Justice Kennedy's Free Speech Jurisprudence: A Quantitative and Qualitative Analysis

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I. INTRODUCTION

In the almost twenty-five years that Justice Anthony M. Kennedy has served on the United States Supreme Court, he has gained a reputation as being the foremost defender of free-speech principles on the modern Court. Indeed, perhaps aside from his jurisprudence defending the rights of sexual minorities,[1] it seems likely that Justice Kennedy's tenure on the Court shall be remembered most clearly for his contributions to First Amendment jurisprudence. Justice Kennedy has undoubtedly written many important opinions vindicating free-speech rights, from his concurring opinion in *International Society for Krishna Consciousness, Inc. v. Lee*,[2] to his groundbreaking, albeit controversial, decision in *Citizens United v. FEC*.[3] On the other hand, Justice Kennedy has also written important opinions rejecting First Amendment claims, including *Turner Broadcasting System, Inc. v. FCC*[4] and *Arkansas Educational Television Commission v. Forbes*.[5] Our modest goal in this Article is to determine whether Justice Kennedy's reputation as a defender of free-speech principles is justified given this mixed history. To that end, we undertake both a quantitative and qualitative analysis of the Supreme Court's free speech jurisprudence during the period of Justice Kennedy's tenure on the Court[6] to determine whether Justice Kennedy has been more likely to support free-speech rights than the Court as a whole. This Article first presents a quantitative analysis and then moves to the qualitative analysis.

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1. *See* Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2003).
2. 505 U.S. 672 (1992).
3. 130 S. Ct. 876 (2010).
4. 520 U.S. 180 (1997).
5. 523 U.S. 666 (1998).
6. February 11, 1988 through the present.

II. QUANTITATIVE ANALYSIS: WHAT THE NUMBERS SHOW

In this section, we describe the steps we took to quantitatively analyze Justice Kennedy's First Amendment jurisprudence. We also describe the results of our analysis.

A. Overall Analysis

First, we compiled all of the free-speech cases the Supreme Court heard since Justice Kennedy joined the Court. To accomplish this, we performed a simple Westlaw search in its Supreme Court database. We entered the search term "'First Amendment' & 'speech.'" We limited the parameters of the search to every opinion the Court issued since the day before Kennedy took his position as an Associate Justice. The search generated a universe of cases larger than necessary, but it ensured a compilation of all free-speech cases decided while Justice Kennedy served on the Court.

Next, we identified which cases resolved a free speech or association issue on the merits. In compiling these cases, we excluded every case not germane to either speech or association. This meant excluding cases in which the Court denied certiorari or otherwise declined to reach the merits. Also, we excluded cases that exclusively involved the religion clauses of the First Amendment. Finally and most obviously, we excluded cases in which Justice Kennedy did not participate. This led to a total of 141 cases in which the Court addressed an issue concerning free speech or the right of expressive association.

Of these 141 cases, 134 cases determined whether or not the government violated the First Amendment. We looked at these 134 cases and noted (1) whether the Court found a First Amendment violation; (2) whether Kennedy also found a First Amendment violation; and (3) whether Kennedy wrote for the Court, wrote a concurring opinion, or wrote a dissenting opinion. Because various cases resolved multiple First Amendment issues, we noted whether the Court ruled on multiple First Amendment issues in a case, and whether Kennedy found First Amendment violations on those individual issues.

The results showed that Kennedy was significantly more willing to find a First Amendment violation than the Court as a whole. Of the 134 cases examined, the Court found a First Amendment violation in sixty-four cases, or 47.8% of the time.[7] Kennedy, however, would have found a First Amendment violation in seventy-seven cases, or 57.5% of the time.[8] When each case is broken down into composite issues, the results show a slightly starker contrast between Kennedy and the Court. Of the 147 individual free speech or association issues in these cases, the Court found sixty-seven First Amendment violations, or

7. *See infra* Table 1.

