



Justice Kennedy Retires: Initial Considerations for Congress

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On June 27, 2018, hours after the Supreme Court released its [final opinions](#) for the term, Justice Anthony M. Kennedy, [announced](#) that, effective July 31, 2018, he would retire from active service as an Associate Justice of the Supreme Court. Nominated to replace Justice [Lewis Powell](#) in 1987, Justice Kennedy has served on the Court for more than three decades. Like his [predecessor](#), Justice Kennedy has often [been referred](#) to as the Court’s “swing” vote. Justice Kennedy has pushed back against such a moniker, declaring in a [2015 speech](#) that “[t]he cases swing, I don’t.” But his central role on the Court in recent decades, and in particular in the Roberts Court era, cannot be overstated. Since the Roberts Court began in 2005, Justice Kennedy has been the justice who cast his votes most often with the majority of the Court in all but three terms. (Chief Justice Roberts edged out Justice Kennedy in the [most recent term](#) and the [October 2007 term](#), while Justice Breyer was the most frequent justice in the majority during the [October 2014 term](#)). This Sidebar highlights various areas of law in which Justice Kennedy—either by authoring or joining a Supreme Court opinion—proved consequential to the trajectory of Supreme Court jurisprudence. In so doing, this post provides a broad overview of key legal issues Congress (and, more specifically the [Senate](#), through its advice and consent role) may wish to consider as it reflects on Justice Kennedy’s jurisprudence and how his eventual successor might shape the future of the Court, Congress, and the nation as a whole.

During his thirty years on the Court, Justice Kennedy encountered nearly every major flashpoint for modern American legal debate—from the powers of the federal government vis-à-vis the states, to separation-of-powers disputes, to key civil liberties issues. And on nearly all of these issues, Justice Kennedy seemed to be at the epicenter of the discussion because of his consequential role in many cases’

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outcomes. Some examples:

- **Abortion:** Justice Kennedy co-authored the joint plurality opinion in the 1992 decision *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which upheld the “central holding” of *Roe v. Wade*, recognizing a woman’s right to terminate a pregnancy, while also recognizing that state restrictions may be permissible if they do not place an undue burden on a woman’s ability to terminate a pregnancy prior to the fetus’s viability. And in more recent years, Justice Kennedy joined the Court’s opinion in *Whole Woman’s Health v. Hellerstedt*, striking down two Texas laws on grounds they imposed an undue burden on a woman’s ability to seek an abortion. At the same time, Justice Kennedy authored the majority opinion in *Gonzales v. Carhart*, upholding the federal Partial-Birth Abortion Ban Act of 2003.
- **Affirmative Action:** Following Justice Sandra Day O’Connor’s retirement in 2005, Justice Kennedy proved to be a critical vote in cases considering the legality of race-conscious education programs. Justice Kennedy concurred in the judgment of the 2007 decision, *Parents Involved in Community Schools v. Seattle School District No. 1*, in which the Court invalidated school assignment plans in two school districts that partially relied on race to determine which schools children in the districts could attend. Justice Kennedy, however, recognized that race can play some role in state education policy, upholding the University of Texas at Austin’s race-conscious admission policy in the 2016 ruling in *Fisher v. University of Texas at Austin*.
- **Death Penalty:** Relying on the Eighth Amendment’s prohibition against the infliction of cruel and unusual punishment, Justice Kennedy authored or voted for opinions that limited the scope of the death penalty. For instance, Justice Kennedy authored the majority opinion in *Roper v. Simmons*, prohibiting the imposition of capital punishment against juvenile offenders, and Justice Kennedy joined the majority in *Atkins v. Virginia*, barring executions of the cognitively disabled. But Justice Kennedy declined to join opinions from colleagues who concluded that the Eighth Amendment wholly prohibits the imposition of the death penalty, and he more recently joined narrow majorities of the Court in several cases rejecting challenges to particular states’ methods of execution.
- **Environmental Law:** Justice Kennedy has been at the center of several major environmental law matters before the Court. For instance, in 2007 he joined the majority opinion in the Supreme Court’s 5-4 ruling in *Massachusetts v. EPA*, holding that the Environmental Protection Agency (EPA) had the authority to regulate greenhouse gases under the Clean Air Act. In 2015, Justice Kennedy joined with the more conservative wing of the Court to comprise the majority in *Michigan v. EPA*, which invalidated certain EPA rules regulating power plants because the agency failed to consider the costs of compliance when promulgating those rules.
- **Freedom of Religion:** Justice Kennedy has played a central role in freedom of religion debates on the Court. He joined the Court’s 1990 landmark ruling in *Employment Division v. Smith*, holding that laws of general applicability require minimal scrutiny against free exercise claims. At the same time, Justice Kennedy authored several opinions recognizing the role of the Court in policing government impositions on the free exercise of religion (e.g., *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*; *Masterpiece Cakeshop v. Colorado Civil Rights Commission*). Justice Kennedy also joined the majority opinion in *Burwell v. Hobby Lobby Stores, Inc.*, which held that a regulation requiring certain employers to provide cost-free contraceptives to their employees violated federal religious protection laws because it burdened the religious liberty of closely held, for-profit corporations. In so doing, he authored a concurrence emphasizing

both the interests of religious objectors and the government's interest in facilitating insurance coverage for contraceptives. Justice Kennedy likewise staked out a middle ground in the Court's Establishment Clause cases, declining in *Lee v. Weisman* to curtail restrictions on school prayer established by the Court in [prior cases](#), but holding that the practice of legislative prayer was permissible in *Town of Greece v. Galloway*.

