Justice Kennedy’s Jurisprudence on the First Amendment Religion Clauses

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Justice Kennedy’s Jurisprudence on the First Amendment Religion Clauses

R. Randall Kelso*

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I. INTRODUCTION

For most of his twenty-five years on the United States Supreme Court, Justice Kennedy has been predominantly known as a moderate civil libertarian. He has struck a course between those Justices perceived as conservative—such as Chief Justices Rehnquist and Roberts, and Justices Scalia, Thomas, and Alito—and those Justices perceived as liberal—such as Justices Brennan, Marshall, Blackmun, Stevens, Ginsburg, Breyer, Sotomayor, and Kagan. This Article seeks to explore Justice Kennedy’s jurisprudence with respect to his political position’s influence on his decision making, and specifically Justice Kennedy’s jurisprudence relating to the religion clauses of the First Amendment. Part II of this Article discusses Justice Kennedy’s moderate civil-libertarian position. In contrast, Part III notes that in a few cases Justice Kennedy has joined his more conservative judicial colleagues and that he may join them in future cases. Part IV then notes that with respect to the religion clauses of the First Amendment, the Establishment Clause and the Free Exercise Clause, Justice Kennedy has likewise adopted more conservative judicial positions.

For most of his tenure on the Court, Justice Kennedy served with other moderate-to-liberal Republican-appointed Justices, including moderate Justices O’Connor and Souter, and more liberal Justices Blackmun and Stevens. As this Article goes to press, the Court is split between four conservative, Republican-appointed Justices—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—and four liberal, Democratic-appointed Justices—Justices Ginsburg, Breyer, Sotomayor, and Kagan. As he is a Republican and appointed by Republican Presidents, and without the pull of moderate Republicans on the Court, it is possible that Justice Kennedy may tend to lean more toward the conservative, Republican side in future cases. If so, his legacy on the Court may not be as a moderate civil libertarian, which it is today, but reflect more the conservative strain in his jurisprudence.

II. KENNEDY AS A MODERATE CIVIL LIBERTARIAN

Justice Kennedy’s moderate civil-libertarian approach is most prominent in four different areas of Supreme Court jurisprudence: (1) Due Process and Equal Protection Clause analysis, (2) First Amendment, Freedom of Speech Doctrine,
(3) criminal defendants’ constitutional rights, and (4) structural issues of separation of powers and federalism.

A. Due Process and Equal Protection Clause Analysis

1. Sexual Orientation Cases

Justice Kennedy wrote for the Court in Romer v. Evans that Amendment 2 of the Colorado Constitution violated the Equal Protection Clause because it lacked a rational relation to a legitimate end. Amendment 2 barred any law entitling gays, lesbians, or bisexuals to “claim any minority status, quota preferences, protected status or claim of discrimination.” Justice Kennedy stated that the breadth of the law made gays and lesbians unequal to everyone else, and thus the only conceivable justification for the law was illegitimate animus toward persons based upon sexual orientation. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented.

Reflecting a moderate civil-libertarian position, however, Justice Kennedy did not accept the argument that Amendment 2 burdened a fundamental right or targeted a suspect class thereby warranting application of heightened scrutiny. This is true despite conflicting arguments stressing a history of discriminatory legislation based upon false stereotypes, and despite increasing evidence that sexual orientation is a substantially immutable characteristic determined predominantly by genetics and hormonal influences and not the product of individual choice. Under some state constitutions, state supreme courts have ruled that sexual orientation discrimination is a suspect class, triggering strict scrutiny. One could also argue that discrimination based upon sexual orientation draws distinctions based upon sex, and thus is a form of gender discrimination that should trigger intermediate review. Despite such arguments, Supreme Court

4. COLO. CONST. art. II, § 30b (held unconstitutional by Romer, 517 U.S. at 635).
5. Romer, 517 U.S. at 632, 635.
6. Id. at 636–50 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (Amendment 2 reflects the traditional “view that homosexuality is morally wrong and socially harmful.”).
7. Id. at 631.
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majorities, led by Justice Kennedy, and thus lower federal courts, have consistently treated constitutional questions involving discrimination based upon sexual orientation as involving only rational review.\textsuperscript{11}

Nonetheless, under rational review, gays and lesbians have had some significant legal victories. In 1986, the Court held, by a 5–4 decision in \textit{Bowers v. Hardwick}, that a law criminalizing sodomy was constitutional.\textsuperscript{12} In 2003, the Court overruled \textit{Bowers} in \textit{Lawrence v. Texas}.\textsuperscript{13} Joined by Justices Stevens, Souter, Ginsburg, and Breyer, Justice Kennedy wrote that a reasoned elaboration of the Court’s precedents

show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. . . . When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and private spheres. . . . [This] demeans the lives of homosexual persons.\textsuperscript{14}

As in \textit{Romer}, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented.\textsuperscript{15}

This disagreement between Justices Kennedy and Scalia in \textit{Lawrence} may have application beyond the facts of the particular case. On behalf of the Court, and echoing a dissent by Justice Stevens in \textit{Bowers}, Justice Kennedy said that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”\textsuperscript{16} Justice Scalia pointed out in his dissent that this

\begin{itemize}
  \item \textsuperscript{11} See generally Equal. Found. of Greater Cincinnati v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995); Steffan v. Perry, 41 F.3d 677, 686–93 (D.C. Cir. 1994); Ben-Shalom v. Marsh, 881 F.2d 454, 463–66 (7th Cir. 1989); Nat’l Gay Task Force v. Bd. of Educ., 729 F.2d 1270, 1273 (10th Cir. 1984). In 1988, a Ninth Circuit panel did apply strict scrutiny to the Army’s policy of discrimination based upon sexual orientation in \textit{Watkins v. United States}, 847 F.2d 1329, 1345–49 (9th Cir. 1988), but on en banc review, the case was resolved on grounds of equitable estoppel preventing the government from failing to reenlist the individual in the particular case. 875 F.2d 699, 705–07, 771 (9th Cir. 1989). Since \textit{Watkins}, the Ninth Circuit has applied rational review in these kinds of cases. See, \textit{e.g.}, High Tech Gays v. Def. Indus. Sec. Clearance Off., 895 F.2d 563, 571–74 (9th Cir. 1990).
  \item \textsuperscript{12} 478 U.S. 186, 191–94 (1986).
  \item \textsuperscript{13} 539 U.S. 558 (2003) (Kennedy, J., opinion for the Court).
  \item \textsuperscript{14} \textit{Id.} at 572, 575.
  \item \textsuperscript{15} \textit{Id.} at 598, 602 (Scalia, J., joined by Rehnquist, C.J. and Thomas, J., dissenting) (“[A]n ‘emerging awareness’ is by definition not ‘deeply rooted in this Nation’s history and tradition[s]’ . . . . Many Americans [still] do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral . . . .”).
  \item \textsuperscript{16} \textit{Id.} at 577–78 (citing \textit{Bowers}, 478 U.S. at 216 & n.9) (Stevens, J., joined by Brennan & Marshall, JJ., dissenting (citing \textit{Loving v. Virginia}, 388 U.S. 1, 11–12 (1967))).
\end{itemize}
reasoning “effectively decrees the end of all morals legislation” and that this includes laws against “bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.” Justice Kennedy indicated that the case was more limited, saying:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship[s] that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to [their] lifestyle.  

Justice Kennedy’s passage is consistent with the principle concerning giving other persons equal concern and respect and not engaging in arbitrary coercion. This principle makes it possible to draw distinctions among Justice Scalia’s “parade of horribles.” Because they are related to protecting against coercion and exploitation, laws against bigamy, adult incest, prostitution, bestiality, and obscenity likely can still be criminalized after Lawrence. Masturbation cannot, and fornication and adultery likely cannot. Same-sex marriage will likely eventually become a constitutional right, but only after a period of increasing legislative acceptance in a number of states.

17. Id. at 590, 599 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).
18. Id. at 578.
19. Id. at 590 (Scalia, J., dissenting).
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2. Abortion Rights Cases

In 1989, the Court was faced with an opportunity to overrule or dramatically limit Roe v. Wade. In Webster v. Reproductive Health Services, a three-Justice plurality opinion of Chief Justice Rehnquist, joined by Justices White and Kennedy, criticized Roe and stated that Roe’s “trimester framework has left this Court to serve as the country’s ‘ex officio medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.’” Justice Scalia indicated his willingness to overturn Roe in its entirety. In contrast, Justice O’Connor decided that it was not necessary in Webster to consider Roe’s broader implications, even though she had previously indicated discomfort with the Roe framework. In Webster, Justice O’Connor concluded that even under the Roe framework, the substantive regulations at issue in this case—a ban on use of public employees, facilities, or funds for performance or assistance with nontherapeutic abortions (that is, those abortions not needed for the mother’s health), and physicians being required to perform reasonable viability tests on a fetus believed to be of twenty or more weeks gestational age—were constitutional. Laws banning use of public funds or public facilities for abortions have routinely been viewed as constitutional under Roe.

Three years later, in 1992, Roe’s legacy was squarely faced in Planned Parenthood of Southeastern Pennsylvania v. Casey. In a 5–4 decision, the Court decided not to overrule Roe v. Wade in its entirety. Justice Scalia, with Chief Justice Rehnquist and Justices White and Thomas, dissented on that matter. Justice Scalia said that the Constitution does not protect a fundamental liberty to abort an unborn child because of two facts: “(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.” In contrast, Justice Blackmun would have had the Court not disturb Roe’s holding and trimester framework in any respect.
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Justice Stevens, also supporting Roe, said that it protected a woman’s freedom “to decide matters of the highest privacy and most personal nature.”

The outcome of the case thus depended on the views of Justices O’Connor, Kennedy, and Souter. They adopted a moderate civil-libertarian position. The joint opinion said:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.

The authors’ analysis stated the importance of individual liberty “combined with the force of stare decisis” outweighed their reservations about “reaffirming the central holding of Roe.” Here, stare decisis was not outweighed by any concern about whether Roe was wrongly decided because the case has not proved unworkable, people have relied on the decision, no evolution of legal principle had weakened its doctrinal footings, its factual underpinnings remain intact, it has been expressly reaffirmed several times, and overruling it might be perceived as a surrender to political pressure.

Having refused to overrule the central principle that a woman has a right to terminate her pregnancy before viability, the joint opinion substituted an “undue burden” test for determining when the fundamental right had been violated—the question being whether a state regulation has “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” The opinion then applied that test to the state law in question, striking down a requirement of spousal notification, but upholding, under rational review, requirements of written informed consent, providing certain information to the patient, a twenty-four-hour waiting period, record keeping, and a parental consent provision for women under eighteen, with the opportunity to pursue a judicial bypass.

33. Id. at 915 (Stevens, J., concurring in part and dissenting in part).
34. Id. at 851 (joint opinion of Justices O’Connor, Kennedy, and Souter).
35. Id. at 853.
36. Id. at 854–61.
37. Id. at 877.
38. Id. at 874–901; see also Women’s Med. Prof’l Corp. v. Baird, 438 F.3d 595, 604–09 (6th Cir. 2006) (finding state licensing provision requiring abortion clinic to have emergency transfer agreement with local hospital, which may require clinic to close and thus force patients to travel to an alternative clinic roughly fifty miles away, not an undue burden on abortion rights).
The opinions of Justices Stevens and Blackmun in *Casey* followed *Roe v. Wade* in its entirety, making every burden on abortion rights subject to strict scrutiny, thereby constitutionalizing all regulations on abortion and following *Roe*’s concern about specific harm if a pro-choice position were not adopted. This approach differed from the more-moderate joint opinion in *Casey*, where the Court did not sit as a super-legislature regarding all aspects of abortion regulation. Thus, under *Casey*’s joint opinion, not every regulation of abortion was constitutionalized under a strict scrutiny approach.

Justice Kennedy’s moderate civil-libertarian position on abortion rights is also reflected in his opinions on the issue of a physical health exception. In *Stenberg v. Carhart*, a 5–4 Court ruled that a Nebraska statute banning even postviability, partial-birth abortions (where normally states can ban abortions to advance the compelling interest of protecting the life of a viable fetus) was unconstitutional as not having a sufficient exception for the life or substantial health interests of the mother, as required in *Roe*, and modified by the “undue burden” analysis in *Casey*. In dissent, Justice Kennedy concluded that the Nebraska law’s medical emergency exception, as a less than undue burden on choice, was sufficient to meet the maternal health exception required by *Casey*. Reflecting a more conservative position, Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, wrote a dissent calling for *Roe* and *Casey* to be overturned.

Following *Stenberg v. Carhart*, Congress passed its own version of a partial-birth abortion ban. In *Gonzales v. Carhart*, Justice Kennedy followed his dissent in *Stenberg v. Carhart* and concluded that a congressional ban on partial-birth abortions, like the Nebraska ban, was a less than undue burden on abortion rights because it only limited one occasionally used means of abortion. Reflecting a

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39. See id. at 911 (Stevens, J., concurring in part and dissenting in part); id. at 922 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

40. Id. at 916–17 (Stevens, J., concurring in part and dissenting in part); id. at 929–34 (Blackmun, J., concurring in part and dissenting in part); see also id. at 927–28 (“[C]ompelled continuation of a pregnancy . . . imposes substantial physical intrusions and significant risks of physical harm. . . . [M]otherhood has a dramatic impact on a woman’s educational prospects, employment opportunities, and self-determination . . . .”; *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care.”)).

41. 505 U.S. at 874–901.

42. Compare id. at 934–40 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (applying strict scrutiny to all of the legislative regulations in *Casey*), with id. at 879–901 (applying rational review to less than undue burdens on abortion choice; strict scrutiny applied only to undue burdens).


44. Id. at 956–58, 964 (Kennedy, J., joined by Rehnquist, C.J., dissenting).

45. Id. at 980–81 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting).


47. Gonzales v. Carhart, 550 U.S. 124, 150–64 (2007) (“Partial-birth abortions” are where part of the
moderate civil-libertarian position, Justice Kennedy noted that Gonzales involved a facial challenge to the statute, and thus, for all women seeking an abortion the statute was not a substantial obstacle to abortion choice. This leaves open the possibility of an as-applied challenge by a woman to whom the ban on a partial-birth abortion would be a significant obstacle given her medical condition.

Regarding viability testing, while in 1973 the point of viability was typically estimated to be around the twenty-eighth week of pregnancy, by 1989, increases in medical technology had moved viability back to typically the twenty-fourth week of pregnancy, where it remains as of 2012. Based on fetal lung capacity, that point is not likely to change much in the future; although, in rare cases, fetuses believed to be twenty weeks or older have survived premature births. Statutes requiring doctors to perform a reasonable viability test on a fetus believed to be in the twentieth week of pregnancy have been upheld, particularly because the parties might be confused as to the time of conception, and thus more likely viable.

While scholars have argued that choosing viability as a critical point in fetal development is somewhat arbitrary, the Court’s justification for viability being the point at which the state has a compelling interest in protecting potential life has remained consistent since Roe. In Roe, the Court stated: “This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.” The justification is based on the belief that at viability, a fetus is an independent life, not necessarily part of the mother’s body. Our traditions of protecting an individual’s rights guard against due process and equal protection violations. Thus, prior to viability, there is no individual, and the state’s interest in fetal life is legitimate but not compelling.

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48. Id. at 150–57.
49. Id. at 167–68. As they had in Stenberg, Justices Stevens, Souter, Ginsburg, and Breyer viewed the congressional partial-birth abortion ban as an undue burden on abortion rights, and therefore unconstitutional. Id. at 169–71 (Ginsburg, J., joined by Stevens, Souter & Breyer, JJ., dissenting).
50. Id. at 150–57.
51. See id. at 134–40 (discussing the implications of the law depending on the point of viability).
55. Id. at 163–64.
56. See id. at 167–68 (discussing the historical protection of individual liberty).

We conclude the line should be drawn at viability . . . . We adhere to this principle for two reasons.
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3. Property Under the Takings Clause

In Takings Clause cases, Justice Kennedy has also adopted a moderate civil-libertarian approach. The Court applies a per se rule that any physical occupation of property, no matter how minor, constitutes a takings. The only question before the court is determining how much compensation must be paid.

In regulatory takings, however, there are two main issues of contention on the Court. Justice Kennedy has joined the liberals in one area and the conservatives in the other. The first issue is determining to what extent lost future opportunities are taken into account, versus impact on existing uses. The leading case on this issue is \textit{Penn Central Transportation Co. v. City of New York}. In deciding the case, Justice Brennan focused on the character of the city’s action and on the nature and extent of interference with rights in the parcel as a whole. Focusing on the economic impact on the property as a whole, and not just on the particular piece being regulated, is standard in Takings Clause doctrine. The Court noted that even if the land-use law had “significantly diminished the value of the Terminal site,” that was just the beginning of the analysis. In deciding whether the challenger could prove that the diminution constituted a taking, Justice Brennan pointed to the special significance of three factors: the economic impact of a regulation, its interference with reasonable, investment-backed expectations, and the character of the governmental action.