8. *Id.*

in 45.6% of the issues.[9] But Kennedy found eighty-five First Amendment violations, totaling 57.8% of the issues before the Court.[10]

Table 1

	Total Number of First Amendment Claims by Case	Number of First Amendment Claims Upheld by Case	Total Number of First Amendment Claims by Issue	Number of First Amendment Claims Upheld by Issue
The Supreme Court	134	64 (47.8%)	147	67 (45.6%)
Justice Kennedy	134	77 (57.5%)	147	85 (57.8%)

Justice Kennedy wrote prolifically throughout this period, writing forty-one opinions in the 134 merits cases in which the Court resolved whether the government violated the First Amendment.[11] In addition, Kennedy wrote for the Court in one of the five cases that resolved a First Amendment issue without determining whether there was a violation.[12]

Kennedy wrote for the Court in eleven of the sixty-four cases in which the Court found a First Amendment violation.[13] He also wrote seven concurrences[14] and three opinions concurring in part and dissenting in part.[15] As far as our

9. *Id.*

10. *Id.*

11. Our data does not include cases decided beyond the October 2011 term, but Justice Kennedy continues to write opinions supportive of cutting-edge free speech claims. *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537 (2012) (Kennedy, J., plurality) (holding that statements do no lose First Amendment protection for falsity alone).

12. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642–43 (1994) (determining that the FCC's must-carry provisions were content-neutral and remanding the case to determine whether the provisions violated the First Amendment under a content-neutral analysis).

13. *See, e.g.*, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (Kennedy, J., writing for the Court) (holding that the Child Pornography Prevention Act's prohibition of virtual child pornography violated the First Amendment). In one such case, Kennedy dissented in part, as the Court did not join him in invalidating the entire restriction at issue. Gentile v. State Bar of Nev., 501 U.S. 1030, 1034 (1991) (holding that the Nevada Supreme Court's interpretation of a Nevada statute was facially invalid under the First Amendment, but Justice Kennedy would have invalidated the entire statute).

14. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 420–21 (1989) (Kennedy, J., concurring) (noting that the symbolic conduct at issue, burning an American flag, was offensive, but that the Court had a duty to protect repugnant and unpopular speech).

15. *See, e.g.*, Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 626 (1996) (Kennedy, J., concurring in part and dissenting in part) (holding that the First Amendment invalidates application of the

research indicates, Kennedy never authored a dissenting opinion when the Court found a First Amendment violation.

Of the seventy cases where the Court upheld restrictions against First Amendment challenges, Kennedy wrote for the Court in seven instances.[16] He also authored separate concurrences in seven of these cases,[17] dissented in eight,[18] and wrote two opinions concurring in part and dissenting in part.[19]

Table 2

	Wrote for the Court	**Wrote a Concurrence**	**Wrote a Concurrence/Dissent**	**Wrote a Dissent**
Cases that Upheld First Amendment Claims	11	7	3	0
Cases that Denied First Amendment Claims	7	7	2	8

B. Results by Class of Case

After compiling the data, we classified each case according to the type of First Amendment dispute. We ultimately created twenty-three classifications.[20] Many of the cases were easy to classify, as the Court applied a particular doctrine

Federal Election Campaign Act's prohibition on political party contributions to a party's independent expenditures).

16. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989) (Kennedy, J., writing for the Court) (holding that a municipal noise regulation that required preapproval for particular sound equipment in a public park's band shell did not violate the First Amendment).

17. *See, e.g.*, Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 693 (1992) (Kennedy, J., concurring) (agreeing with the Court that restrictions on direct solicitations in certain public forums withstood First Amendment scrutiny).

18. *See, e.g.*, Fla. Bar v. Went for It, Inc., 515 U.S. 618, 636 (1995) (Kennedy, J., dissenting) (concluding that the majority failed to consider the societal advantages of attorney advertising in its application in upholding a limitation on commercial speech).

19. *See, e.g.*, Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) (holding that a public employees' union could lawfully collect mandatory agency fees from non-members under certain conditions).