- **Freedom of Speech:** The Roberts Court has, in the view of some observers, been the “[most speech-protective Supreme Court in memory](#),” particularly on matters involving the confluence between speech and the expenditures of private entities. That reputation is due in large part to Justice Kennedy. Most notably, Justice Kennedy was the author of the 2010 opinion in *Citizens United v. FEC*, which held that “no sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.” Kennedy also authored or joined [several recent](#) opinions increasing protections for commercial speech. And on the day he announced his retirement, Justice Kennedy joined a majority of the Court to [strike down on](#) free speech grounds a state law compelling public employees to pay certain agency fees to a union. Nonetheless, Justice Kennedy has authored several critical opinions recognizing the limits of the First Amendment's Free Speech Clause, including landmark decisions concerning [federal regulations of cable television](#) and [public employee speech](#).
- **National Security:** The Court has considered numerous cases implicating national security matters in recent decades, with Justice Kennedy typically casting the deciding vote. This term, he was part of a 5-4 majority that accorded broad deference to presidential security determinations when upholding the Trump Administration's “Travel Ban,” which barred certain foreign travelers from entering the United States because of security concerns. He also authored or joined Court opinions that, partially out of deference to the political branches' judgment in national security matters, dismissed or effectively foreclosed [various lawsuits related](#) to counterterrorism policies pursued in the aftermath of the September 11, 2001 terrorist attacks. While Justice Kennedy joined a majority of justices in *Hamdi v. Rumsfeld* to recognize the government's ability to detain indefinitely “enemy combatants,” including U.S. citizens, captured in post-9/11 hostilities, Justice Kennedy also joined or authored opinions [recognizing limits](#) to the Executive's wartime authority in several opinions. Perhaps most notably, he authored the Court's landmark opinion in *Boumediene v. Bush*, which held that the constitutional writ of habeas corpus extended to foreign nationals held as enemy belligerents at the Guantanamo Bay detention facility, enabling them to challenge their detention in habeas proceedings.
- **Power of Congress:** Justice Kennedy joined or wrote several opinions during the Rehnquist and Roberts Court eras that recognized limitations on Congress's Commerce Power (e.g., *United States v. Lopez*, *United States v. Morrison*); restricted Congress's powers under the reconstruction amendments (e.g., *City of Boerne v. Flores*; *Shelby County v. Holder*); established the anti-commandeering doctrine prohibiting congressional directives to state executive and legislative officials (e.g., *New York v. United States*; *Printz v. United States*; *Murphy v. NCAA*); and limited Congress's ability to subject state governments to monetary damages remedies (e.g., *Seminole Tribe of Florida v. Florida*; *Alden v. Maine*). Notwithstanding these decisions, Justice Kennedy joined Court opinions recognizing Congress's power under the Commerce Clause to regulate certain intrastate activities with tangential connections to interstate commercial activities. For example, Justice Kennedy voted with the majority in *Gonzales v. Raich* to uphold the application of the federal Controlled Substances Act to the local cultivation of

medicinal marijuana and recognizing Congress's power to require the civil commitment of dangerous sexual predators in *United States v. Comstock*.

- **Second Amendment:** Justice Kennedy was part of the five-justice majority that concluded in *District of Columbia v. Heller* that the Second Amendment protected an individual (as opposed to collective) right to bear and keep arms. Two years later, he was part of the five-justice bloc that held in *McDonald v. City of Chicago* that the Second Amendment applied to the actions of state and local governments through the Fourteenth Amendment. Nonetheless, in the wake of *Heller* and *McDonald*, Justice Kennedy has declined to join other justices who have called for the Supreme Court to consider Second Amendment challenges to (and potentially invalidate) state laws imposing [waiting periods](#) for purchasing firearms or restricting the [right to carry](#) firearms in public.
- **Sexual Orientation:** Justice Kennedy authored several Court opinions concerning state and federal laws differentiating between persons based on sexual orientation, in which he struck down state or federal laws because the laws were either enacted by reason of animus and violated equal protection principles (e.g., *Romer v. Evans*; *United States v. Windsor*) or invaded privacy rights protected by the substantive component of the Fourteenth Amendment's Due Process Clause (e.g., *Lawrence v. Texas*). In the landmark 2015 ruling in *Obergefell v. Hodges*, Justice Kennedy, on behalf of a five-member majority, invalidated state laws that recognized marriage as being exclusively between a man and a woman. Nonetheless, Justice Kennedy identified limits to state public accommodation laws which seek to protect sexual minorities from discrimination, when those laws were applied in a manner that was in tension with the First Amendment rights of religious or moral objectors (e.g., *Boys Scouts of America v. Dale*; *Masterpiece Cakeshop v. Colorado Civil Rights Commission*).

As Justice Byron White once [noted](#), “every time a new justice comes to the Supreme Court, it’s a different court.” That adage could be particularly true of Justice Kennedy’s successor given Justice Kennedy’s outsized role on the Roberts Court. [Article II of the Constitution](#) provides the President with the power to appoint judges to the Supreme Court, with the Senate’s advice and consent. It is [expected](#) that President Trump will nominate one of the [25 individuals](#) he previously placed on his “Supreme Court List” to fill Justice Kennedy’s seat. [Reports](#) suggest a vote on the nominee may occur in early autumn 2018.

As with [past vacancies](#) on the High Court, in the coming weeks and months, CRS will be publishing more products examining the vacancy created by Justice Kennedy’s retirement and President Trump’s nominee to fill his seat on the Court. And on June 29, 2018, a CRS seminar will be held in HVC-215 (Gabriel Zimmerman Meeting Room), U.S. Capitol Visitor Center at 10 a.m. examining the latest term of the Court and considering Justice Kennedy’s retirement. For more information, see [CRS.gov](#).