v. FCC*, in an opinion by Justice Kennedy.¹⁹⁰ Since they were content-neutral and aimed only at protecting access to free television programming for the forty percent of Americans without cable, the laws were reviewed by the intermediate level of scrutiny.¹⁹¹ The government was required to show only that they were genuinely needed to protect local broadcasting.¹⁹² Because the government had not made even that showing, the case was remanded for the district court to determine what harms local broadcasters would suffer without must-carry laws and what harms cable would suffer with them.¹⁹³

When *Turner* returned following remand, Justice Kennedy delivered the opinion of the Court, which upheld the district court opinion requiring cable television stations to carry the programs of local commercial television stations.¹⁹⁴ Justice Kennedy agreed with the district court that Congress had drawn reasonable inferences from the substantial evidence before it to conclude that in the absence of must-carry rules, significant numbers of broadcast stations would be refused carriage.¹⁹⁵ Thus, the

187. *Morse v. Frederick*, 551 U.S. 393, 396, 408–10 (2007).

188. *Id.* at 422–25 (Alito, J., concurring) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 514 (1969)).

189. *Id.* at 425 (citing *Tinker*, 393 U.S. at 508–09) (noting that under *Tinker* the school must show concern about a “substantial disruption” of the school environment, which reflects the intermediate review requirement of a substantial government interest to regulate).

190. *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 652 (1994).

191. *Id.* at 661–63.

192. *Id.* at 664.

193. *Id.* at 667–68.

194. *Turner Broad. Sys. Inc. v. FCC*, 520 U.S. 180, 185 (1997).

195. *Id.* at 196, 201–02.

must-carry provisions did not burden substantially more speech than necessary to further a substantial government interest.¹⁹⁶

4. *Other Cases*

As previously discussed,¹⁹⁷ Justice Kennedy wrote for the Court in *Ward v. Rock Against Racism* that requiring concert performers in Central Park to use government-supplied sound technicians was content-neutral and needed only intermediate scrutiny.¹⁹⁸ The city did not have to prove that its regulation was the least intrusive means of furthering its goal of protecting citizens from unwelcome noise.¹⁹⁹ It was sufficient that the city's means used to control sound volume to protect residential privacy and prevent noise pollution were not "substantially broader than necessary" to achieve the city's ends.²⁰⁰ Critical to this conclusion, however, was the fact that the city's regulation did not interfere with the performer's desired sound mix, and thus was not content-based.²⁰¹

In *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, a 5–4 majority upheld a university's policy of supporting student organizations only if they accepted all students because it was reasonable and viewpoint neutral.²⁰² Justice Kennedy said that if the challenging student organization could enforce its membership policy of requiring members to uphold certain religious beliefs, then that would conflict with the university's legitimate purpose in creating a limited forum to encourage vibrant dialogue between students.²⁰³ Given this educational purpose, and Justice Kennedy's general support for the teaching and learning aspect of free speech doctrine, the university's limitation on free speech was constitutional in this narrow setting.²⁰⁴

196. *Id.* at 215–16.

197. *See supra* text accompanying notes 46–50.

198. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

199. *Id.* at 789–90.

200. *Id.* at 802 (internal quotation marks omitted) (quoting *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984)).

201. *Id.* at 801–02.

202. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2994–95 (2010).

203. *Id.* at 2999–3000 (Kennedy, J., concurring).

204. *Id.*

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

Despite Justice Kennedy's usual support for content-neutral regulations of speech, sometimes the government regulation cannot survive intermediate review. For example, as discussed earlier,²⁰⁵ in *International Society for Krishna Consciousness, Inc. v. Lee*, Justice Kennedy concurred with a judgment invalidating an airport regulation preventing a group from handing out leaflets in an airport.²⁰⁶ Justice Kennedy found the ban on distributing leaflets invalid because any danger with disrupting free flow of movement of persons in the airport terminal was not substantial enough to satisfy intermediate review.²⁰⁷ In addition, ample alternative channels for solicitation did not exist.²⁰⁸

In some cases, where the Court had concluded that the regulation was content-neutral, Justice Kennedy disagreed and concluded that the regulation was in fact content-based. For example, in *Hill v. Colorado*, the Court found that a statute that affected abortion protesters was content neutral.²⁰⁹ In contrast, Justice Kennedy said that the Court should break through the form of a speech regulation to the reality, present here, that only one side of the abortion debate was being regulated.²¹⁰ Thus, the law was actually content-based and should be given strict scrutiny.²¹¹

VI. CONCLUSION

Justice Kennedy's basic principles in free speech cases are supporting political freedom, supporting individual autonomy, and protecting freedom to teach, learn, and innovate. Given these principles, his opinions in free speech cases protect free speech from government regulation unless the government can provide strong reasons for any restrictive action and show that the means it has chosen to carry out its purposes are closely tailored to its goals. At a minimum, judicial review is by strict scrutiny for content-based regulations and intermediate review for content-neutral time, place, and manner regulations. In some cases, Justice Kennedy has indicated a preference for a stronger, absolute rule of unconstitutionality for content-based regulations that do not fall into one of the traditional exceptions of free speech doctrine, such as obscenity, defamation, words

205. See *supra* text accompanying notes 67–75.

206. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 702–03 (1992) (Kennedy, J., concurring).

207. *Id.* at 702.

208. *Id.* at 702–03.

209. *Hill v. Colorado*, 530 U.S. 703, 723 (2000).

210. *Id.* at 768 (Kennedy, J., dissenting).

211. *Id.* at 768–70.

tantamount to an act otherwise criminal, impairing some other constitutional right, an incitement to lawless action, or speech calculated to bring about imminent harm that the state has substantive power to regulate. Given his entire body of decisions regarding the freedom of speech over his quarter century on the Court, no Justice on the modern Court has been more consistently protective of the First Amendment freedom of speech than Justice Kennedy.