20. The twenty-three categories we classified are, in alphabetical order: Abortion, Association, Charitable Donations, Commercial Speech, Compelled Speech, Content-Neutrality, Copyright, Defamation, Election Law, Freedom of the Press, Hate Speech, Judicial Process, Labor Law, National Security, Obscenity, Overbreadth, Prisoners' Speech, Public Employees, Public Forum, Students' Speech, Symbolic Conduct, Telecommunications, and Zoning of Adult Establishments.

or precedent to resolve the issue, such as the *Central Hudson* test to determine the validity of regulations on commercial speech.[21] We classified cases involving campaign finance, candidate speech, and ballot access under "Election Law."[22] Other ballot-access cases, typically involving party primaries, along with cases concerning public accommodations, were classified under "Association."[23] We classified cases involving public nudity and flag burning under "Symbolic Conduct."[24] We classified all cases involving regulations of pornography or arguably harmful media content as "Obscenity."[25]

We classified cases involving speech on government property under "Public Forum."[26] However, we classified cases involving speech related to abortion, including protests near healthcare facilities and the use of Title X funds to counsel abortion, under "Abortion."[27] We made this distinction because the Justices may reach different conclusions when a case involves a regulation

21. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489, 508, 516 (1996) (holding that Rhode Island's prohibition on price advertisement of alcohol was an unconstitutional infringement on commercial speech).

22. *See, e.g.*, Randall v. Sorrell, 548 U.S. 230, 236–37, 262–63 (2006) (holding that Vermont's laws restricting campaign contributions to political candidates violated the First Amendment); Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (holding that a provision in Minnesota's canon of judicial ethics that prohibited candidates for judicial office from speaking about their views violated the First Amendment); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 353–54, 369–70 (1997) (holding that Minnesota's "antifusion" law, which prohibited a candidate from appearing on the ballot for more than one party, did not violate the First Amendment).

23. *See, e.g.*, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 444, 447 (2008) (holding that Washington's "moderated blanket primary," where each candidate on the ballot could affiliate with the party of his choosing regardless of whether the party approved his candidacy, did not violate the First Amendment right of association of state political parties); Boy Scouts of Am. v. Dale, 530 U.S. 640, 644, 661 (2000) (holding that New Jersey's application of its public accommodations law to the Boy Scouts of America violated the First Amendment).

24. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 282–83 (2000) (holding that Erie's prohibition on public nudity was content neutral and satisfied *O'Brien*); Texas v. Johnson, 491 U.S. 397, 397, 420 (1989) (holding that Texas's law prohibiting flag burning violated the First Amendment as flag burning was expressive conduct).

25. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2742, 2745 (2011) (holding that video games constitute speech for First Amendment purposes, and that violent material, unlike obscene sexual material, is not a historically unprotected category of speech); United States v. Stevens, 130 S. Ct. 1577, 1592 (2010) (holding that the federal government's ban on depictions of animal cruelty was substantially overbroad and thus violated the First Amendment); United States v. Williams, 553 U.S. 285, 397, 420 (2008) (holding that a federal statute that prohibited the pandering of child pornography did not violate the First Amendment).

26. *See, e.g.*, Thomas v. Chicago Park Dist., 534 U.S. 316, 317–18, 323–25 (2002) (holding that Chicago's ordinance requiring event organizers to receive a permit for any event with more than fifty people on public property did not violate the First Amendment); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 102, 120 (2001) (holding that a public school's exclusion of a Christian student group from meeting after hours violated the First Amendment because the school was engaging in viewpoint discrimination).

27. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 707–08, 725 (2000) (holding that Colorado's statute prohibiting an individual from approaching another within eight feet outside a healthcare facility without that person's consent was a content-neutral time, place, and manner restriction that did not violate the First Amendment); Rust v. Sullivan, 500 U.S. 173, 177–78 (1991) (holding that prohibiting Title X recipients from counseling abortion services did not violate the First Amendment).

designed to address antiabortion protests outside healthcare facilities than other regulations of speech on government property.

Other categories we designated included "Freedom of the Press,"[28] "Compelled Speech,"[29] "Defamation,"[30] "Copyright,"[31] "Hate Speech,"[32] "Public Employees,"[33] "Prisoners' Speech,"[34] "Telecommunications,"[35] "Zoning of Adult Establishments,"[36] "Students' Speech,"[37] "Labor Law,"[38] "Charitable Donations,"[39] "Judicial Process,"[40] "Content-Neutrality,"[41] "Overbreadth,"[42] and "National Security."[43]

28. *See, e.g.*, L.A. Police Dep't v. United Reporting Pub. Corp., 528 U.S. 32, 34, 37 (1999) (upholding a statute that limited commercial access to arrestees' address). Many of the cases filed under Freedom of the Press involve rights of access to information from police or access to judicial proceedings.