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First, as we have said, is the doctrine of \textit{stare decisis}. . . . The second reason is that the concept of viability, as we noted in \textit{Roe}, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. . . . On the other side of the equation is the interest of the State in the protection of potential life. The \textit{Roe} Court recognized the State’s “important and legitimate interest in protecting the potentiality of human life.”

\textit{Id.} As a general matter, about sixty percent of the roughly 1.2 million abortions in the United States each year take place within the first eight weeks of pregnancy; about nine in ten occur within the first twelve weeks; and about one percent are performed after twenty weeks. PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., \textit{Abortion After the First Trimester in the United States} (Sept. 2010), available at http://www.plannedparenthood.org/files/PPFA/fact_abortion_1st_tri_2010-09.pdf (on file with the McGeorge Law Review). Abortions performed after twenty-six weeks, when the fetus is likely viable, is extremely rare. \textit{Abortion After Twelve Weeks}, NAT’L ABORTION FED’N, http://www.prochoice.org/about_abortion/facts/after_12_weeks.html (last revised 2003) (on file with the \textit{McGeorge Law Review}). Almost inevitably, these are done in the context of substantial health risks to the mother or fetal defects not diagnosed until late in the pregnancy. \textit{Id.}

59. For example, in \textit{Loretto}, the Court held that the mere placement of a cable box on the roof of an apartment building constituted a taking. \textit{Id.} at 425–28.
61. \textit{Id.} at 142.
64. \textit{Id.}
Justice Rehnquist took the conservative position in his dissent, saying the lost opportunity of using the air rights above the railroad station should be given greater weight in this balancing approach.65 Focusing on the profits lost by being denied the ability to use the air rights to build the fifty-story tower, the dissent concluded that the regulation went “too far” and constituted a taking of those rights from the property owner that was not offset by the ability to use the air rights on other buildings or the increase in value of Grand Central Terminal attributable to similar land-use restrictions on neighboring properties.66 Because Justice Kennedy has never adopted this more conservative, pro-property owner analysis, it is not the majority opinion on the Court today. Of course, where a complete deprivation of economically viable uses exists, a taking occurs.67

The second issue involves whether to apply Penn Central to a case involving a government exaction of property rights tailored for a specific individual. Here, Justice Kennedy has joined with the conservatives. In Dolan v. Tigard, the Court held that where a city conditions the approval of a building permit on an individual parcel on the owner giving up some property rights, the city has the burden to show not only that the “essential nexus” exists between the ‘legitimate state interest’ and the permit condition,” but also that the degree of the exaction by the city bears a “rough proportionality” to the projected impact of the proposed development.68 The Court said, “No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”69 Four Justices dissented in Dolan. Both of the dissents—one by Justice Stevens, joined by Justices Blackmun and Ginsburg; one by Justice Souter—disagreed with the majority that the burden should have been shifted to the government in this case70 and would have applied the standard Penn Central analysis.71

Another Takings Clause issue involves whether the taking is for a public use. As Justice O’Connor noted in her dissent in 2005 in Kelo v. City of New London, clear examples of public use involve transferring “private property to public ownership—such as for a road, a hospital, or a military base” or transferring

65. Id. at 142–43 (Rehnquist, J., joined by Burger, C.J., and Stewart, J., dissenting).
66. Id. at 138–40.
67. For example, in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015–16 (1992), a statute, as applied, barred a property owner from erecting any permanent habitable structures on beachfront property.
69. Id. at 391.
70. Id. at 396–407 (Stevens, J., joined by Blackmun & Ginsburg, JJ., dissenting); id. at 411–14 (Souter, J., dissenting).
71. Id.
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“private property to private parties, often common carriers, who make the property available for the public’s use—such as with a railroad, a public utility, or a stadium.” Justice O’Connor noted, however, that these two categories of “‘public ownership’ and ‘use-by-the-public’ are sometimes too constricting and impractical.” Under some exigent circumstances, the Court has therefore allowed “takings that serve a public purpose also [to] satisfy the Constitution even if the property is destined for subsequent private use.” Regardless, in Kelo, Justice O’Connor concluded that a case of eminent domain to aid a private developer to build a waterfront project could not be defined as for a “public use.”

The Kelo majority read the third category of “public purpose” takings more broadly. They noted, “[O]ur cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments . . . . Promoting economic development is a traditional and long-accepted function of government.”

In his concurrence, Justice Kennedy adopted a moderate position between Justice O’Connor’s dissent and the majority. He observed:

This Court has declared that a taking should be upheld as consistent with the Public Use Clause, as long as it is “rationally related to a conceivable public purpose.” . . . The determination that a rational-basis standard of review is appropriate does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.

B. The Freedom of Speech

From his numerous free-speech opinions, three general principles emerge as the basis for Justice Kennedy’s belief that freedom of speech was intended to have, and deserves, much protection from action by all branches of state and federal government. These three principles, based on eighteenth century

73. Id. at 498.
74. Id.
75. Id. at 498–502.
76. Id. at 480, 484.
77. Id.
78. Id. at 490 (Kennedy, J., concurring) (citations omitted). On Justice Kennedy’s approach to the Takings Clause generally, see John G. Sprankling, The Property Jurisprudence of Justice Kennedy, 44 McGeorge L. Rev. 61 (2013).
Enlightenment philosophy, are supporting political freedom; supporting individual autonomy; and protecting freedom to teach, learn, and innovate.\(^{79}\)

Justice Kennedy has been a strong protector of free-speech rights.\(^{80}\) He has been particularly influential in cases dealing with viewpoint discrimination, such as *Rosenberger v. Rector and Visitors of the University of Virginia.*\(^{81}\) In *Rosenberger,* the university was paying the printing costs for a variety of publications by certified student organizations, but on Establishment Clause grounds refused to pay for a student paper that promoted “a particular belief[ ] in or about a deity or an ultimate reality.”\(^{82}\) Joined by the more conservative Justices, and writing for a 5–4 Court, Justice Kennedy said that this was viewpoint discrimination, since the university did not exclude religion as a subject matter, but imposed disfavored treatment on the student journalistic efforts that had religious editorial viewpoints.\(^{83}\) Justice Kennedy also wrote the majority opinion in *Legal Services Corporation v. Velasquez.*\(^{84}\) In *Velasquez,* Justice Kennedy was joined by the more liberal Justices in a 5–4 opinion.\(^{85}\) 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 to question the validity of statutes under the Constitution . . . .”\(^{86}\)

Justice Kennedy has championed students’ free-speech rights. In *Morse v. Frederick,* the Supreme Court indicated that rational review applies to student speech made in the context of the non-public forum of a “school-sanctioned and school-supervised” event.\(^{87}\) The Court held that the school had a legitimate interest in regulating speech that could rationally be viewed as promoting illegal drug use.\(^{88}\) Justices Kennedy and Alito concurred, and their votes were critical to

\(^{79}\) 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 “mischief” of politicians).


\(^{82}\) Id. at 822–28 (alteration in original).

\(^{83}\) Id. at 828–37. For four Justices in dissent, Justice Souter said that there was no viewpoint discrimination because the university had simply denied funding for the subject matter of religious speech. Id. at 863–64 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).

\(^{84}\) 531 U.S. 533 (2001).

\(^{85}\) Id. at 535.

\(^{86}\) Id. at 540–49. For four Justices in dissent, Justice Scalia viewed the government’s action as involving government spending of its own funds, not regulating other person’s speech, and thus subject only to minimum rationality review. Id. at 549–52 (Scalia, J., joined by Rehnquist, C.J., and O’Connor & Thomas, JJ., dissenting).

\(^{87}\) 551 U.S. 393, 393, 408–10 (2007).

\(^{88}\) Id.
make up the majority. Their concurring opinion indicated that the more rigorous Tinker v. Des Moines Independent Community School District test would apply to student-generated speech that was not connected to the school curriculum, even if the speech conflicted with the “educational mission” of the school.

In some cases, where the Court had concluded that the regulation was content-neutral, Justice Kennedy disagreed and concluded the regulation was in fact content-based. For example, in Hill v. Colorado, while the Court found that an injunction that affected abortion protesters was content neutral, Justice Kennedy recommended that the Court should break through the form of a speech regulation to the reality—that only one side of the abortion debate was being regulated.

C. Criminal Procedure Doctrine

In cases involving criminal procedure, Justice Kennedy has been sensitive to the needs of police enforcement and to traditional constitutional doctrine regarding criminal procedural practice. In contrast, he has joined liberals in moderate civil-libertarian positions in death-penalty cases. For example, in Atkins v. Virginia, a 6–3 Court, including Justice Kennedy, discussed evolving societal practice to hold unconstitutional the death penalty for mentally retarded criminals. A similar pattern of voting occurred in 2005 in Roper v. Simmons, where the Court ruled that executing persons under eighteen was cruel and unusual punishment. Roper overruled the decision in Stanford v Kentucky, which permitted the execution of persons under eighteen in some circumstances. Even before Stanford, the Court had ruled in Thompson v. Oklahoma that it was unconstitutional for persons under sixteen to be executed.

89. Id. at 422–25 (Kennedy & Alito, JJ., concurring).
90. Id. (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508–09 (1969)) (noting that under Tinker the school must show a concern with “substantial disruption” of the school environment, which reflects the intermediate review requirement of a substantial government interest to regulate, not a mere rational review approach).
91. 530 U.S. 703 (2000); id. at 768–70 (Kennedy, J., dissenting); see also id. at 741–42 (Scalia, J., joined by Thomas, J., dissenting) (“[T]he Court today continues and expands its assault upon their individual right to persuade women contemplating abortion that what they are doing is wrong.”).
93. See Stephanos Bibas, Justice Kennedy’s Sixth Amendment Pragmatism, 44 MCGEORGE L. REV. 211 (2013).
94. 536 U.S. 304, 316 n.21 (2002).
96. Roper, 543 U.S. at 560–78, overruling Stanford, 492 U.S. at 380. It should be noted that Justice Kennedy joined the majority in Stanford, id. at 364, but shifted his vote in Roper, perhaps based on the fact that fewer states authorized the death penalty for minors by 2005 than in 1989.
In *Kennedy v. Louisiana*, a 5–4 Court held that the Eighth Amendment bars imposition of the death penalty for the rape of a child where the crime did not cause, and was not intended to cause, the victim’s death. Justice Kennedy, joined by Justices Stevens, Souter, Ginsburg, and Breyer, reasoned that the “cruel and unusual punishment” clause of the Eighth Amendment requires that punishment for crime be proportional to the offense, determined in terms of evolving societal standards rather than by standards prevailing when the Amendment was adopted. Those standards are determined by national consensus (considering the history of the Amendment, judicial precedents, legislative enactments, and state practice), and by the Court’s own independent judgment. Justice Alito dissented, joined by Chief Justice Roberts and Justices Scalia and Thomas.

In *Graham v. Florida*, the Court considered the constitutionality of life imprisonment without parole for juveniles. Justice Kennedy had observed in *Roper v. Simmons* that juveniles “cannot with reliability be classified among the worst offenders” because of: “[a] lack of maturity and an underdeveloped sense of responsibility”; “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”; and the “personality traits of juveniles are more transitory, less fixed.” These observations support the notion that life imprisonment without parole is not an appropriate punishment for juvenile offenders, particularly for non-homicide offenses. In *Graham v. Florida*, following a *Roper*-like analysis, Justice Kennedy joined with Justices Stevens, Ginsburg, Breyer, and Sotomayor to hold unconstitutional life imprisonment without parole for juveniles for non-homicide offenses.

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99. Id. at 434–38.
100. Id. at 418–26.
101. Id. at 447 (Alito, J., joined by Roberts, C.J., and Scalia & Thomas, J.J., dissenting). Following the decision, it emerged that under the Military Code of Justice the death penalty is authorized for rape of a child when done by military personnel. This additional example of a government entity having a provision, not used in recent history, made no real difference in terms of the case outcome. Kennedy v. Louisiana, 129 S. Ct. 1, 1–3 (2008) (petition for rehearing denied). Justice Kennedy’s majority opinion was driven by an evolving consensus regarding standards of decency, and not the erroneous conclusion that no federal law imposes the death penalty for rape.
103. 543 U.S. 551, 569–70 (2005) (alteration in original) (internal quotations omitted).
104. *Graham*, 130 S. Ct. at 2023–30. Chief Justice Roberts agreed that a life sentence without parole for the armed burglary in this case was unconstitutional, but was unwilling to adopt the majority’s absolute rule applicable to any non-homicide offense. Id. at 2039–40 (Roberts, C.J., concurring in the judgment). In dissent, focused on text and specific historical intent, Justice Thomas, joined by Justices Scalia and Alito, noted that “the text of the Constitution is silent regarding the permissibility of this sentencing practice, and . . . it would not have offended the standards that prevailed at the founding.” Id. at 2043 (Thomas, J., joined by Scalia, J., and Alito, J., as to Parts I and III). On these death-penalty cases generally, see Linda E. Carter, *The Evolution of Justice Kennedy’s Eighth Amendment Jurisprudence on Categorical Bars in Capital Cases*, 44 *McGeorge L. Rev.* 229 (2013).
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D. Structural Issues

Two kinds of structural issues exist regarding the federal government. First, there are separation of powers issues regarding federal legislative, executive, and judicial powers. Second, there are federalism issues regarding the power of the federal government vis-à-vis the power of the States.

1. Separation of Powers

The most significant separation of powers cases for Justice Kennedy have involved the “war on terrorism.” In Hamdi v. Rumsfeld, a case involving a United States citizen enemy combatant, a plurality of Justice O’Connor, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, concluded that “although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”

Reflecting a moderate civil-libertarian position, the plurality noted:

Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them. The Government also argues . . . that . . . military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war. To the extent that these burdens are triggered by heightened procedures, they are properly taken into account in our due process analysis.

Adopting a more conservative position, Justice Thomas agreed with the plurality in Hamdi that Congress had authorized military detention, but granted the President greater power to engage in unilateral action. Four Justices

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106.  Id. at 531–32 (citations omitted).
107.  Id. at 579 (Thomas, J., dissenting) (“This detention falls squarely within the Federal Government’s war powers, and we lack the expertise and capacity to second-guess that decision. . . . Arguably, Congress could provide for additional procedural protections, but until it does, we have no right to insist upon them.”). Following the Hamdi case, the government chose to release Mr. Hamdi, rather than prosecute him. His release was based on an agreement that he would give up his United States citizenship, relocate in another country, Saudi Arabia, and consent not to travel to an extensive list of countries, including Afghanistan, Iran, Iraq, or Syria, where he could be presumably be recruited for terrorist activity. Jerry Markon, Hamdi Returned to Saudi Arabia, WASH. POST, Oct. 12, 2004, at A02.
dissented. Justice Scalia read the Suspension Clause, Article I, Section nine, Clause three, to give the Congress no independent power to authorize military detentions of United States citizens absent suspension of the writ of habeas corpus, a position Justice Stevens joined. Adopting a less extreme position, Justices Souter and Ginsburg required a clear statement from Congress to authorize such detentions, which they said did not exist.

The issue of what rights non-United States citizens held at Guantanamo Bay should have in their trials was the focus of *Hamdan v. Rumsfeld*. In *Hamdan*, the Court decided that no congressional act had expressly authorized the initial set of procedures adopted by the Bush Administration to try detainees at Guantanamo Bay. Absent such congressional authorization, the procedures violated existing statutory and treaty requirements: the Uniform Code of Military Justice (UCMJ) and Article 3 of the Geneva Conventions. As Justice Kennedy pointed out in his concurrence, the UCMJ and Article 3 of the Geneva Conventions require that military commissions be “regularly constituted.” Such commissions are not established, he said, unless the government is prepared to explain why practical reasons require any differences between their structure and procedures and those used by courts-martial. The Court held that Article 3 of the Geneva Conventions applied because it regulates any “conflict not of an international character occurring in the territory of one of the High Contracting Parties.” The Court concluded that because acts by terrorists are not acts between “nations,” they are conflicts “not of an international character” as that phrase is used in the Geneva Conventions.