29. *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553, 566–67 (2005) (holding that an assessment on beef producers to fund advertising did not violate the First Amendment's prohibition on compelled speech). Many of the cases under this category involved assessments by the United States Department of Agriculture on certain groups of farmers in order to finance advertising.

30. *See, e.g.*, Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 499 (1991) (holding that a summary judgment in favor of a media defendant is improper when a material fact question exists as to whether a defamatory statement about a public figure was made with actual malice).

31. *See, e.g.*, Golan v. Holder, 132 S. Ct. 873, 877–78 (2012) (holding that a trade agreement's protection of certain copyrighted works that would otherwise fall under the public domain did not violate the First Amendment).

32. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 347–48, 362–63, 367 (2003) (holding that a prohibition against cross-burning, when the act is intended to be threatening, did not violate the First Amendment, but that a statutory presumption that made the burning of a cross threatening did violate the First Amendment).

33. *See, e.g.*, Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2491–93 (2011) (holding that a public employee must show that he was speaking as a citizen, not an employee, on a matter of public concern; the government must then show that its interest in retaliating outweighed the employee's speech rights).

34. *See, e.g.*, Beard v. Banks, 548 U.S. 521, 524–25 (2006) (holding that a prison does not violate the First Amendment when it restricts inmates' allowable reading materials).

35. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 185, 224 (1997) (holding that the FCC's must-carry provisions did not violate the First Amendment).

36. *See, e.g.*, City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 776, 784 (2004) (upholding a city's licensing scheme for adult establishments so long as the city establishes a timely appeals process for businesses denied licenses).

37. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 396–97 (2007) (holding that a school district does not violate the First Amendment when it punishes students for promoting drug use off campus but in sight of students who are on campus).

38. *See, e.g.*, Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 511 (1991) (upholding a restriction on a labor union's use of agency fees collected from nonunion employees for political purposes). Many of the cases that we classified under Labor Law involved whether a restriction on the labor union's use of agency fees violated the union's First Amendment rights.

39. *See, e.g.*, Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 605–06, 624 (2003) (holding that a state attorney general does not violate the First Amendment by prosecuting a charitable organization for fraud).

40. *See, e.g.*, United States v. Aguilar, 515 U.S. 593, 605–06 (1995) (holding that protective orders restricting disclosure made during discovery did not violate the First Amendment).

41. *See, e.g.*, Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 153, 165–69 (2002) (holding that requiring a permit for door-to-door petitioners violated the First Amendment as applied to political and religious organizations).

42. *See, e.g.*, Virginia v. Hicks, 539 U.S. 113, 124 (2003) (holding that the Richmond Redevelopment and Housing Authority's anti-trespassing rule was not facially overbroad).

A number of cases fell under multiple categories. For example, we classified cases that involved FCC's regulations of obscenity on television under both "Obscenity" and "Telecommunications."[44]

After classifying the cases, we organized the cases into a spreadsheet and sought to determine what areas Justice Kennedy was most willing and least willing to find a First Amendment violation.[45] Of the twenty-three categories, "Election Law" was the largest category with twenty-one cases.[46] In fifteen of these cases, Justice Kennedy voted in favor of the First Amendment claimants, yet the Court only upheld First Amendment claims in eleven cases.[47] The next largest category was "Obscenity," with sixteen cases.[48] Justice Kennedy upheld ten First Amendment claims in Obscenity cases, but the Court did so only nine times.[49] A close third was "Public Forum," with fourteen cases.[50] Both Justice Kennedy and the Court found four First Amendment violations in cases involving speech on government property.[51] Another large category was "Commercial Speech," which included twelve cases.[52] Justice Kennedy found free speech violations in all such cases, but the Court was not far behind, as it upheld eleven such claims.[53] The following table summarizes the frequency with which Justice Kennedy and the Court voted to find a First Amendment violation within each of the categories we identified.[54] Note that cases that fit into multiple categories are counted within each category relevant to the respective case.

43. *See* Holder v. Humanitarian Law Project, 30 S. Ct. 2705, 2712 (2010) (holding that the Antiterrorism and Effective Death Penalty Act's (AEDPA) provision banning material support for terrorist organizations did not violate the respondents' First Amendment rights).

44. *See, e.g.*, United States v. Playboy Entm't Grp. Ass'n, 529 U.S. 803, 806–07, 827 (2000) (holding that the Telecommunications Act's "signal bleed" provision requiring cable operators to scramble sexually explicit channels violated the First Amendment).

45. *See infra* Table 3.

46. *Id.*

47. *Compare, e.g.*, Citizens United v. FEC, 130 S. Ct. 876 (2010) (Kennedy, J., writing for the Court) (holding that the Bipartisan Campaign Reform Act's (BCRA) limitation on independent corporate, nonprofit, and union electioneering expenditures violated the First Amendment), *with, e.g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 337 (2000) (holding, over a dissent by Justice Kennedy, that Missouri's campaign contribution limitations were sufficiently tailored to survive First Amendment scrutiny).

48. *Id.*

49. *Compare, e.g.*, United States v. Stevens, 130 S. Ct. 1577 (2010) (holding that a federal ban on depictions of animal cruelty was substantially overbroad to survive First Amendment scrutiny), *with, e.g.*, Denver Area Educ. Telecomm. Consortium, Inc., v. FCC, 518 U.S. 727 (1996) (upholding, over a dissent in part by Justice Kennedy, a provision in the Cable Television Consumer Protection and Competition Act that permitted an operator to prohibit patently offensive or indecent programming on leased access channels).

50. *Id.*

51. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (holding that a school's exclusion of a Christian group from meeting in school facilities after hours was viewpoint discriminatory and thus invalid).

52. *See, e.g.*, Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (holding that prohibiting display of a beer's alcohol content violated the First Amendment).

53. *Id.*

54. *See infra* Table 3.

Table 3

Type of Case	Total Number of Cases	Number of Cases with Claims Upheld	Number of Cases with Claims Upheld by Kennedy
Election Law	21	11	15
Obscenity	16	9	10
Public Forum	14	4	4
Commercial Speech	12	11	12
Association	9	4	5
Public Employees	9	4	3
Judicial Process	6	5	5
Freedom of the Press	5	3	4
Compelled Speech	6	2	3
Abortion	4	0	3
Labor Law	4	2	3
Prisoners' Speech	4	1	1
Hate Speech	4	3	4
Defamation	4	1	1
Symbolic Conduct	3	2	2
Telecommunications	4	2	2
Zoning of Adult Establishments	3	0	0
Charitable Donations	2	1	1
Content-Neutrality	2	2	2
Copyright	2	0	0
National Security	2	0	0
Overbreadth	2	0	0
Students' Speech	1	0	0

All in all, although Justice Kennedy's support for free speech claims often depends on the nature of the case, he has still been more willing to hold for free-speech claimants than the Court as a whole.

III. QUALITATIVE ANALYSIS: WHAT THE OPINIONS SHOW

Our quantitative analysis of Justice Kennedy's votes in free-speech cases clearly demonstrates that Justice Kennedy is significantly more inclined than the Court to protect free-speech rights. An examination of Justice Kennedy's free-speech opinions suggests that the numbers, if anything, understate Justice Kennedy's commitment to free speech relative to the Court. In particular, the numbers fail to catch two important phenomena: first, that Justice Kennedy has authored a large and disproportionate number of majority opinions in key First Amendment cases during his time on the Court;[55] and second, that even in cases where Justice Kennedy joined with the majority on free-speech issues (whether to uphold or deny a constitutional claim), when he writes separately, he often adopts analyses and positions that are substantially more speech-protective than the Court as a whole.[56] We proceed by considering each of these points in turn.

A. Key Cases

We begin by briefly summarizing what we consider to be some of the most important free speech majority opinions authored by Justice Kennedy, in chronological order.