A conservative dissent by Justice Thomas, joined by Justice Scalia and joined in part by Justice Alito, would have granted greater deference to the president. In part of his dissent, Justice Thomas concluded that Article 3 of the Geneva Conventions did not apply, in part because the Court should defer to the president’s judgment that because the war on terrorism was “international in scope” it was a conflict “of an international character” for purposes of the

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108. *Id.* at 539 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 554 (Scalia, J., joined by Stevens, J., dissenting); *id.* at 579 (Thomas, J., dissenting).
109. *Id.* at 554 (Scalia, J., joined by Stevens, J., dissenting).
110. *Id.* at 540 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment).
112. *Id.* at 567.
113. *Id.* at 565–67, 590–95, 628–32.
114. *Id.* at 629, 632 (internal quotation marks omitted).
115. *Id.* at 636–38 (Kennedy, J., joined by Souter, Ginsburg & Breyer, JJ., as to Parts I & II, concurring in part).
116. *Id.* at 637.
117. *Id.* at 629–32.
118. *Id.* at 629.
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Geneva Conventions. In a separate dissent, Justice Alito noted that even if Article 3 of the Geneva Conventions applied, it imposes only three requirements: “Sentences may be imposed only by (1) a ‘court,’ (2) that is ‘regularly constituted,’ and (3) that affords ‘all the judicial guarantees which are recognized as indispensable by civilized peoples.’” The commissions created by the president met this standard, concluded Justice Alito, and there is no basis for the Court to strike down the commissions because their rules can be changed from time to time by the Secretary of Defense or that evidence may be admitted which has probative value to a reasonable person.

In response to Hamdan, Congress passed, and President Bush signed, the Military Commissions Act of 2006, which set out procedures to govern trial of unlawful enemy combatants. The Act defined enemy combatants broadly as any foreign national individual that the president, or presidential designate, to have “purposefully and materially” supported anti-United States hostilities and is not part of a country’s regular armed forces. The ad hoc nature of the existing process before this statute was passed had naturally caused due process problems. In the Act, Congress expanded the evidence that could be used at trial from traditional UCMJ procedures—both hearsay evidence and evidence from coerced confessions (although not from torture), as long as the evidence meets a generic test of “probative value to a reasonable person.” The Act provided, however, for a ban on any habeas corpus petition filed by a non-United States citizen detainee, instead opting for a more limited review. In Boumediene v. Bush, a 5–4 Court, held that aliens designated as enemy combatants and detained at Guantanamo Bay have the constitutional right of habeas corpus, and the procedures in the Military Commissions Act were an inadequate substitute. Justice Kennedy, writing for the majority, reasoned that the procedures in the Military Commissions Act were inadequate because the

119. Id. at 718–19 (Thomas, J., joined by Scalia, J., and by Alito, J., except for Parts I, II.C.1, and III.B.2, dissenting).
120. Id. at 726 (Alito, J., joined by Scalia & Thomas, JJ., as to Parts I, II, & III, dissenting).
121. Id. at 726–30.
123. Id.
detainee is not allowed to present exculpatory evidence after the proceedings concluded, as would be needed for a Court of Appeals to make findings of fact. In dissent, Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, criticized Justice Kennedy’s opinion for not being sufficiently deferential to decisions by Congress and military authorities. Chief Justice Roberts said that the system created by Congress protects whatever rights the detainees may possess. As for use of later-discovered evidence, Chief Justice Roberts noted that the Court of Appeals for the District of Columbia has the power to remand a case to the tribunal below to allow that body to consider such evidence.

Since Boumediene, a number of cases involving enemy combatants have been tried. In a number of these cases, courts have ordered detainees released due to a lack of evidence even under flexible evidentiary standards suggested in Hamdan and Boumediene. In other cases, courts have ordered individuals detained and held that the procedures adopted in the Military Commissions Act satisfy due process concerns, including a preponderance of the evidence standard to determine guilt; use of hearsay testimony, as long as it is “reliable”; and reasonable discovery procedures.

2. Federalism

In 1976, a 5–4 Court held in National League of Cities v. Usery that the Tenth Amendment prohibits Congress, when exercising its Commerce Clause power, from directly displacing a state’s freedom to structure integral operations in areas of traditional governmental functions. Four liberal Justices dissented in National League. The critical fifth vote in National League belonged to Justice Blackmun. In National League, Justice Blackmun balanced the demands of federal versus state power, creating an area for state sovereignty, but noted that federal power should not be outlawed “in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.”

In Garcia v. San Antonio Metropolitan Transit Authority, Justice Blackmun abandoned his National League balancing approach, a mere nine years after

128. Id. at 787–92.
129. Id. at 801, 821 (Roberts, C.J., dissenting).
130. Id. at 822.
131. Id. at 801–03, 816–22 (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., dissenting).
133. See, e.g., Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010).
135. Id. at 856, 867–68 (Brennan, J., joined by White & Marshall, JJ., dissenting); id. at 880–81 (Stevens, J., dissenting).
136. Id. at 856 (Blackmun, J., concurring).
137. Id.
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*National League* was decided. In *Garcia*, he joined the liberal dissenters in *National League* to overrule *National League* in favor of a strong, pro-federal power decision. Justice Blackmun said in his opinion for the Court that it was unworkable to seek limits on Congress’s power in terms of particular governmental functions, whether “traditional,” “integral,” “ordinary,” or “necessary.” Such distinctions merely invite judges to decide on what state policies they favor or dislike. Blackmun noted that any Tenth Amendment limits on Congress’s Commerce Clause power are in the procedural safeguards inherent in the structure and political processes of the federal system, including the lobbying ability of groups like the National Governors’ Association, the National Conference of State Legislatures, the U.S. Conference of Mayors, or the Council of State Governments.

Despite conservative Justices typically having a strong states’ rights predisposition when deciding cases, during his tenure on the Court, Justice Kennedy has shown no willingness to reconsider this holding in *Garcia*. This is true despite four more conservative Justices on the Court today, no doubt willing to overrule *Garcia*, similar to the four conservative Justices in dissent in *Garcia*.

Despite *Garcia*’s Tenth Amendment doctrine, states’ rights have been indirectly enhanced after *Garcia* in two ways. First, in *Gregory v. Ashcroft*, the Court held that Congress needs to make a clear statement in federal statutes for those statutes to apply to states also. The majority opinion, authored by Justice O’Connor, was joined by Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Souter. Second, the moderate conservative Justices have carved out some meaning for the Tenth Amendment by banning federal commandeering of state legislative, executive, or administrative agencies.

In *New York v. United States*, Justice O’Connor wrote for a 6–3 Court, including Justices Kennedy and Souter, that “Congress may not simply ‘commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’” This doctrine is based upon the dual theory of sovereignty. Under that theory, as explained by Justice Kennedy in *United States Term Limits, Inc. v. Thornton*, the genius of our

138. 469 U.S. 528, 530–31 (1985) (Blackmun, J., for the Court) (Fair Labor Standards Act can be applied to city bus drivers).
139. Id. at 529.
140. Id. at 546–47.
141. Id. at 547.
142. Id. at 547–54.
143. Id. at 557–60 (Powell, J., joined by Burger, C.J., and Rehnquist & O’Connor, JJ., dissenting).
145. Id. at 454.
147. Id. at 155–59.
found ing generation was to split sovereignty in the United States system into two parts: states and federal government. As Chief Justice Marshall had noted in *McCulloch v. Maryland*, the founding generation established dual systems of government, each deriving its authority independently from the consent of the people. After all, the Constitution provides, in the first three words, “We, the People,” not “We, the States.” Further, the Constitution was ratified in special state conventions elected specially by the people for that purpose, not ratified by the existing state legislatures. Thus, in our system, there are two sovereign entities, the federal government and the states, linked by the Constitution’s Supremacy Clause of Article VI, Section two.

Under this dual theory of sovereignty, the federal government can regulate both individuals and states where constitutional power exists under the United States Constitution, and states can regulate individuals and the federal government under their own state constitutions and the United States Constitution consistent with doctrines of intergovernmental immunity. However, the federal government cannot tell the states in any manner how they should regulate their own people because that would infringe on the states’ reserved sovereign power.

The 5–4 decision in *Printz v. United States* extended the theory of New York v. United States. There, the Court held that Congress could not require state officials to conduct a background check on persons who had applied to purchase a gun. Relying on the dual theory of sovereignty, history, and legislative and executive practice, the Court concluded that just as Congress could not commandeer the state legislature in New York, Congress cannot commandeer state executive or administrative officials. However, the Court suggested strongly in dicta in *Printz*, that Congress can commandeer state judges to enforce the United States Constitution. This is based on the view of the Framers and Ratifiers’ expectations that, given no federal court system under the Articles of Confederation and no requirement that Congress create lower federal courts, state

149. Id. at 839 (citing McCulloch v. Maryland, 17 U.S. 316, 316 (1819)).
151. Id. at 905–07.
courts would be the primary initial enforcers of federal constitutional and statutory rights.\textsuperscript{158} The Court has made it clear that the \textit{New York} and \textit{Printz} cases apply only where Congress attempts to “use” or “commandeer” state officials for federal purposes.\textsuperscript{159} These cases pose no Tenth Amendment limit on Congress’s power to regulate states or individuals directly.\textsuperscript{160} Thus, in \textit{Reno v. Condon}, a federal act barring unconsented disclosure of drivers’ license information was applied to both the states and private persons.\textsuperscript{161} The Court stated that \textit{New York} and \textit{Printz} did not apply where the federal exercise of Commerce Clause power regulated state activities \textit{directly}, rather than seeking to control or influence the manner in which the states regulated private parties.\textsuperscript{162} In \textit{Condon}, because the federal statute regulated state workers at the state’s Department of Motor Vehicles and did not tell those workers how to regulate their own citizens, the federal act was constitutional.\textsuperscript{163}

\section*{III. Kennedy as a Conservative Justice}

In a few areas, Justice Kennedy has tended to join with the conservative Justices on the Court. The most prominent areas are: (1) state sovereign immunity cases, (2) the \textit{Bush v. Gore} election case, (3) cases involving the Second Amendment right to bear arms, (4) campaign finance litigation, (5) the constitutionality of the Patient Protection and Affordable Care Act (Obamacare), and (6) affirmative action cases.

\subsection*{A. State Sovereign Immunity}

In \textit{Pennsylvania v. Union Gas Co.}, the Court held 5–4 that Congress can create federal court actions against states for damages caused by acting under the Commerce Clause.\textsuperscript{164} Justice Scalia’s dissenting opinion, joined by Chief Justice Rehnquist and Justices O’Connor and Kennedy, said that \textit{Hans v. Louisiana} declared otherwise.\textsuperscript{165} That case, Justice Scalia said, broadly held that despite the limited text of the Eleventh Amendment, federal jurisdiction over unconsenting states “was not contemplated by the Constitution when establishing the judicial
power of the United States.” Justice Scalia observed that there was no need to state that conclusion in the Eleventh Amendment itself, since it was a background principle of wide acceptance.

The dissenters in Union Gas, joined by newly appointed Justice Thomas, voted to overrule Union Gas in Seminole Tribe of Florida v. Florida. In Seminole Tribe, Justice Stevens, dissenting, said the Eleventh Amendment applies only to suits premised on diversity jurisdiction. Justice Souter, dissenting, joined Justices Ginsburg and Breyer, also took issue with the holding in Hans “that a State could plead sovereign immunity against a noncitizen suing under federal-question jurisdiction, and for that reason a State must enjoy the same protection in a suit by one of its citizens.” Justice Souter explored historical materials to show that even those framers who expected common-law immunity to survive ratification were talking about diversity jurisdiction, not immunity of a state against the general federal-question jurisdiction of the national courts. Justice Souter concluded government action should not be trumped by judicially discoverable principles “untethered” to any written provision.

Despite the dissent’s analysis, a majority of the Court, including Justice Kennedy, have adhered to Seminole Tribe. Indeed, the Court extended Seminole Tribe through several cases, further limiting Congress’s power to abrogate state sovereign immunity by use of Congress’s Section five power to enforce the Fourteenth Amendment. The most important of these cases is City of Boerne v. Flores. In a 5–4 decision, Justice Kennedy wrote that Section five authorized Congress only to remedy or prevent unconstitutional actions by states. Under Section five, Congress could not make a substantive change in the governing law. Justice Kennedy said that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” Applying that test, Justice Kennedy examined the legislative record of the Religious Freedom Restoration Act, which purported to require strict scrutiny, rather than rational basis, of all state action that

166. Id.
167. Id. at 31–32.
169. Id. at 76–78 (Stevens, J., dissenting).
170. Id. at 102 (Souter, J., joined by Ginsburg & Breyer, JJ., dissenting).
171. Id. at 100–85.
172. Id. at 117.
174. See, e.g., id.
175. Id.
176. Id. at 518–20.
177. Id.
178. Id. at 520.
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substantially burdens religious exercise. Justice Kennedy said the legislative record lacked examples of modern instances of generally applicable laws passed because of religious bigotry. Thus, Justice Kennedy concluded that the Act was “so out of proportion to . . . [any] remedial or preventive object that it . . . [was not] responsive to, or designed to prevent, unconstitutional behavior,” and was an attempt to make a substantive change in the law.

Applying the “congruence and proportionality test,” the Court has held subsequently that the Age Discrimination in Employment Act (ADEA) was not “appropriate” legislation under Section five of the Fourteenth Amendment, because there was no evidence of a sufficient pattern of state discrimination on the basis of age to which the statute would be a “congruent and proportionate” response. Thus, the Court held that Congress could not abrogate state sovereign immunity in the case, because Congress has no power to abrogate state sovereign immunity if the statute were viewed as only authorized under the Commerce Clause, as opposed to the Fourteenth Amendment. Similar results have been reached in other cases involving the power of Congress to abrogate state sovereign immunity under Congress’s Section five enforcement power, where the underlying regulatory legislation is based on the Commerce Clause power or other Article One authority. In each of these cases, Justices Stevens, Souter, Ginsburg, and Breyer dissented, concluding that the legislation was “appropriate” under a proper definition of “appropriate” and not the majority’s heightened “congruence and proportionality” standard.

In two cases, Congress was able to establish that the remedial schemes were “congruent and proportional.” These cases dealt with the Family and Medical Leave Act’s provision for unpaid leave and the Americans with Disabilities Act regulating access to state courthouses. In determining whether sufficient evidence exists to establish a pattern of state constitutional violations, Chief Justice Rehnquist noted in Nevada Department of Human Resources v. Hibbs, the Family and Medical Leave Act case, that where “the standard for

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179. Id. at 529, 532–36.
180. Id. at 530–31.
181. Id. at 529–36.
183. Id.
185. See, e.g., Garrett, 531 U.S. at 386–89 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting).
188. Lane, 541 U.S. at 509.
demonstrating the constitutionality of [government action] is more difficult to meet than our rational-basis test,” such as the intermediate scrutiny used to test cases of gender discrimination, it is “easier for Congress to show a pattern of state constitutional violations.”\textsuperscript{189} Even with regard to the mentally or physically disabled under the Americans with Disabilities Act, an area of rational basis scrutiny, the Court concluded in \textit{Tennessee v. Lane} that there was sufficient evidence of state lack of compliance with the equal protection rights of disabled persons to equal access to state courthouses that the Americans with Disabilities Act was a “congruent and proportionate” response to state failures to build ramps to their numerous, but often old, county courthouses.\textsuperscript{190} In both of these cases, however, Justice Kennedy dissented and found no grounds to abrogate state sovereign immunity.\textsuperscript{191} In a recent case under the Family and Medical Leave Act’s self-care provision, Justice Kennedy again provided the critical fifth vote to find no grounds to abrogate state sovereign immunity.\textsuperscript{192}

\textbf{B. Bush v. Gore}

The most noteworthy case involving equal protection issues and the right to vote during Justice Kennedy’s tenure on the Court is unquestionably \textit{Bush v. Gore}.\textsuperscript{193} In this case, the Court considered the constitutionality of the Florida Supreme Court’s recount decision in the 2000 Presidential election between Governor George W. Bush and Vice President Al Gore.\textsuperscript{194} One concern was the Florida Supreme Court’s decision to recount only “undervotes”\textsuperscript{195} but not “overvotes.”\textsuperscript{196} A second concern was with the differing ways Florida counties chose to count the undervotes, some viewing an indentation as being sufficient to determine voter intent, while other counties required the card to be punched through.\textsuperscript{197} All of these issues were critical because under the original certified

\begin{itemize}
  \item \textsuperscript{189} \textit{Hibbs}, 538 U.S. at 736.
  \item \textsuperscript{190} \textit{Lane}, 541 U.S. at 533–34.
  \item \textsuperscript{191} \textit{Hibbs}, 538 U.S. at 744 (Kennedy, J., joined by Scalia & Thomas, JJ., dissenting); \textit{Lane}, 541 U.S. at 538 (Rehnquist, C.J., joined by Kennedy & Thomas, JJ., dissenting). Justice Scalia also dissented in \textit{Lane}. \textit{Id.} at 558 (Scalia, J., dissenting).
  \item \textsuperscript{192} Coleman v. Ct. of App. of Md., 132 S. Ct. 1327, 1332 (2012).
  \item \textsuperscript{193} \textit{Bush}, 531 U.S. 98 (2000).
  \item \textsuperscript{194} \textit{Id.} at 100–03.
  \item \textsuperscript{195} “Undervotes” can occur if the machine does not register a vote, as would occur if the voter had punched the punch card but either did not pierce the card at all but only left an indentation, or punched the card but did not dislodge the chad. \textit{Id.} at 129.
  \item \textsuperscript{196} \textit{Id.} at 100. “Overvotes” can occur where the machine indicates more than one vote had been cast, as would occur for a voter marking a candidate’s name, but then also writing in that candidate’s name on the write-in line. \textit{Id.} at 107–08.
  \item \textsuperscript{197} \textit{Id.} at 106–07.
\end{itemize}
result, Bush’s lead over Gore in Florida was just 537 votes, with Bush having received 2,912,790 votes and Gore 2,912,253.\textsuperscript{198}

Faced with these facts, seven Justices agreed that there were equal protection problems with the recount ordered by the Florida Supreme Court.\textsuperscript{199} Five of these seven Justices concluded there was no way factually for a constitutionally adequate recount to be completed in time.\textsuperscript{200} In contrast, Justices Souter and Breyer concluded that the majority should not presume that a constitutionally adequate recount could not be completed in time.\textsuperscript{201}

It should be noted that the five Justices in the majority and the four Justices in dissent disagreed on whether the Court should have taken the case at all.\textsuperscript{202} The dissenting opinions suggested that the case was either a political question, or was not yet ripe for resolution.\textsuperscript{203} As Justice Souter noted in one dissent,

\begin{quote}
If this Court had allowed the State to follow the course indicated by the opinions of its own Supreme Court, it is entirely possible that there would ultimately have been no issue requiring our review, and political tension could have worked itself out in the Congress following the procedure provided in 3 U.S.C. § 15.\textsuperscript{204}
\end{quote}

Justice Breyer noted in another dissent,

\begin{quote}
[T]he Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes. . . . [T]here is no reason to believe that federal law either foresees or requires resolution of such a political issue by this Court. Nor, for that matter, is there any reason to think that the Constitution’s Framers would have reached a different conclusion.\textsuperscript{205}
\end{quote}

\textsuperscript{198} On these issues, see generally Lynne H. Rambo, \textit{The Lawyer’s Role in Selecting the President: A Complete History of the 2000 Election}, 8 TEX. WESLEYAN L. REV. 105 (2002).

\textsuperscript{199} \textit{Bush}, 531 U.S. at 111 (per curiam) (“Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court.”); \textit{id.} at 134 (Souter, J., joined by Breyer, J. in Part III, dissenting) (“I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters’ fundamental rights.”). Justices Stevens and Ginsburg decided that these problems were not serious enough to justify a finding of a violation of the equal protection clause. \textit{id.} at 143 (Ginsburg, J., joined by Stevens, J., in Part II, dissenting).

\textsuperscript{200} \textit{id.} at 110 (“[I]t is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work.”).

\textsuperscript{201} \textit{id.} at 135 (Souter, J., joined by Breyer, J. in Part III, dissenting) (“Unlike the majority, I see no warrant for this Court to assume that Florida could not possibly comply . . . before the date set for the meeting of electors, December 18.”).

\textsuperscript{202} \textit{id.} at 129.

\textsuperscript{203} \textit{id.} at 129; \textit{id.} at 154–55 (Breyer, J., joined by Stevens & Ginsburg, J.J., dissenting).

\textsuperscript{204} \textit{id.} at 129 (Souter, J., joined by Stevens, Ginsburg, & Breyer, J.J., dissenting).

\textsuperscript{205} \textit{id.} at 154–55 (Breyer, J., joined by Stevens & Ginsburg, J.J., dissenting).
The majority per curiam opinion in *Bush v. Gore* did not directly address the issues of ripeness and political question.\(^{206}\) Justice Scalia did address, indirectly, the ripeness argument in his concurrence to the emergency stay order, which also served as a grant of a petition for certiorari in the case.\(^{207}\) He concluded that “irreparable harm” would result to “petitioner Bush, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election.”\(^{208}\) One can ask, however, whether it was ripe to conclude there would be a “cloud” on the “legitimacy” of the election if Congress were simply allowed to follow the constitutionally proscribed procedures for counting electoral votes without prior court intervention. In fact, based upon a later media-backed recount of the votes in Florida, it appears that Bush would have remained ahead even if the Florida recount had proceeded.\(^{209}\) At that point, Al Gore would have conceded the election, and there would have been no need for a Court decision. The five conservative Justices were uncertain that Bush would win the election, and may have wished to decide the case and ensure he did.

Regarding the political question issue, it can be noted that there are judicially manageable standards under the Equal Protection Clause to govern resolution of this dispute and require uniformity in counting votes, using the *Baker v. Carr* factors to determine if an issue is a political question.\(^{210}\) In contrast, while the Court routinely resolves election disputes in the context of equal protection violations, the issue regarding electors is unique because the Constitution explicitly commits to Congress the responsibility of counting electoral votes\(^ {211}\) and commits to state legislatures exclusive power to create methods for selecting electors.\(^{212}\) Thus, under these provisions, there are “textually demonstrable constitutional commitments” to “coordinate political departments,” and it could reasonably be regarded as a political question under *Baker v. Carr*.\(^{213}\)

Election challenges found little success in the wake of *Bush v. Gore*. *Bush v. Gore* was decided under rational basis review.\(^{214}\) Seven of the nine Justices held the recount authorized by the Florida Supreme Court unconstitutional under

\(^{206}\) *Id.*


\(^{208}\) *Id.*


\(^{210}\) See 369 U.S. 186, 217 (1962).

\(^{211}\) U.S. CONST. amend. XII.

\(^{212}\) U.S. CONST. art. II, § 1, cl. 2; *see generally* Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 76–78 (2000) (”[I]n such Manner as the Legislature thereof may direct” means that this exclusive legislative power cannot be circumscribed by the Florida Constitution.); *cf.* Nixon v. United States, 506 U.S. 224 (1993) (”[S]ole” power of Senate to try impeachments means Senate decisions regarding impeachment are political questions not subject to Court review.).


rational basis review, because it was so flawed in design that it was irrational in terms of an attempt to count votes equally. Most other election inequalities, however, such as optical scan machines in some counties of a state (more reliable but more costly), but punch cards in others (more prone to error but cheaper), or differences in the amount of voting booths provided (so that in poor areas the lines typically are longer because not as many machines are provided), may be unfair, but are not likely to be viewed as irrational under a rational basis test. This is so particularly because considerations of administrative costs constitute a legitimate government interest under rational basis scrutiny to justify such disparities. For this reason, Bush v. Gore has not been viewed as very relevant in other election cases. Recent election cases have typically involved electronic voting equipment such as digital recording electronic devices (DREs). The main concern here is security of the machines from hackers and accurate electronic counting of the votes.

C. District of Columbia v. Heller

In District of Columbia v. Heller, the Court held 5–4 that the Second Amendment protects an individual’s right to keep and bear arms, and that the District of Columbia’s prohibition on possessing usable handguns in the home violated that right. In Justice Scalia’s opinion, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito, Justice Scalia acknowledged a principal purpose of the Second Amendment was to ensure that citizens had a right to own guns in order to participate in organized state militias, a purpose not relevant to participation in state militias today. However, while Justice Scalia noted that the Framers’ focus in the Second Amendment may have been the participation in militias, they also contemplated that individuals would use guns for self-protection. That right to own guns for self-protection still applied
today. Justice Scalia stated that the Court’s opinion should not cast doubt on longstanding laws such as those prohibiting felons or the mentally ill from possessing firearms; forbidding the carrying of firearms in sensitive places such as schools and government buildings; or imposing conditions and qualifications on the commercial sale of arms. Justice Scalia also noted that the right only extends to the “sorts of weapons” that were “in common use” at the time the Second Amendment was adopted. Thus, the right does not protect “dangerous and unusual weapons.”

Justice Stevens, dissenting with Justices Souter, Ginsburg, and Breyer, said that the text of the Second Amendment, the history of its adoption, and United States v. Miller, all indicate that the Amendment protects the right to keep and bear arms for military purposes, but does not limit the legislature’s power to regulate the nonmilitary use and ownership of arms. The Court’s precedents, and the legislative history surrounding the adoption of the Second Amendment, support this view. Normally, Justice Kennedy would have relied on such sources and joined Justice Stevens’ opinion. In this case, however, Justice Kennedy joined the conservative Justices to uphold an individual’s right to own guns under the Second Amendment.

Heller will surely lead to legislative reexamination of gun-control laws and lawsuits challenging existing bans. The decision in District of Columbia v. Heller may have limited impact, however, except for rendering unconstitutional very intrusive regulations regarding owning handguns or rifles. Only a few cities have ordinances similar to the District of Columbia, and it is unclear how many those statutes are enforced in practice. Since Heller, the Eighth Circuit Court of Appeals has held in United States v. Fincher that machine guns and sawed-off shotguns were not covered by Heller because they are “dangerous and unusual weapons.” The Ninth Circuit Court of Appeals, in Nordyke v. King, held that a county ordinance barring guns on county property survived a Second

225. See id.
226. Id. at 626–28.
227. Id. at 627.
228. Id.
229. Id. at 636–40 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting). Reflecting a similar 5–4 split, the Court held in McDonald v. City of Chicago, 130 S. Ct. 3020 (2010), that the Second Amendment is incorporated into the Fourteenth Amendment. Id. at 3088 (Stevens, J., dissenting); id. at 3120 (Breyer, J., joined by Ginsburg & Sotomayor, JJ., dissenting).
230. See, e.g., Heller, 554 U.S. at 637. “The text of the Amendment, its history, and our decision in United States v. Miller . . . provide a clear answer to that question.” Id. (citation omitted).
232. Heller, 554 U.S. at 572 (stating that Justice Kennedy joined the opinion of the Court).
233. 538 F.3d 868, 886 (8th Cir. 2008).
Amendment challenge by gun show organizers seeking to set up a booth at local fairgrounds.  

D. Citizens United v. Federal Election Commission

In *Citizens United v. Federal Election Commission*, the Court considered the constitutionality of 2 U.S.C. § 441b, prohibiting 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. The Government advanced three interests which it said were compelling: distorting effects of large aggregations of wealth, an anti-corruption interest, and a shareholder protection interest. In his opinion for a 5–4 Court, Justice Kennedy rejected each one. He said that First Amendment protection does not depend on the speaker’s financial ability to engage in public discourse; independent expenditures do not give rise to corruption or the appearance of corruption; and if the shareholder protection theory were adopted, it would give the Government power to restrict the political speech of media corporations and, furthermore, there is little evidence of abuse that cannot be protected by shareholders through the processes of corporation democracy. Justice Kennedy stated the Court did not reach the question of whether the government has a compelling interest in preventing foreign corporations from influencing our nation’s political process. In striking down 2 U.S.C. § 441b, Justice Kennedy overruled *Austin v. Michigan Chamber of Commerce* and part of *McConnell v. Federal Election Commission*. The statute also included a disclaimer requirement indicating who is responsible for the content of any advertisement, and a disclosure requirement for any person spending more than
$10,000 on electioneering communications within a calendar year.\(^{245}\) Justice Kennedy found no constitutional impediment to applying those requirements to a movie broadcast via video-on-demand, as there had been no showing that these requirements would chill speech or expression.\(^{246}\)

Justice Kennedy has consistently adopted the conservative free speech position in campaign finance cases. For example, in Davis v. Federal Election Commission, a 5–4 Court invalidated a “Millionaire’s Amendment” to campaign financing laws.\(^{247}\) The “Millionaire’s Amendment” allowed a candidate to receive treble the normal limit on individual contributions and unlimited party expenditures if the other candidate is regarded as self-financing because of spending more than $350,000 of personal funds.\(^{248}\) Since that provision was invalidated, so also were special disclosure requirements that were to be used in calculating self-financing expenditures.\(^{249}\) Justice Stevens, dissenting with Justices Souter, Ginsburg, and Breyer, said the Amendment does not deprive the millionaire of any speech; it merely assisted the opponent of a self-financed candidate to make his voice heard.\(^{250}\)

In Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett, a 5–4 Court ruled unconstitutional a law allowing candidates for state office who accept public financing to receive roughly one dollar for every dollar spent by an opposing, privately financed candidate, once a set spending limit is reached.\(^{251}\) The Court held that there was no compelling interest to equalize electoral funding.\(^{252}\) As in Davis, the four more liberal Justices dissented.\(^{253}\)

\(^{245}\) Citizens United, 130 S. Ct. at 914.

\(^{246}\) Id. at 913–14. Justice Thomas joined all but the final part of Justice Kennedy’s opinion, where the Court upheld the disclaimer and disclosure requirements. Id. at 916. Justice Thomas pointed to a number of examples wherein persons whose names and addresses were disclosed, as required by law, were subjected to attacks and were left subject to retaliation from elected officials. Id. at 980–82 (Thomas, J., concurring in part and dissenting in part). He said that persons should have a right to anonymous speech. Id. Four other Justices dissented in the case. Id. at 929 (Stevens, J., joined by Ginsburg, Breyer & Sotomayor, JJ., dissenting). In his dissent, Justice Stevens concluded that there was plenty of evidence supporting the reasonableness of Congress’s concern to deal with corruption, distortion, and shareholder protection. Justice Stevens said the fact that corporations have no consciences, no beliefs, no feelings, and no thoughts or desires is a reminder that they themselves are not “We the People” by whom and for whom our Constitution was established. Id. at 960–79. He concluded that the majority view is contrary to the long recognition by the people of the need to prevent corporations from undermining self-government. Id. at 948–60. These four Justices did agree with Justice Kennedy that the disclaimer and disclosure requirements were constitutional. Id. at 979.


\(^{248}\) Id. at 729.

\(^{249}\) Id. at 740–44.

\(^{250}\) Id. at 749–57 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting)


\(^{252}\) Id. at 2828.

\(^{253}\) Id. at 2829 (Kagan, J., joined by Ginsburg, Breyer & Sotomayor, JJ., dissenting) (compelling interest to counteract corruption of large campaign contributions).
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Justice Kennedy joined the four conservative Justices in Federal Election Commission v. Wisconsin Right to Life, Inc. 254 Chief Justice Roberts and Justice Alito acknowledged that McConnell upheld a ban on “express advocacy” by corporations within sixty days of a general election, or thirty days of a primary election, because there is a compelling interest in regulating “express advocacy” by corporations whose economic power could otherwise distort the election process. 255 The Justices, however, held that McConnell did not control because the ads at issue in Wisconsin Right to Life, Inc. were more properly viewed as “issue ads” rather than “express advocacy” for a candidate. 256 In adopting a test to distinguish “express advocacy” from “issue advocacy,” Chief Justice Roberts adopted a test by which most ads would be “issue ads,” since the “test affords protection unless an ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” and any “tie is resolved in favor of protecting speech.” 257 Justices Scalia, Kennedy, and Thomas adhered to their view that McConnell was wrongly decided, and even “express advocacy” should be permitted by corporations throughout the election cycle. 258 Given Chief Justice Roberts’ test, most ads will be viewed as “issue ads” anyway. 259 Continued skepticism toward campaign finance laws appears in lower federal court cases. 260

E. Possible Future Cases

1. Healthcare

Under current Commerce Clause doctrine, the power of Congress to pass the individual mandate under the Patient Protection and Affordable Care Act (Obamacare) should be clear. Under modern doctrine, two issues must be addressed: (1) does the regulation deal with commerce; and, if so, (2) does the

255. Id. at 455–57.
256. Id. at 456–57.
257. Id. at 474–82 & n.7 (Roberts, C.J., announcing judgment of the Court, joined by Alito, J., with respect to Parts III and IV).
258. Id. at 483–84 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in part and concurring in the judgment).
259. Justices Stevens, Souter, Ginsburg, and Breyer would have upheld the regulations on the ground that the same compelling interest concerned with distortion of the election process by corporations with economic power applies to both “express advocacy” ads and most “issue ads.” Id. at 504–08 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).
260. See Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684 (9th Cir. 2010) (municipal cap on acceptance of contributions by any “person” that makes independent expenditures supporting or opposing a candidate unconstitutional); Dallman v. Ritter, 225 P.3d 610 (Colo. 2010) (voter-approved amendment to the Colorado Constitution that prohibited political contributions from holders of no-bid contracts with state entities unconstitutional).
regulation deal with commerce among the states. Under United States v. Lopez, a 5–4 decision by the conservative Justices, including Justice Kennedy, there are three ways to find such commerce among the states: (1) use of the channels of interstate commerce and protecting the instrumentalities of interstate commerce (Caminetti);261 (2) non-interstate activities if they threaten the instrumentalities of interstate commerce, or persons or things in interstate commerce (The Shreveport Rate Cases);262 or (3) commercial activities that have a substantial effect on interstate commerce (Wickard).263

Certainly, the medical insurance industry market is a commercial market that has a substantial effect on interstate commerce under Wickard. Even if one focuses solely on the individual mandate part of the Act, the cumulative economic effect resulting from a person choosing not to buy insurance is estimated at $1,000 a year.264 Additionally, even if the individual mandate is viewed as mandating commerce, not regulating existing commerce, Congress must have the ability to regulate both because, in the language of The Shreveport Rate Cases, where

the government of the one [here, the interstate medical insurance market] involves control of the other [here, regulating persons currently uninsured], it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the Nation, would be supreme in the national field.265