Edenfield v. Fane[57]: Florida ethical rules prohibited the in-person solicitation of clients by certified public accountants (CPAs).[58] Fane, a CPA who had recently relocated to Florida from New Jersey where such solicitation was permitted, challenged the rule.[59] The Court, by an 8–1 vote, struck down the regulation as violating the First Amendment.[60] Justice Kennedy's majority opinion applied the intermediate-scrutiny test of *Central Hudson*,[61] but found that the Florida rule did not advance any substantial governmental interest.[62] Significantly, the Court distinguished an earlier opinion upholding a ban on in-person solicitation of clients by lawyers[63] on the grounds that such solicitation by CPAs did not raise the same concerns about undue influence posed by lawyers.[64]

Rosenberger v. Rector and Visitors of the University of Virginia[65]: The University of Virginia paid the printing costs of publications issued by student

55. *See infra* Part III.A.
56. *See infra* Part III.B.
57. 507 U.S. 761 (1993).
58. *Id.* at 763.
59. *Id.* at 763–64.
60. *Id.* at 777.
61. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).
62. *Edenfield*, 507 U.S. at 771.
63. *See id.* at 774 (discussing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)).
64. *Id.* at 774–76.
65. 515 U.S. 819 (1995).

groups through its Student Activities Fund (the Fund).[66] However, the Fund's guidelines prohibited funding for any "religious activity," including any publication that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."[67] Invoking this restriction, the Fund refused to pay for the publication of a newspaper called *Wide Awake: A Christian Perspective at the University of Virginia*.[68] The Court, by a 5–4 vote, held that excluding *Wide Awake* violated the Free Speech Clause of the First Amendment.[69] In particular, the Court held that the Student Activities Fund constituted a limited public forum, albeit a "metaphysical" one, and that the exclusion of religious publications constituted viewpoint discrimination, which is prohibited by the First Amendment.[70]

O'Hare Truck Service, Inc. v. City of Northlake[71]: O'Hare Truck Service provided towing services as an independent contractor to the City of Northlake.[72] During a mayoral election, O'Hare and its owner refused to provide campaign contributions to the incumbent, but rather supported a challenger.[73] As a consequence, O'Hare was removed from the list of approved towing companies maintained by the City.[74] The Court, by a 7–2 vote, held that the First Amendment protected the political association and free-speech rights of independent contractors on the same terms as public employees, and therefore O'Hare had stated a viable First Amendment claim (thereby reversing the Seventh Circuit's holding excluding independent contractors from this form of protection).[75]

United States v. Playboy Entertainment Group Ass'n[76]: Congress adopted legislation requiring cable operators to take special steps with respect to cable channels whose contact was primarily sexually explicit.[77] In particular, the statute required such channels to either be fully scrambled (for financial reasons, most operators only partially scrambled such channels), or be transmitted only during late-night hours.[78] The purpose was to prevent "signal bleed," where partially scrambled images could be glimpsed by viewers (in particular, by children).[79]

66. *Id.* at 822.

67. *Id.* at 825.

68. *Id.* at 827.

69. *Id.* at 837.

70. *Id.* at 830–31. The Court also held that funding *Wide Awake* through the Student Activities Fund would not violate the Establishment Clause. *Id.* at 840–45.

71. 518 U.S. 712 (1996).

72. *Id.* at 715.

73. *Id.*

74. *Id.*

75. *Id.* at 720.

76. 529 U.S. 803 (2000).

77. *Id.* at 806.

78. *Id.*

79. *Id.*

Because full scrambling was not financially viable, operators generally responded by restricting such channels to late-night hours.[80] The Court held, 5–4, that the full scrambling requirement was a content-based restriction on fully protected speech, and that it was unconstitutional because less-restrictive means existed by which Congress could achieve its goal of protecting children.[81]

Legal Services Corp. v. Velazquez[82]: The Legal Services Corporation distributes funds appropriated by Congress to local organizations that provide legal services to the poor.[83] Congress enacted a restriction prohibiting the funding of any organization that represented clients who sought to amend or challenge any welfare law.[84] The Court struck down this restriction by a 6–3 vote.[85] Drawing upon his earlier *Rosenberger* opinion, Justice Kennedy concluded that this statute did not restrict government speech; it constituted a discriminatory subsidy for private speech.[86] He then held that the restriction was unconstitutional because it had a substantial impact on lawyers' ability to properly represent their clients and courts' ability to properly adjudicate legal claims.[87]