This has been true since Gibbons v. Ogden, where the Court held that to permit Congress to have national solutions to national problems, Congress can regulate whenever the commercial activity applies “to all the external concerns of the nation, and to those internal concerns which affect the States generally.”266 From the nation’s beginning, Congress has had the power to compel individuals to purchase things to advance important public policy purposes.267 For example, in the Second Militia Act of 1792, Congress required not only every able-bodied white male between the age of eighteen to forty-five to register for service in a

265. The Shreveport Rate Cases, 234 U.S. at 351–52.
266. 22 U.S. (9 Wheat.) 1, 195 (1824).
267. See, e.g., Militia Act of 1792, ch. 33, 1 Stat. 271 (1792).
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State Militia, but also required each such individual to purchase a musket, ammunition, shoulder-carrying case, and other implements to outfit himself. 268

For these reasons, the real issue in the Patient Protection and Affordable Care Act should not be the power to regulate, 269 but whether the individual mandate provision violates Due Process. 270 While requiring every person to “buy and consume broccoli,” a concern of a district court in Florida, 271 might violate due process, as not being rationally related to a legitimate government interest, requiring everyone to buy health insurance to avoid a problem of free-riders is rational. 272

Even conservative Justices have acknowledged these Commerce Clause principles in other recent cases. For example, in 2005 in Gonzales v. Raich, a 6–3 Court upheld application of the federal Controlled Substances Act (CSA) to intrastate growers and users of marijuana for medical purposes, which were allowed under provisions of California law. 273 The majority opinion by Justice Stevens, joined by Justices Kennedy, Souter, Ginsburg, and Breyer, reasoned, as in Wickard v. Filburn, that Congress could find that failure to regulate this class of activity could result, in the aggregate, in a substantial effect on the broad market for illegal drugs that the CSA regulated. 274 Congress acted rationally in determining that none of the characteristics making up the purported class of marijuana users compelled an exemption from CSA. 275 Justice Scalia, concurring, said that in addition to a power to regulate activities having a substantial effect on interstate commerce, Congress has power under The Shreveport Rate Cases to make its regulations of interstate commerce effective. 276 Justice Scalia noted that “Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.” 277

268. Id.
269. See Thomas More Law Ctr. v. Obama, 651 F.3d 529 (6th Cir. 2011) (holding the law is constitutional).
271. See id.
272. See Florida ex rel. Atty. Gen. v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011) (Marcus, J., concurring in part and dissenting in part) (“Congress rationally found that the individual mandate would address the powerful economic problems associated with cost shifting from the uninsured to the insured and to health care providers . . . .”).
274. Id. at 32–33.
275. Id. at 14–33.
276. Id. at 38.
277. Id. at 33–42 (Scalia, J., concurring in the judgment). In Gonzales v. Raich, Justice O’Connor was joined in dissent by Chief Justice Rehnquist and Justice Thomas. Id. at 42. Justice O’Connor concluded that “[t]he homegrown cultivation and personal possession and use of marijuana for medicinal purposes has no apparent commercial character.” Id. at 50. She noted that even Wickard did not specifically approve of federal control over small-scale, noncommercial wheat farming, since the federal law exempted the planting of less
Similarly, the Court adopted a broad approach to federal legislative power in *United States v. Comstock*.

In *Comstock*, adopting a minimum rationality review approach, the Court upheld 18 U.S.C. § 4248, which authorizes the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released, as long as the original confinement was within Congress’s power, either authorized by express constitutional text, such as for “counterfeiting” or “treason,” or a criminal law in furtherance of some other power, such as mail fraud statutes as related to the post office power. The Court also indicated that the same minimum rationality review governs the Commerce Clause issue of whether Congress could rationally think some activity has a substantial effect on interstate commerce.

Despite these decisions, Chief Justice Roberts and Justices Scalia, Kennedy, and Alito, indicated real concern at oral argument with whether the individual mandate provision of the Patient Protection and Affordable Care Act was constitutional. Justice Kennedy did acknowledge that he saw the connection between persons not buying insurance and that effect on other individuals, but, as it turned out, that was not enough for Justice Kennedy to vote to uphold the Act in *National Federation of Independent Business v. Sebelius*.

than six tons of wheat and, when the wheat was harvested, federal law exempted plantings of less than six acres. Id. at 50–51. Even if the activity was commercial in some sense, Justice O’Connor concluded, “There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable [sic], let alone substantial, impact on the national illicit drug market—or otherwise to threaten the CSA regime.” Id. at 53 (O’Connor, J., joined by Rehnquist, C.J., and Thomas, J., as to all but Part III, dissenting).

278. 130 S. Ct. 1949 (2010).
279. Id. at 1957–65.
280. Id. at 1956–57. Concurring in the judgment, Justices Kennedy and Alito indicated their belief that the Necessary and Proper Clause analysis, and the Commerce Clause analysis, may well require more justification than a mere Equal Protection rational relationship test. Id. at 1966–68 (Kennedy, J., concurring in the judgment); id. at 1968–69 (Alito, J., concurring in the judgment). In dissent, Justice Thomas, joined by Justice Scalia, was more forceful in rejecting the majority’s deferential Necessary and Proper Clause analysis. Id. at 1975–77 (Thomas, J., joined by Scalia, J., in all but Part III.A.1.b, dissenting). However, the five-Justice majority of Chief Justice Roberts and the four liberal instrumentalists, Justices Stevens, Ginsburg, Breyer, and Sotomayor, adopted this view.


282. Id. at 104 (Kennedy, J., speaking) (“[T]he young person who is uninsured is uniquely proximately very close to affecting the rates of insurance and the cost of providing medical care in a way that is not true in other industries.”).

283. 132 S. Ct. 2566, 2643 (2012) (Kennedy, J. dissenting). Following the initial drafting of this Article, the Supreme Court decided *National Federation of Independent Business v. Sebelius*. Id. In *Sebelius*, a five-Justice majority voted to uphold the constitutionality of the individual mandate provision of the Patient Protection and Affordable Care Act. Id. at 2578. Four Justices would have upheld the mandate under the Commerce Clause, consistent with views expressed in this Article. Id. at 2609. In their view, the insurance mandate was a regulation of commerce, since at some point in their lives every individual will need health care, and thus individuals by being alive should be viewed as participating in the health care market. Id. (Ginsburg, J., joined by Sotomayor, J., and joined as to Parts I, II, III, and IV by Breyer & Kagan, J.J., concurring in part, concurring in the judgment in part, and dissenting in part). In contrast, Chief Justice Roberts, in a view shared by the other four Justices on the Court, including Justice Kennedy, concluded the mandate was not a
2. **Affirmative Action**

In *Grutter v. Bollinger*, a 5–4 Court, per Justice O’Connor, concluded that the University of Michigan’s law school system of individualized consideration of applicants, taking race into account as a factor, satisfied strict scrutiny, consistent with Justice Powell’s opinion in *Bakke*. On the other hand, with Justice O’Connor switching sides, a 5–4 Court in *Gratz v. Bollinger* held unconstitutional University of Michigan’s undergraduate system of giving the same extra points to every member of a minority group without regard to how much that individual had been the victim of prior discrimination. It was not the least burdensome effective alternative available to ensure the undergraduate program received the educational benefits flowing from a racially diverse student body.

With the replacement of Justice O’Connor by Justice Alito in 2006, Justice Kennedy will likely become the critical swing vote on race-based affirmative action cases, including one the Court will hear this term. In his dissent in *Grutter*, Justice Kennedy indicated less willingness to defer to government decisions than Justice O’Connor, and a greater willingness to conclude that programs in practice are adopting more burdensome kinds of quota systems, rather than more permissible kinds of factor analyses. Justice Kennedy applied a similar hard look to the race-based affirmation action programs in *Parents Involved in Community Schools v. Seattle School District No. 1*. While

“regulation” of commerce, but rather “mandating” commerce, since it required individuals to purchase insurance. *Id.* at 2586–93. Since the text of the Commerce Clause only gives Congress the power “to Regulate Commerce,” these five Justices concluded that the mandate could not be authorized by the Commerce Clause. *Id.* (Roberts, C.J., announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, and III-C); *id.* at 2642–43 (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting). However, Chief Justice Roberts then adopted the judicial restraint maxim that when there are two possible interpretations, the court should interpret the statute in a way that is constitutional. *Id.* at 2592 (citing Parsons v. Bedford, 7 L. Ed. 732 (1830); Blodgett v. Holden, 274 U.S. 142, 148 (1927) (concurring opinion)). Applying that maxim, Chief Justice Roberts concluded that the mandate could be viewed as a tax on individuals who do not have health insurance, since “functionally” the provision operates as a tax, is collected by the Internal Revenue Service, and the amount of the payment varies depending on a person’s income, just like a tax. *Id.* at 2593–96. Thus, the mandate was constitutional under Congress’s broad power to tax. *Id.* Thus, as with certain of Justice Kennedy’s more conservative positions in the Establishment Clause area which have not been adopted by a majority of the Court, see infra text accompanying notes 345–73, Justice Kennedy’s more conservative position was not adopted here, and thus did not become law.


285. 539 U.S. 244, 270–76 (2003); *id.* at 276–80 (O’Connor, J., concurring, joined by Breyer, J., concurring only in Justice O’Connor’s opinion and in the judgment).

286. *Id.* at 271–72.

287. Fisher v. Univ. of Tex., 644 F.3d 301 (5th Cir. 2011), rehearing en banc denied, 644 F.3d 301 (5th Cir. 2011), cert. granted, 132 S. Ct. 1536 (2012).


acknowledging that diversity in a student body is a compelling interest, Justice Kennedy concluded that the affirmative action programs in these cases either did not clearly indicate whether they were using race: (1) as a factor, which would be permissible under *Grutter v. Bollinger*; (2) as an absolute point preference, quota, or set-aside, which would be impermissible under *Gratz v. Bollinger*; or (3) in a clearly impermissible manner, with a blunt “white/non-white” classification system.\(^{290}\)

The holding in *Seattle School District No. 1* indicates the wisdom of moving to socio-economic affirmative action. Socio-economic affirmative action will be tested only by minimum rationality review, rather than the strict scrutiny given to race-based affirmative action. Even Chief Justice Roberts’ four-Justice plurality in *Seattle School District No. 1* indicated a willingness to consider a broader concept of socio-economic diversity based upon “‘many possible bases for diversity admissions, [such as] admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields.’”\(^{291}\) In a case this term involving use of race as a factor in the University of Texas undergraduate admissions process, Justice Kennedy may again apply a hard look and strike down the affirmative action program.\(^{292}\)

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### IV. JUSTICE KENNEDY ON THE RELIGION CLAUSES

#### A. Establishment Clause Analysis

##### 1. General Principles

Under the Establishment Clause, four different tests have been used to find an “establishment of religion.” The four tests are: (1) the so-called *Lemon* Test, which asks whether the government action has a sole purpose to advance religion, or a principal or primary effect to advance religion, or creates an excessive entanglement between church and state;\(^{293}\) (2) whether an objective

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\(^{290}\). *Id.* at 783–85 (Kennedy, J., concurring in part and concurring in the judgment). Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, did not specifically conclude, as did Justice Kennedy, that racial diversity in educational settings was a compelling interest. *Id.* at 725–32 (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., as to Part III(B)); *id.* at 783–84 (Kennedy, J., concurring in part and dissenting in part). They avoided that issue by agreeing with Justice Kennedy that the programs here were not the least restrictive effective alternatives under strict scrutiny review. *Id.* at 732–36 (Roberts, C.J., opinion for the Court, joined by Scalia, Kennedy, Thomas & Alito, JJ.).

\(^{291}\). *Id.* at 722 (citing *Grutter*, 539 U.S. at 338).


observer would think the government action was an endorsement of religion; 294 (3) whether the government action is coercing or proselytizing religion; 295 and (4) whether the government action is an unreasonable accommodation of religion given our Nation’s history and traditions. 296

The Lemon test is still supported by the liberal instrumentalist Justices, as the precedents decided under the Lemon test reflect the liberal policy of a strong separation of church and state. 297 Justice O’Connor advocated replacing the Lemon test with an “endorsement” test, which Justice Souter was willing to follow. 298 Justice Kennedy has focused more on the “coercion” or “proselytizing” of religion. 299 Chief Justice Rehnquist and Justices Scalia and Thomas have wanted the analysis to focus on specific historical examples of accommodation between church and state, both at the time of ratification and examples of our nation’s history since that time. 300 As conservative Justices, Chief Justice Roberts and Justice Alito will likely take that approach.

In 1971, in Lemon v. Kurtzman, the Court analyzed Establishment Clause doctrine in light of three concerns: (1) the law must have a secular legislative purpose; (2) the law’s principal or primary effect must be one that neither advances nor inhibits religion; and (3) the law must not foster an excessive government entanglement with religion. 301 The Lemon test, particularly as applied by liberal instrumentalist Justices, has been used to support sensitivity to religious diversity and the inclusion of all persons of different faiths or non-believers as equal citizens in American society. 302 More broadly, the Lemon test supports a pluralistic democracy by serving as

a prophylactic measure that (1) protects religious liberty and autonomy, including the protection of taxpayers from being forced to support religious ideologies to which they are opposed; (2) stands for equal citizenship without regard to religion, . . . ; (3) protects against the

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297. See infra text accompanying notes 301–20.
298. See infra text accompanying notes 340–43.
299. See infra text accompanying notes 327–39.
300. See, e.g., Van Orden, 545 U.S. at 692 (Scalia, J., concurring) (“I would prefer . . . [doctrine] that is in accord with our Nation’s past and present practices, and that can be consistently applied—the central relevant feature of which is that there is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.”).
302. See generally Lisa Shaw Roy, The Establishment Clause and the Concept of Inclusion, 83 OR. L. REV. 1 (2004). “[T]here is a] trend within a particular strand of the Supreme Court’s Establishment Clause jurisprudence that has become increasingly concerned with the religious minority’s sense of inclusion in a given religious message.” Id. (footnote omitted).
destabilizing influence of having the polity divided along religious lines; (4) promotes political community; (5) safeguards the autonomy of the state to protect the public interest; (6) shelters churches from the corrupting influences of the state; and (7) promotes religion in the private sphere.\footnote{303}{Steven H. Shiffrin, \textit{The Pluralistic Foundations of the Religion Clauses}, 90 \textsc{Cornell L. Rev.} 9, 37 (2004).}

As the Court has applied the \textit{Lemon} test, it has come under attack as not reflecting, in practice, principled or predictable doctrine. For example, when considering the issue of legislative “purpose,” the Court concluded in \textit{Engel v. Vitale} that beginning each public school day with a prayer had no secular purpose.\footnote{304}{370 U.S. 421, 435 (1962).} The Court noted, “It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look for religious guidance.”\footnote{305}{\textit{Id}.} Similarly, in \textit{Stone v. Graham}, the Court held that a statute requiring the posting of the Ten Commandments on the walls of every public-school classroom had only a religious purpose.\footnote{306}{449 U.S. 39, 41 (1980).} At issue in \textit{Edwards v. Aguillard} was the constitutionality of Louisiana’s Creationism Act forbidding the teaching of the theory of evolution in public elementary and secondary schools unless accompanied by instruction in the theory of “creation science.”\footnote{307}{482 U.S. 578, 594 (1987).} The Court found the Act unconstitutional despite Louisiana’s argument they were merely supporting a diversity of viewpoints because “the primary purpose of the Creationism Act is to endorse a particular religious doctrine.”\footnote{308}{\textit{Id}.}

On the other hand, the Court held in \textit{McGowan v. Maryland} that a state law requiring businesses to be closed on Sunday, while having “strongly religious origin[s]” and thus accommodating religion, was nonetheless permissible because it had a secular purpose of providing “a uniform day of rest for all citizens.”\footnote{309}{366 U.S. 420, 433, 445 (1961).} In \textit{Gillette v. United States}, the Court held that creating an exception to draft laws for conscientious objectors did not violate the Establishment Clause because the law was supported by the secular, pragmatic consideration of the difficulty of converting “a sincere conscientious objector into an effective fighting man.”\footnote{310}{401 U.S. 437, 452–53 (1971).} In \textit{Rosenberger v. Rector and Visitors of the University of Virginia}, the Court permitted a university to impose on students a fee to support a
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diversity of viewpoints, including religious viewpoints, because excluding religious viewpoints would be “hostile” to religion and would deny individuals free-speech rights.\textsuperscript{311} In addition, in a number of cases involving the Free Exercise Clause, the Court has held that states must accommodate the beliefs of religious citizens by exempting them from generally applicable regulations and that is not an unconstitutional legislative purpose.\textsuperscript{312} In some cases, public schools used the concern of a possible violation of the Establishment Clause as a justification for refusing to allow groups with a religious perspective to use school facilities.\textsuperscript{313} However, since Justice Kennedy has joined the Court, that justification has not been successfully invoked, because the Court has concluded that denial of equal access to school facilities violated the free-speech rights of such groups.\textsuperscript{314}

There are inconsistencies throughout the Court’s decisions regarding the second “principal or primary effect” prong of \textit{Lemon}. For example, the Court has found a primary effect to advance religion in providing funds to repair “physical facilities” at a private religious school,\textsuperscript{315} but only an incidental effect where funds were provided to build “secular buildings” on a religious campus.\textsuperscript{316} Additionally, the Court found a primary effect to advance religion by providing loans of “instructional equipment and materials” to private schools,\textsuperscript{317} but only an

\textsuperscript{311} 515 U.S. 819, 842–46 (1995).

\textsuperscript{312} See, e.g., Thomas v. Review Bd., Ind. Emp’t Sec. Div., 450 U.S. 707, 716–20 (1981) (stating unemployment compensation benefits cannot be denied to claimant, who terminated his job because his religious beliefs forbade participation in production of armaments); Wisconsin v. Yoder, 406 U.S. 205, 213–19 (1972) (finding it is unconstitutional to apply Wisconsin’s compulsory education law to Amish parents who amply supported their claim that enforcement of the compulsory formal education requirement after the eighth grade would gravely endanger the free exercise of their religious belief); Sherbert v. Verner, 374 U.S. 398, 403–09 (1963) (holding it unconstitutional to apply eligibility provisions of unemployment compensation statute to deny benefits to a Seventh-Day Adventist, who had refused employment based on her religious beliefs).


\textsuperscript{314} For example, in 1993, in \textit{Lamb’s Chapel v. Center Moriches Union Free School District}, 508 U.S. 384, 392–97 (1993), the Court held that a school district violated the First Amendment freedom of speech when it excluded a bible club from presenting films in a public forum opened by the school. \textit{Id}. The school had denied access because the films’ discussion of family values was from a religious perspective. \textit{Id}. For the Court, Justice White wrote that allowing use of school facilities for bible study would not have been an establishment under the three-part \textit{Lemon} test or constitute government endorsement of religion. \textit{Id}. Justice Kennedy, concurred in the judgment, but indicated his disapproval of the endorsement test. \textit{Id}. at 397 (Kennedy, J., concurring in part and concurring in the judgment). Consistent with \textit{Lamb’s Chapel}, the Court held in \textit{Good News Club v. Milford Central School}, 533 U.S. 98 (2001), that a public school violated the free speech rights of a religious club that was excluded from meeting after hours on school premises. \textit{Id}. Justice Thomas said that if a public agency has opened a limited public forum, as was done here, its power to restrict speech is limited in two ways: it may not discriminate against speech on the basis of viewpoint and its restriction must be reasonable in light of the purpose served by the forum. \textit{Id}. at 106–20. The exclusion here, as in \textit{Lamb’s Chapel}, constituted viewpoint discrimination. \textit{Id}.


\textsuperscript{316} Tilton v. Richardson, 403 U.S. 672, 678–89 (1971).

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incidental effect to provide “secular textbooks” to students. The Court also found a primary effect to advance religion to provide tuition grants to parents of children attending private schools, but only an incidental effect where tax benefits for textbooks, tuition, and transportation were granted to parents for children in public or private schools, despite the fact that parents of children in private schools would get most of the benefit, since private tuition is the main part of the expense, and ninety-six percent of children attending private schools attended religious schools.

Regarding the third “excessive entanglement” prong of Lemon, an attempt to police the risk that religious messages will be conveyed in a school program funded by public funds has constituted excessive entanglement of religion. At the same time, no excessive entanglement existed in annual state grants to private colleges, including religiously affiliated institutions, although four Justices dissenting would have found excessive entanglement from dependency on grant money. Recordkeeping and disclosure requirements associated with routine collection of sales taxes on sales of religious materials was held to create no excessive entanglement, while recordkeeping and disclosure requirements on charities soliciting funds in a city, where disclosure included names, salaries, and criminal histories of solicitors, and reports of funds collected, was held to constitute excessive entanglement when applied to religious organizations.

2. Coercion or Proselytizing in the School Context

In 1980, before Justice Kennedy joined the Supreme Court, the Court held in Stone v. Graham that the display of a copy of the Ten Commandments on the walls of public classrooms violated the Establishment Clause as its sole purpose was to advance religion. The decision in Stone was per curiam and summarily reached without full briefing and argument.

323. Mitchell, 530 U.S. at 808.
326. Id. at 40–43. Four Justices dissented in the case. Chief Justice Burger and Justice Blackmun indicated they would grant certiorari and give the case plenary consideration. Id. at 43 (Burger, C.J., joined by Blackmun, J., dissenting). Justice Stewart also dissented from the summary reversal, indicating his view that, so
Once Justice Kennedy joined the Court in 1992, his vote controlled in *Lee v. Weisman.* In *Weisman*, the 5–4 Court, per Justice Kennedy, held that a public school could not offer an invocation or benediction in a graduation exercise because this exerted a subtle coercive pressure on students to participate in, or appear to participate in, a religious exercise, given the fact that presence at graduation is, in a practical sense, obligatory. Justice Kennedy explained that a “state-created orthodoxy puts at grave risk the freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.”

Reflecting a pragmatic approach, Justice Kennedy indicated that literal legal coercion was not required if in-fact coercive pressure existed. For Justice Kennedy, the case was distinguishable from *Marsh v. Chambers,* which upheld prayers at legislative sessions, because any influence is much less in that setting. In legislative sessions, any benediction is directed to individuals as part of discharging their public jobs. Those individuals already have well-formed views. The benedictions were not part of a state-sponsored educational program, as in *Weisman,* with the state coercing or proselytizing on behalf of religion. This focus on “coercion” as the touchstone of Establishment Clause analysis is consistent with an emphasis on legislative and executive practice, which, during the first 150 years of the Nation’s history, was predominantly concerned with: “(1) institutional mingling between government and religion, (2) direct governmental support for a particular religion, (3) special privileges for a particular religion, or (4) coercion of religious belief, including the punishing of non-adherents.”

An indication of how close the issue of “coercion” is in *Weisman* is the fact that, according to Justice Blackmun’s private court papers (made public in 2004), Justice Kennedy initially voted in the case to uphold the graduation benediction as not being coercive. Justice Kennedy was assigned to write that opinion for

far as appears, the lower courts applied correct constitutional criteria. Id. (Stewart, J., dissenting). Justice Rehnquist filed a dissent, stating that the statute did have a secular purpose of acknowledging the role the Ten Commandments has played in the social, cultural, and historical development of our Nation. Id. at 44–46 (Rehnquist, J., dissenting).

328. Id. at 586–99.
329. Id. at 592.
330. Id.
332. Id. at 783.
333. Id. at 821.
the conservative position, but in drafting the opinion he changed his mind, eventually viewing the benediction as creating too much subtle coercive pressure. Justice Kennedy thus switched his vote and wrote the opinion for himself and the other more liberal Justices on the Court. Perhaps this partly explains Justice Scalia’s bitter dissent, and his focus on why, in his view, there was no unconstitutional coercion present in Weisman.

While Justice Kennedy was the critical fifth vote in Weisman, and thus his adoption of the “coercion” test was determinative in that case, given the change in Court membership since 1992, a five-Justice majority (Justices Stevens, O’Connor, Souter, Ginsburg, and Breyer) analyzed Establishment Clause cases from 1994–2005 from the more vigorous requirement of “neutrality,” which prohibits government “endorsement” of religion. For example, in 2000, the Court considered the constitutionality of a student prayer delivered before a football game. In Santa Fe Independent School District v. Doe, the Court held 6–3 that school involvement in the process of selecting the student speaker invited and encouraged religious messages. Reflecting the endorsement theory, the Court opinion noted, “Regardless of the listener’s support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school’s seal of approval.” The Court also noted that the prayer was “coercive” under Justice Kennedy’s opinion in Lee v. Weisman.

3. Coercion or Proselytizing in Non-School Cases

In cases not involving children in school, Justice Kennedy has been less willing to find coercion, and has often voted differently than results under the endorsement approach. For example, in County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, a county displayed a crèche in the county courthouse and a city displayed a menorah in front of the City-County

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337. Id.
338. See, e.g., id.
339. 505 U.S. at 636–44 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., dissenting).
341. Id.
342. Id. at 314–15.
343. Id. at 308.
344. Id. at 312. Chief Justice Rehnquist, dissenting with Justices Scalia and Thomas, said the majority opinion “bristles with hostility to all things religious in public life.” Id. at 318 (Rehnquist, C.J., joined by Scalia & Thomas, JJ., dissenting). The Court should not declare the policy invalid on its face because it has plausible secular purposes—to solemnize the event, to promote good sportsmanship, and thereby also to promote student safety. Id. at 320. The dissent noted that “‘[i]t has not been the Court’s practice, in considering facial challenges to statutes . . . to strike them down in anticipation that particular applications may result in unconstitutional’” behavior. Id. at 319 n.1 (citing Bowen v. Kendrick, 487 U.S. 589, 612 (1988)) (alterations in original).
Building. The crèche had a banner that proclaimed, “Gloria in Excelsis Deo,” and there were no figures of Santa Clause or other decorations. The menorah was placed next to a forty-five-foot Christmas tree and a sign titled “Salute to Liberty.” Beneath this title, the sign stated: “During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom.” Justice Brennan, joined by Justices Marshall and Stevens, would have held that both displays violated the Establishment Clause. Justice Brennan stated, “I continue to believe that the display of an object that ‘retains a specifically Christian [or other] religious meaning,’ is incompatible with the separation of church and state demanded by our Constitution.

In contrast, Justices Blackmun and O’Connor drew distinctions between the crèche display and the menorah/Christmas tree/sign (MCS) display. Both viewed the crèche display as having the impermissible effect of endorsing religion, while both viewed the MCS display as not constituting government endorsement. Justice Blackmun explained his conclusion that the two displays were different by noting that the combination of the tree and the menorah communicates, not a simultaneous endorsement of both the Christian and Jewish faiths, but instead, a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition. The sign states that during the holiday season the city salutes liberty.

Justice O’Connor explained her conclusion that the two displays were different by noting that the crèche display conveys a message to non-adherents of Christianity that they are “not full members of the political community,” and a corresponding message to Christians that they are “favored members of the political community.” However, the MCS display sent a message of pluralism.

346. Id. at 580–81.
347. Id. at 581–82.
348. Id. at 582.
349. Id. at 649–50 (Brennan, J., joined by Marshall & Stevens, JJ., concurring in part and dissenting in part).
351. Id. at 581–85.
352. Id. at 598–602 (Blackmun, J., joined by Brennan, Marshall, Stevens & O’Connor, JJ.).
353. Id.
354. Id. at 616–21 (this part of Justice Blackmun’s opinion was joined by no other Justice on the Court).
355. Id. at 625 (O’Connor, J., concurring in part and concurring in the judgment).
and freedom to choose one’s own beliefs, and not a message of endorsement of Judaism or of religion in general.\footnote{356} Justice Kennedy, with Chief Justice Rehnquist and Justices White and Scalia, said that both displays were constitutional.\footnote{357} Reflecting his coercion approach to the Establishment Clause, Justice Kennedy noted that in his view, only two limiting principles should exist on accommodating religion: (1) the “government may not coerce anyone to support or participate in any religion or its exercise,”\footnote{358} and (2) “it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact ‘establishes a [state] religion or religious faith, or tends to do so.’”\footnote{359} Justice Kennedy also stated that to find unconstitutional advancement of religion here reflects “an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents.”\footnote{360}

In 2005, in \textit{McCreary County, Kentucky v. American Civil Liberties Union of Kentucky}, a five-Judge majority of Justices Stevens, O’Connor, Souter, Ginsburg, and Breyer held that posting a version of the Ten Commandments in a courthouse was unconstitutional.\footnote{361} Justice Souter’s majority opinion struck down the display based on the first prong of \textit{Lemon}, that its “primary purpose” was to advance religion.\footnote{362} Justice O’Connor, concurring, noted that the “primary purpose” behind the county’s display was relevant because, under her endorsement test, it conveyed “an unmistakable message of endorsement to the reasonable observer.”\footnote{363} Indeed, consistent with this view, in 1987 Justice O’Connor had joined with Justice Powell, concurring in \textit{Edwards v. Aguillard}, noting that to violate the Establishment Clause the “religious purpose must predominate.”\footnote{364}

In Part I of his dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, would have upheld the display of the Ten Commandments based

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\footnote{356. \textit{Id}. at 625–27, 632–37.}
\footnote{357. \textit{Id}. at 576 (Kennedy, J., joined by Rehnquist, C.J., and White & Scalia, JJ., concurring in the judgment in part and dissenting in part).}
\footnote{358. \textit{Id}. at 659.}
\footnote{359. \textit{Id}. (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)) (alteration in original).}
\footnote{360. \textit{Id}. at 655 (citations omitted).}
\footnote{361. 545 U.S. 844, 881 (2005).}
\footnote{362. \textit{Id}. at 861–65; see also ACLU of Ohio Found., Inc. v. Ashbrook, 375 F.3d 484 (6th Cir. 2004) (finding a judge’s display of a framed poster in his courtroom of the Ten Commandments, which he created himself on his computer, unconstitutional, despite being displayed across from a similarly styled framed poster of the Bill of Rights).}
\footnote{363. \textit{Id}. at 883–84 (O’Connor, J., concurring) (citing Lynch, 465 U.S. at 690).}
\footnote{364. 482 U.S. 578, 599 (1987) (Powell, J., joined by O’Connor, J., concurring). In \textit{American Civil Liberties Union of Kentucky v. McCreary County, Kentucky}, 607 F.3d 439 (6th Cir. 2010), the preliminary injunction against the display of the Ten Commandments which the Supreme Court affirmed in \textit{McCreary County, Kentucky v. American Civil Liberties Union of Kentucky}, 545 U.S. 844 (2005), was made permanent.}
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on a “customs and traditions” approach. In Part II of his dissent, which was also joined by Justice Kennedy, Justice Scalia criticized the majority for (1) shifting the focus in Lemon from “actual” government purposes to how government purposes would be “perceived” by an objective observer under an “endorsement” inquiry; and (2) modifying Lemon to hold that “primary” or “predominate” religious purposes, rather than “sole” religious purposes, can violate the first prong of the Lemon test. In Part III of his dissent, Justice Scalia, joined by Justice Kennedy, concluded that, even under the Lemon test, the display was motivated not by a religious purpose, but by a non-coercive secular acknowledgment of the role the Ten Commandments have played in our Nation’s moral and legal history.

On the same day McCreary was decided, Justice Breyer voted in Van Orden v. Perry with Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas, to uphold a plaque of the Ten Commandments that was included among sixteen other plaques on grounds in front of the Texas Capitol building. In this case, Justice Breyer concluded:

In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law) . . . . The circumstances surrounding the display’s placement on the capitol grounds and its physical setting suggest that the State itself intended the latter, nonreligious aspects of the tablets’ message to predominate. And the monument’s 40-year history on the Texas state grounds indicates that has been its effect.

The other eight Justices on the Court decided McCreary and Van Orden the same way. Justices Stevens, O’Connor, Souter, and Ginsburg concluded that this plaque in Van Orden also constituted an endorsement of religion.

365. McCreary County, 545 U.S. at 885–94 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., and joined in Parts II and III by Kennedy, J., dissenting).
366. Id. at 900–03.
367. Id. at 903–12.
368. 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment).
369. Id. at 701.
370. Id. at 677–79.
371. Id. at 738–39 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting) (“[A] pedestrian happening upon the monument at issue here needs no training in religious doctrine to realize that the statement of the Commandments, quoting God himself, proclaims that the will of the divine being is the source of obligation to obey the rules, including the facially secular ones.”). Responding to an argument that the sixteen other plaques reduced the religious message conveyed by the plaque, Justice Souter responded, But 17 monuments with no common appearance, history, or esthetic role scattered over 22 acres is
Justice Rehnquist and Justices Scalia, Kennedy, and Thomas found no coercion or proselytizing in placing the plaque, and said that the plaque was consistent with the Nation’s history and traditions.\textsuperscript{372} For them, whatever “may be the fate of the Lemon test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.”\textsuperscript{373}

Cases involving the Ten Commandments continue to be litigated. Following \textit{Van Orden}, the Eighth Circuit held en banc in \textit{ACLU Nebraska Foundation v. City of Plattsmouth} that a granite monument in a city park displaying the Ten Commandments did not violate the Establishment Clause.\textsuperscript{374} A dissenting opinion noted that, unlike the display in \textit{Van Orden}, the monument’s message here stood alone with nothing to suggest a broader historical or secular context.\textsuperscript{375} The dissent also noted that

the oft noted image of Moses holding two tablets, depicted on the frieze in the Supreme Court’s courtroom, appears in the company of seventeen other lawgivers, both religious and secular. Similarly, the depiction of Moses and the Ten Commandments on the Court’s east pediment also finds him in the company of renowned secular figures.\textsuperscript{376}

On the other hand, in \textit{Green v. Haskell County Board of Commissioners}, the Tenth Circuit Court of Appeals held that placing a Ten Commandments monument on a county courthouse lawn was an impermissible endorsement of religion, particularly given statements by commissioners underscoring the religious significance of the message.\textsuperscript{377} The county was also ordered to pay, over ten years, $199,000 in attorneys’ fees to the prevailing party.\textsuperscript{378}

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\textsuperscript{372} \textit{Van Orden}, 545 U.S. at 677–78.

\textsuperscript{373} Id. at 688 (Rehnquist, C.J., joined by Scalia, Thomas & Kennedy, JJ., plurality opinion).

\textsuperscript{374} 419 F.3d 772, 774–77 (8th Cir. 2005) (en banc opinion) (citations omitted).

\textsuperscript{375} Id. at 778–81 (Bye, J., joined by M.S. Arnold, J., dissenting).

\textsuperscript{376} Id. at 780 (Bye, J., joined by M.S. Arnold, J., dissenting) (citations omitted).

\textsuperscript{377} 568 F.3d 784, 788 (10th Cir. 2009), \textit{cert. denied}, 130 S. Ct. 1687 (2010).

\textsuperscript{378} CNN Wire Staff, Oklahoma County Must Pay Up in Ten Commandments Case, CNN (July 28, 2010), \url{http://articles.cnn.com/2010-07-28/us/oklahoma.ten.commandments_1_aclu-granite-monument-court-house-lawn?_s=PM:US} (on file with the \textit{McGeorge Law Review}).
In 1934, in *Salazar v. Buono*, private citizens had placed a Latin cross on a rock outcropping in a remote section of the Mojave Desert, owned by the federal government, in order to honor American soldiers who died in World War I. In 2004, the federal government passed a statute to transfer the cross and the land on which it stands to a private party, the Veterans of Foreign Wars, in order to avoid a violation of the Establishment Clause. In *Buono*, a 5–4 Court remanded the case to the district court to determine whether a “reasonable observer” would view the transfer as the endorsement of religion. Justice Kennedy’s plurality opinion strongly indicated the transfer should be viewed as constitutional. He noted, “Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.”

The accommodation permitted in *Buono*, of course, has its limits. For example, in *American Atheists, Inc. v. Duncan*, the Tenth Circuit Court of Appeals held that a sequence of crosses erected on Utah highways to memorialize fallen Utah Highway Patrol state troopers violated the Establishment Clause, as they would convey to a reasonable observer the message that the state prefers, or otherwise endorses, a certain religion.

4. Support for Religious Expression or Aid in Schools

For Justice Kennedy, other aspects of government support for private religious schools do not pose the same kind of problem of proselytizing or coercion as prayer, or benedictions at graduation, or posting of the Ten Commandments in the school context. Even under the endorsement test, such support is more likely to be held constitutional, although on narrower grounds.

For example, in 1997, in *Agostini v. Felton*, the Court overruled early cases decided under the *Lemon* test which had limited the kind and amount of government aid to private religious schools. In a case involving Title I funds, used to provide remedial education, guidance, and job counseling to eligible students, Justice O’Connor rejected the argument that Title I provides aid to religion by creating incentives for persons to attend parochial schools. She stated that no such incentive exists where the aid is allocated on the basis of

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380. *Id.* at 1829.
381. *Id.* at 1821.
382. *Id.* at 1820.
383. *Id.*
384. 616 F.3d 1145, 1150 (10th Cir. 2010).
neutral, secular criteria that neither favor nor disfavor religion, and where the aid is made available to religious and secular beneficiaries on a nondiscriminatory basis. 387

The weakening of the Lemon test in the school aid context continued in 2000 in Mitchell v. Helms. 388 In a plurality opinion, Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, upheld a federal program funding state agencies that loaned educational materials and equipment to public and private schools, with the enrollment of each participating school determining the amount of aid. 389 Justice Thomas noted that in Agostini, the Court had modified the Lemon test for the purpose of evaluating aid to schools by stating that entanglement is not a separate inquiry, but only one criterion for deciding if there is a primary effect of advancing religion, and by revising criteria for determining the principal or primary effect of a statute. 390 After Agostini, Justice Thomas said three primary criteria are used to evaluate whether government aid has the effect of impermissibly advancing religion:

1. does the aid “result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.” 391 Justice Thomas also noted that government neutrality, rather than indoctrination, is virtually assured if an aid program literally, or figuratively, passes through the hands of numerous private citizens who can direct the aid elsewhere by choosing a school for their children. 392 In such a case, the private citizen is making the choice, not the government. 393

Justice O’Connor, joined by Justice Breyer, concurred in the judgment, but said the plurality was relying too heavily on formal neutrality and the plurality’s discussion of direct versus indirect aid and of diversion was flawed. 394 For Justice O’Connor, the three Agostini criteria are “factors” to be weighed against an overall decision of whether a reasonable observer would conclude that the government’s action constituted an “endorsement” of religion. 395 From that perspective, as Justice O’Connor noted:

[A] government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn,

387. Id. at 228–32. Four more liberal Justices dissented in Agostini. Id. at 241–47 (Souter, J., joined by Stevens & Ginsburg, J.J., and which Breyer, J., joined in part, dissenting).
389. Id. at 801–02, 836.
390. Id. at 808–09.
391. Id. at 808 (citing Agostini, 521 U.S. at 234).
392. Id. at 816.
393. Id. at 809–14, 820–25.
394. Id. at 837 (O’Connor, J., concurring).
395. Id. at 843–44.
decide to use the aid at the same religious schools. In the former example, if the religious school uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement. . . . In contrast, when government aid supports a school’s religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, “[n]o reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief.”

The more accommodating approach toward school aid issues adopted in Mitchell continued in 2002 in Zelman v. Simmons-Harris. Zelman involved a pilot program adopted by the state of Ohio in 1996 to provide educational choices to families with children who reside in a “covered district,” defined to apply only to Cleveland. Under the program, the state provided tuition aid of up to $2,250 per year to parents who chose to send their child to a school other than a Cleveland public school. Any private school, whether religious or nonreligious, could participate in the program and accept program students so long as the school was located within the boundaries of a covered district and met statewide educational standards. Participating private schools had to agree not to discriminate on the basis of race, religion, or ethnic background, or to “advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.” Any public school located in a school district adjacent to the covered district could also participate in the program. Adjacent public schools were eligible to receive the same

396. Id. at 842–43 (O’Connor, J., joined by Breyer, J., concurring in the judgment), (citing Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O’Connor, J., concurring)) (discussing “endorsement”). Justice Souter, dissenting with Stevens and Ginsburg, agreed with Justice O’Connor that the Agostini criteria are factors to be weighed in an overall balance concerning the principal or primary effect of any aid program. Id. at 868, 889–99 (Souter, J., joined by Stevens & Ginsburg, J., dissenting). In engaging in this factor analysis, Justice Souter noted that the Court’s precedents under Lemon has considered “whether the government is acting neutrally in distributing its money, and about the form of the aid itself, its path from government to religious institution, its divertibility to religious nurture, its potential for reducing traditional expenditures of religious institutions, and its relative importance to the recipient, among other things.” Id. at 868–69. In addition, reflecting concerns with entanglement between church and state, Justice Souter noted that the Court’s precedents had expressed concern with whether state aid would “violate a taxpayer’s liberty of conscience, threaten to corrupt religion, [or] generate disputes over aid.” Id. at 901. In this case, Justice Souter said, the plurality was rejecting the fundamental principle that had emerged from applying these factors in earlier cases of no taxpayer funded aid to a school’s religious mission. Id. at 912. Here there was aid to the schools themselves which could be used, and was being used, to advance the religious inculcative functions of the recipient religious schools. Id. at 868–69, 885, 901, 908–13.

398. Id. at 643–44.
399. Id. at 645.
400. Id. at 647.
401. Id. at 645 (quoting OHIO REV. CODE ANN. § 3313.976(A)(6)).
402. Id.
$2,250 tuition grant for each program student accepted, in addition to the full amount of per-pupil state funding attributable to each additional student, although none of the public schools chose to participate in the program.\footnote{403}{Id. at 643–48.}

Given these details, the governmental aid program was neutral on its face with respect to religion, providing voucher assistance for educational expenses to a broad class of citizens, who made independent judgments whether to use the voucher to fund educational expenses at religious or secular private schools.\footnote{404}{Id. at 662–63.} For the Mitchell majority, including Justice Kennedy, this made the program clearly constitutional.\footnote{405}{Id. at 652–54.} Justice Thomas also noted in a separate concurrence that the main beneficiaries of this program would be low-income minorities living in Cleveland who wished for educational alternatives to the Cleveland public schools, which were “[b]esieged by escalating financial problems and declining academic achievement.”\footnote{406}{Id. at 676–77 (Thomas, J., concurring).}

Concurring as the critical fifth vote, Justice O’Connor emphasized the limited nature of the program: it did not provide “substantial” aid to the religious schools; the nonpublic schools, both religious and secular, had to accept students without regard to “race, religion, or ethnic background”; and the parents had a range of non-religious private schools from which to choose.\footnote{407}{Id. at 663 (O’Connor, J., concurring).} Thus, the program could not be viewed by a reasonable observer as government endorsement of religion.\footnote{408}{Id. at 668–76.} Lower court opinions after Zelman have followed this approach.\footnote{409}{See Am. Jewish Congress v. Corp. for Nat’l & Cmty. Serv., 399 F.3d 351, 354–59 (D.C. Cir. 2005) (stating federally chartered corporation’s AmeriCorps Education Awards Program, a nationwide community service program which allowed participants to be placed as teachers in both secular and religious schools, did not violate Establishment Clause, even though some participating individuals at religious schools elected to teach religion in addition to secular subjects; participants were chosen without regard to religion, participants’ choice to teach religion in addition to secular subjects did not have imprimatur of government endorsement, and participants who chose to teach in religious schools did so only as a result of their own private choice).}
Regarding religious influences in the public schools, it is relatively uncontroversial that public schools can teach about religion and religious influences on society and historical events.\textsuperscript{410} Indeed, in 1963 in \textit{School District of Abington Township v. Schempp}, the Court acknowledged that reading passages from religious works, such as the Bible, the Torah, or the Koran, was permissible when presented objectively as part of a secular program of education, as they are worthy of study for their literary and historic qualities.\textsuperscript{411} For Justice O’Connor, as well as Justice Kennedy, these cases do not raise difficult issues. As she stated, concurring in \textit{Elk Grove School District v. Newdow}, “It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths.”\textsuperscript{412}

Note, for example, the following state mottoes: Arizona (“God Enriches”); Colorado (“Nothing without the Deity”); Connecticut (“He Who Is Transplanted Still Sustains”); Florida (“In God We Trust”); Ohio (“With God All Things Are Possible”); and South Dakota (“Under God the People Rule”).\textsuperscript{413} Arizona, Colorado, and Florida have placed their mottoes on their state seals, and the mottoes of Connecticut and South Dakota appear on the flags of those states as well.\textsuperscript{414} Georgia’s newly redesigned flag includes the motto, “In God We Trust.”\textsuperscript{415} Many of our patriotic songs contain overt or implicit references to the divine, among them: “America” (“Protect us by thy might, great God our

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Concerning the phrase “Under God” in the Pledge of Allegiance,
[c]ertain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty. It would be ironic indeed if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it.  

Consistent with Justice O’Connor’s concurrence in Elk Grove School District v. Newdow, in Newdow v. Rio Linda Union School District, the Ninth Circuit held that voluntary recitation of the Pledge of Allegiance did not violate the Establishment Clause because the addition of the phrase “Under God” in 1954 advanced the secular purposes of (1) underscoring the political philosophy of the Founding Fathers that God granted certain inalienable rights to the people which the government cannot take away, and (2) adding a note of importance to the Pledge as a matter of ceremonial deism.  

This decision departed from the Ninth Circuit’s earlier ruling in Newdow v. United States Congress.

It is also reasonably well-established that public schools can teach and perform sacred choral music as an integral part of a complete and historically accurate music education, to broaden the students’ understanding of musical culture and to increase awareness of diversity. Such use is permissible as long as the sacred choral music does not predominate the music selection to create a “principal or primary effect” to advance religion under Lemon; lead an objective observer to conclude the school is endorsing religion under the endorsement test; or involve proselytizing or coercing students to participate in a religious, rather than musical, event, under the coercion test.
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Although schools may include sacred choral music as part of an overall music curriculum, a school is not required to do so. Thus, in Stratechuk v. Board of Education, the Third Circuit held that a school district’s policy to bar performance of religious holiday music at seasonal shows, while allowing it to be taught in class, had a legitimate secular purpose of avoiding potential Establishment Clause problems.424 This is particularly true when a school has a history of parental complaints about which religious holiday music had been included in the past.425

B. Free Exercise Clause Analysis

The main issue of contention under the Free Exercise Clause concerns what standard of review the Court should use. An important change in the level of protection given to the free exercise of religion occurred in 1963.426 Writing for the Court in Sherbert v. Verner, Justice Brennan said that strict scrutiny should apply when a law imposes a substantial burden on the free exercise of religion.427 A state had refused unemployment compensation to appellant, a member of the Seventh-Day Adventist Church, on the ground that she had failed to accept available suitable work when offered because she refused to work on Saturday, the Sabbath day of her faith.428 Justice Brennan said that the effect of the law was to pressure the appellant to forgo the practice of her religion.429 This was compounded by the religious discrimination in the scheme, for even in times of emergency no employee could be required to work on Sunday if he or she had conscientious objections to such work.430 Where a substantial burden was imposed, no showing of a mere rational relationship to some colorable state interest would suffice; the state had to show a paramount interest.431 The state did not show any interest in Sherbert beyond the possibility of fraudulent claims by persons claiming religious objections to Saturday work.432

In reaching this conclusion, Justice Brennan distinguished the 1961 case of Braunfeld v. Brown, where the Court had refused to require an exception to a Sunday closing law for a Jewish merchant, who would have to close on both Saturday and Sunday.433 Justice Brennan distinguished Braunfeld because in that

424. 587 F.3d 597, 604–10 (3d Cir. 2009).
425. See id. at 603.
427. Id. at 403–06.
428. Id. at 399–402.
429. Id. at 404.
430. Id. at 406.
431. Id. at 403.
432. Id. at 402–09.
case, there was a strong state interest in one uniform day of rest for all workers. Justice Brennan added that the Court was not fostering an “establishment” when ordering compensation to be paid, because extending unemployment benefits to Sabbatarians in common with Sunday worshipers reflects government neutrality and does not interrelate religions with secular institutions. No other person’s religious liberties are abridged, nor did appellant’s religious convictions make her a nonproductive member of society. The Court reached a similar conclusion in 1981 in *Thomas v. Review Board of the Indiana Employment Security Division*, holding that the state could not deny a claimant who terminated his job because his religious beliefs forbade participation in production of armaments.

The Court also applied a strict scrutiny approach for a burden on religious beliefs in 1972 in *Wisconsin v. Yoder*. In *Yoder*, the Court held that it would violate the free exercise rights of Amish parents to require their children to attend public high school. For the Court, Chief Justice Burger said that the state did not have an interest of sufficient magnitude to overbalance the Amish claims to free exercise of religion, considering testimony that compulsory formal education after the eighth grade would gravely endanger, if not destroy, the free exercise of Amish religious beliefs. There was also evidence that additional years of formal high school for Amish children would do little to serve the state’s interests in education, especially since most Amish children plan to live in Amish society and, with respect to those who might leave, there is nothing to suggest that Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today’s society.

Despite application of strict scrutiny, courts uphold a number of cases of government actions burdening religious beliefs as satisfying a compelling government interest, the least restrictive alternative analysis. For example, in *United States v. Lee*, the Court held that Congress could require all employers, including Amish employers, to pay social security taxes, even if such payments

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434. 374 U.S. at 403–04.
435. Id. at 409.
436. Id.
437. Id. at 409–10. Justice Stewart, concurring in *Sherbert v. Verner*, said that *Braunfeld* was wrongly decided and should be overruled. Id. at 417–18 (Stewart, J., concurring in the result). Justice Harlan, dissenting with Justice White, pointed out that the state law did not provide unemployment compensation for persons who are unavailable for work for personal reasons of any kind. Id. at 422–23 (Harlan, J., joined by White, J., dissenting). Reflecting a Holmesian deference-to-government approach, Justice Harlan said the Court should not require the state to carve out an exception from that principle for those unavailable because of religious convictions. Id. Such compulsion is particularly inappropriate in light of the indirect, remote, and insubstantial effect of the state’s decision on the exercise of appellant’s religion. See id.
440. Id. at 219.
441. Id. at 221.
442. Id. at 209–19.
would violate the Amish’s religious beliefs. Congress had granted self-employed Amish an exception from participation in the Social Security program, but the choice not to extend that exception to Amish employers was for Congress to make. Similarly, the Supreme Court, and lower federal courts, upheld other aspects of economic regulations against free exercise challenges, such as application of the Fair Labor Standards Act requirements on minimum wages and record keeping requirements to religious organizations conducting “ordinary commercial activities,” or application of other aspects of the tax code.

The Court also noted that a strict scrutiny standard was inappropriate if the challenge was to how the government was conducting its own affairs, rather than regulating the affairs of private citizens. For example, in Bowen v. Roy, the challenger complained that the federal government’s requirement that his daughter have a Social Security number in order for him to collect AFDC welfare benefits violated his religious belief that assigning her a number would tend to “rob the spirit” of his daughter. The Court responded, “Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for government benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.” Similarly, the Court held in Goldman v. Weinberger that the United States military could apply its uniform dress regulations to deny an Orthodox Jewish service member the right to wear a yarmulke while on duty. In Lyng v. Northwest Indian Cemetery Protective Ass’n, the Court applied the doctrine of Bowen v. Roy to conclude, under a rational basis approach, that the government could permit the harvesting of timber and construction of a road on federal government land, despite objections from three Native American tribes that such activities interfered with a portion of that land they traditionally used for religious purposes.

In 1990, however, a majority of the Supreme Court in Employment Division v. Smith changed the Free Exercise doctrine. In Smith, persons were dismissed from their jobs because of their religious use of peyote, illegal under state law,
and the resulting denial of unemployment compensation.\textsuperscript{451} Justice Scalia, joined by Chief Justice Rehnquist and Justices Stevens, White, and Kennedy, wrote that the use of strict scrutiny in Free Exercise cases did not extend beyond: (1) unemployment compensation cases involving denial for refusing to work for religious reasons, such as working on one’s sabbath, as in \textit{Sherbert v. Verner}, based on that precedent being “settled law”; (2) cases involving “hybrid” claims, that is, claims based on a conjunction of Free Exercise claims combined with other constitutional protections, such as Freedom of Speech, or, as in \textit{Wisconsin v. Yoder}, the right of parents to direct the education of their children, where the related right would trigger strict scrutiny on its own; or (3) cases involving direct discrimination against religion.\textsuperscript{452}

An example of the third kind of case is \textit{Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah}.\textsuperscript{453} In this case, the city adopted a special rule regarding the ritual slaughtering of animals, which was different and more burdensome than the rules regarding slaughtering of animals for secular food purposes.\textsuperscript{454} The Court thus applied a strict scrutiny approach and held the ordinance unconstitutional.\textsuperscript{455}

In the absence of these three circumstances, the Court held in \textit{Smith} that where there is a general neutral regulation that has merely an incidental effect on the exercise of religion, the Court will not use a heightened level of review.\textsuperscript{456} To do so, said Justice Scalia, would be to allow a person, by virtue of his beliefs, to become a law unto himself.\textsuperscript{457} He said this would contradict constitutional traditions and common sense.\textsuperscript{458} Justice Scalia distinguished the use of strict scrutiny in cases of race discrimination or content regulation of speech, where the heightened level produced equality of treatment or an unrestricted flow of speech, with what would be produced here: a private right to ignore a generally applicable law that denies unemployment compensation when dismissal results

\textsuperscript{451} \textit{Id.} at 874–78. For a good discussion of the background facts surrounding the \textit{Smith} case, see \textsc{Garrett Epps}, \textit{To An Unknown God: Religious Freedom on Trial} (2001).

\textsuperscript{452} \textit{Smith}, 494 U.S. at 876–85.

\textsuperscript{453} 508 U.S. 520 (1993).

\textsuperscript{454} \textit{Id.} at 527–28.

\textsuperscript{455} \textit{Id.} at 530–47; \textit{see also} Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 364–66 (3d Cir. 1999) (finding a police department’s decision to provide medical exemptions to its no-beard requirement, while refusing religious exemptions from same requirement, was subject to heightened scrutiny based on religious discrimination), \textit{cert. denied}, 528 U.S. 817 (1999). \textit{But see} Valov v. Dep’t of Motor Vehicles, 34 Cal. Rptr. 3d 174, 178–83 (Ct. App. 2005) (holding a California statute requiring full-face photograph on driver’s licenses, with no exemption for persons whose religious beliefs bar such personal photographs, constitutional as a neutral law promoting expeditious identification of persons during traffic stops and at accident scenes, deterring identity theft, and preventing fraud, relying on \textit{Smith} and \textit{Bowen v. Roy}).

\textsuperscript{456} 494 U.S. at 881.

\textsuperscript{457} \textit{Id.} at 877–78.

\textsuperscript{458} \textit{Id.} at 874–76.
from using an illegal drug.\footnote{Id. at 885–90.} Subsequently, the state of Oregon created a religious exemption for peyote use, but that is a matter of legislative choice, not constitutional mandate.\footnote{Current Oregon law regarding peyote use appears at Oregon Revised Statutes section 475.840. Justice O’Connor, concurring in the judgment, and Justice Blackmun, joined by Justices Brennan and Marshall, dissenting, said the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether imposed directly through prohibitions or indirectly by the denial of a benefit. \textit{Id.} at 893–97, 905–07 (O’Connor, J., concurring in the judgment, joined in Parts I & II by Brennan, Marshall & Blackmun, J.J.). In either case, the government should have to satisfy a strict standard, as called for in \textit{Sherbert} and \textit{Yoder}. \textit{Id.} (finding strict scrutiny met on these facts); \textit{id.} at 907–16 (Blackmun, J., joined by Brennan & Marshall, J.J., dissenting) (finding statute unconstitutional under strict scrutiny).}

Reacting to the \textit{Smith} case, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA).\footnote{Pub. L. 103–141 (Nov. 16, 1993), codified in 42 U.S.C. §§ 2000bb–2000bb-4 (2006).} RFRA called for courts to use strict scrutiny whenever any government substantially burdens a person’s exercise of religion, even if the burden results from a law of general applicability.\footnote{Id.} In \textit{City of Boerne v. Flores}, the Court declared RFRA invalid as applied to state laws.\footnote{Id. at 507 (1997).} Congress sought to justify RFRA as an exercise of power under Section five of the Fourteenth Amendment.\footnote{Id. at 529–36.} Justice Kennedy said that there must be congruence and proportionality between the injury to be prevented or modified and the means adopted to that end.\footnote{Id. at 533.} Here, the legislative record lacked examples of modern instances of generally applicable laws passed because of religious bigotry.\footnote{Id. at 530–36.} The RFRA, said Justice Kennedy, is so out of proportion to a supposed remedial or preventing object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior on the part of States.\footnote{Id. at 544–45 (O’Connor, J., joined by Breyer, J., except as to the first paragraph of Part I, dissenting); \textit{id.} at 565 (Souter, J., dissenting).} Justice O’Connor said that \textit{Smith} was wrong and should be re-examined, as did Justices Breyer and Souter.\footnote{Id. at 565 (Souter, J., dissenting).}

Congress did not surrender, but has only been able to change the law somewhat. Under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), a strict scrutiny approach is statutorily applied to all laws regarding any land use regulation or prison regulation that imposes a substantial burden on religion if: (1) that burden affects, or removal of that burden would itself affect, interstate commerce; (2) the burden is imposed in a program or activity receiving federal financial aid; or (3) the burden is imposed in implementation of any regulation that permits individual assessments of the
proposed property use.\textsuperscript{469} The validity of this legislation in the context of a prison regulation was upheld in \textit{Cutter v. Wilkinson}, where the Court unanimously ruled that the statute was merely an attempt to respect the Free Exercise rights of prisoners and did not create an Establishment Clause problem as long as the statute did not “elevate accommodation of religious observances over the institution’s need to maintain order and safety.”\textsuperscript{470}

In \textit{Hankins v. Lyght}, the Second Circuit Court of Appeals upheld the earlier-passed RFRA on Commerce Clause grounds, as applied to federal rather than state laws.\textsuperscript{471} In \textit{Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal}, the Supreme Court similarly applied the RFRA’s compelling interest test to strike down the failure under the federal Controlled Substance Act to grant an exception for sacramental use of hallucinogenic tea.\textsuperscript{472} The decision was unanimous, with Justice Alito not participating in the consideration or decision of the case.\textsuperscript{473} Meanwhile, in cases not covered by RLUIPA or the RFRA, lower courts continue to apply \textit{Smith} and its holding that the court should only apply a rational relation test even when a substantial burden has been imposed on the exercise of religious behavior.\textsuperscript{474}

One might wonder why religious conservatives undermined strict scrutiny Free Exercise Clause review in \textit{Smith}. The key is found in a passage near the end of Justice Scalia’s opinion in \textit{Smith}.\textsuperscript{475} There, he stated,

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself . . . .\textsuperscript{476}

Thus, the presumption seems to be that religions more well-established in the United States in terms of overall numbers of adherents, like Protestant sects or Catholics, will be protected by the legislature as part of democratic sensitivity to the majority, while only religions of small groups would need Free Exercise Clause protection. Typically, it has been such minority religious groups—Amish, Seventh-Day Adventists, Native Americans, or Jews—that have triggered

\textsuperscript{470} 544 U.S. 709, 719–26 (2005).
\textsuperscript{471} 441 F.3d 96, 107–09 (2d Cir. 2006).
\textsuperscript{473} Id. at 439.
\textsuperscript{474} See, e.g., Levitan v. Ashcroft, 281 F.3d 1313, 1315 (D.C. Cir. 2002) (holding where prisoners did not raise RLUIPA, the court analyzed under the Free Exercise Clause a prison rule allowing only the chaplain to consume wine during Communion services under a rational basis standard of review).
\textsuperscript{476} Id.
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And, as a general matter, it is liberal Justices who are usually more sensitive to protecting minority rights, which occurs under the 1963–1990 Sherbert v. Verner strict scrutiny approach.\(^\text{478}\)

That this doctrine can yield anomalous results is evidenced by the dispute this past year over the Obama Administration’s requirement that all employers, either themselves or through their health insurers, provide contraceptive coverage under their health care plans, even Catholic-affiliated institutions, like universities or hospitals, which have traditional religious objections to contraception.\(^\text{479}\) Under Sherbert, the Catholic Church could force the government to satisfy strict scrutiny to impose this obligation on them.\(^\text{480}\) Under the Smith doctrine, the Catholic Church does not appear to have any serious Free Exercise argument, although, consistent with the Second Circuit Court of Appeals opinion in Hankins, noted above, they may have a statutory RFRA argument.\(^\text{481}\)

In addition to these protections, all Justices on the Supreme Court support a “ministerial” exception to laws applied to the internal operations of religious organizations. For example, a unanimous Supreme Court upheld a ministerial exception in Hossana-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission.\(^\text{482}\) That case involved a teacher, formally commissioned as a minister in the religious order, who filed an Equal Employment Opportunity complaint.\(^\text{483}\)

This decision is consistent with lower federal courts handling of similar issues. For example, the Seventh Circuit Court of Appeals held in Tomic v. Catholic Diocese of Peoria, that the ministerial exception bars an ADEA lawsuit by a fifty-year-old church music director who was fired after a dispute with the bishop’s assistant over music to be played for Easter services.\(^\text{484}\) The church then hired a “much younger person” as a replacement.\(^\text{485}\) The court noted that,

if the suit were permitted to go forward, the diocese would argue that he was dismissed for a religious reason—his opinion concerning the suitability of particular music for Easter services—and . . . Tomic would argue that the church’s criticism of his musical choices was a pretext for

\(^{477}\) See supra text accompanying notes 446–62.

\(^{478}\) Id.

\(^{479}\) See generally N.C. Aizenman, Peter Wallsten & Karen Tumulty, Obama Shifts on Birth Control, WASH. POST, Feb. 11, 2012, at A01.

\(^{480}\) See supra text accompanying notes 427–37.

\(^{481}\) Id. at 699–701.

\(^{482}\) 132 S. Ct. 694 (2012).

\(^{483}\) Id. at 699–701.

\(^{484}\) 442 F.3d 1036, 1037–42 (7th Cir. 2006).

\(^{485}\) Id. at 1037.
firing him, that the real reason was his age . . . . The court would be asked to resolve a theological dispute. 486

Similarly, in Curay-Cramer v. Ursuline Academy of Wilmington, Delaware, Inc., the Third Circuit Court of Appeals held that a teacher at a private Catholic school could not sue the school for retaliation for protected speech and sex discrimination in violation of Title VII of the Civil Rights Act of 1964, when she was terminated after signing a pro-choice advertisement in a local newspaper. 487 The court held that her claims were not cognizable, since it would necessitate the court’s assessment of the relative severity of violations of church doctrine. 488 The Court noted:

Were we . . . to require Ursuline [Academy] to treat Jewish males or males who oppose the war in Iraq the same as a Catholic female who publicly advocates pro-choice positions, we would be meddling in matters related to a religious organization’s ability to define the parameters of what constitutes orthodoxy. 489

On the other hand, the Ninth Circuit held in Elvig v. Calvin Presbyterian Church that a Presbyterian minister could sue her former church under Title VII for sexual harassment and retaliation that occurred prior to her discharge that do not implicate the church’s protected employment decisions. 490 In her complaint, she alleged that shortly after the Calvin Presbyterian Church hired her as the Associate Pastor, the Church’s Pastor engaged in sexually harassing and intimidating conduct toward her, creating a hostile work environment. 491 The Court noted that as part of this lawsuit, the Church could:

assert as an affirmative defense that they “exercised reasonable care to prevent and correct the harassment, and that [the plaintiff] failed to take advantage of these opportunities to avoid or limit harm.” 492 "Nothing in the character of this defense will require a jury to evaluate religious doctrine or the ‘reasonableness’ of religious practices . . . ." 492

486. Id. at 1040.
487. 450 F.3d 130, 138–42 (3d Cir. 2006).
488. Id. at 142.
489. Id. at 141.
490. 375 F.3d 951, 953 (9th Cir. 2004), rehearing en banc denied, 397 F.3d 790 (9th Cir. 2005).
491. Id.
492. Id. at 957 (quoting Bollard v. Cal. Province of the Soc’y of Jesus, 196 F.3d 940, 949–50 (9th Cir. 1999)).
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The court noted that while the decision to terminate her ministry was clearly within the scope of the ministerial exception, she may “nonetheless hold the Church vicariously liable for the sexual harassment itself.”

A federal district court held in Redhead v. Conference of Seventh-Day Adventists that the “ministerial exception” did not apply to Title VII sex and pregnancy discrimination claims by a teacher who was terminated from a Seventh-Day Adventist school for being pregnant and unmarried, as her teaching duties were primarily secular. Her duties that were religious in nature were limited to only one hour of Bible instruction per day and attending religious ceremonies with students only once per year. Churches have also been held liable in child sex abuse cases by church personnel, including priests or ministers, although it is a matter of debate whether various laws limiting damages against charitable institutions should be invoked to limit liability in such cases.

V. CONCLUSION

As noted in this Article, for most of his twenty-five years on the United States Supreme Court, Justice Kennedy has been predominantly known as a moderate civil libertarian. Justice Kennedy’s moderate civil-libertarian approach can be seen most prominently in four different areas of Supreme Court jurisprudence: (1) due process and equal protection clause analysis, (2) First Amendment freedom of speech, (3) criminal defendants’ constitutional rights, and (4) structural issues of separation of powers and federalism. In certain cases, however, he has joined his more conservative judicial colleagues, and may join them in future cases. These areas include existing doctrine, such as cases involving (1) state sovereign immunity, (2) the Bush v. Gore election case, (3) cases involving the Second Amendment and right to bear arms, (4) campaign finance litigation, (5) the constitutionality of the Patient Protection and Affordable Care Act (Obamacare), and (6) affirmative action cases. With respect to the religion clauses of the First Amendment—the Establishment Clause and the Free Exercise Clause—Justice Kennedy has likewise adopted more conservative judicial positions.

It is possible that Justice Kennedy may lean more toward the conservative side in later high-profile cases. If so, his legacy on the Court may not be as a moderate civil libertarian, which is his legacy today, but reflect more the conservative strain in his jurisprudence. For those who have applauded Justice Kennedy’s moderate civil-libertarian decisions, that would be an unfortunate

493. Id. at 960.
495. Id.
development. Further, since a moderate civil-libertarian approach reflects more aspects of a progressive agenda, and since over time, progressive ideology tends to prevail over conservative ideology because it represents the future, not the past, history would not likely view kindly any such shift toward a more conservative jurisprudential stance.