Ashcroft v. Free Speech Coalition[88]: Child pornography is, of course, unprotected under the First Amendment.[89] Congress passed a statute prohibiting "virtual" child pornography, meaning visual depictions that appear to be of minors engaging in sexual activity, but may not involve any actual minors (typically because the image was created either using a computer or an adult actor who merely looks underage).[90] The Court struck down the statute by a 6–3 vote.[91] First, the Court clarified that the statute could not be upheld as prohibiting unprotected speech because virtual child pornography does not involve the actual sexual abuse of a child and does not implicate the same concerns as actual child pornography.[92] The Court also rejected the government's claims that the ban was necessary because virtual child pornography might be used by pedophiles to lure children or to whet their own appetites.[93] Finally, the Court rejected the idea that potential prosecutorial difficulties in convicting those who possess actual child pornography justified a ban on virtual child pornography.[94]

80. *Id.* at 806, 809.
81. *Id.* at 811–15.
82. 531 U.S. 533 (2001).
83. *Id.* at 536.
84. *Id.* at 536–37.
85. *Id.* at 535.
86. *Id.* at 542–43.
87. *Id.* at 542–44, 548–49.
88. 535 U.S. 234 (2002).
89. *See* New York v. Ferber, 458 U.S. 747, 773–74 (1982).
90. *Free Speech Coal.*, 535 U.S. at 239–40.
91. *Id.* at 238, 256.
92. *Id.* at 250–51.
93. *Id.* at 253–54.
94. *Id.* at 254–56.

Ashcroft v. ACLU[95]: In response to the Court's decision in *Reno v. ACLU*,[96] which unanimously struck down an across-the-board prohibition on posting to or sending over the Internet of "indecent" material if the material might be accessed by minors, Congress adopted the Child Online Protection Act (COPA).[97] COPA adopted a narrower ban, limited to the posting of materials to commercial websites material which is "harmful to minors," unless the website uses a screening mechanism to confirm that viewers were adults.[98] This time the Court struck down the law by a 5–4 vote.[99] The Court held that COPA was a content-based restriction on protected speech and was not narrowly tailored because less restrictive means to protect children already existed (in particular, the Court pointed to encouraging the use of software filters as the primary alternative).[100]

Citizens United v. FEC[101]: Federal law prohibits corporations and labor unions from using general treasury funds to engage in "electioneering communication," defined as a broadcast, cable, or satellite communication that "refers to a clearly identified candidate for Federal office" within certain time periods before primary or general elections.[102] The Court struck down the prohibition in its entirety by a 5–4 vote.[103] The Court held that the prohibition was a direct restriction on core political speech, and that the corporate identity of the restricted speakers was irrelevant.[104] It also rejected the government's rationales for the legislation, including an "antidistortion" justification,[105] and the argument that the law was necessary to prevent "corruption or the appearance of corruption."[106] As such, the law clearly violated the First Amendment.[107]

Sorrell v. IMS Health Inc.[108]: Vermont adopted a statute prohibiting pharmacies from selling information regarding the prescribing habits of physicians if the information was going to be used by pharmaceutical companies to market prescription drugs.[109] A group of pharmaceutical companies and data-

95. 542 U.S. 656 (2004).

96. 521 U.S. 844 (1997).

97. *ACLU*, 542 U.S. at 659–60.

98. *Id.* at 661–62.

99. *Id.* at 659, 673.

100. *Id.* at 666–67.

101. 130 S. Ct. 876 (2010).

102. *Id.* at 887 (quoting 2 U.S.C. § 434(f)(3)(A) (2006)). Federal law had long prohibited the use of such funds to make direct contributions to candidates, or to expressly advocate the election of defeat of a candidate. The Bipartisan Campaign Reform Act of 2002 (BCRA), better known as the McCain-Feingold bill, extended the prohibition to all electioneering communications. *Id.*

103. *Id.* at 886.

104. *Id.*

105. *Id.* at 904–08.

106. *Id.* at 908–11.

107. *Id.* at 917.

108. 131 S. Ct. 2653 (2011).

109. *Id.* at 2660.

mining companies (who, in the past, had purchased and analyzed such prescriber-identifying information and then sold the results to pharmaceuticals) challenged the statute.[110] The Court, by a 6–3 vote, sustained their challenge.[111] In dicta, the Court strongly suggested that the ban on the sale of information was in itself a content- and speaker-based restriction on protected speech.[112] Ultimately, however, because Vermont only prohibited the sale of such information for marketing purposes, the Court invoked the commercial speech doctrine.[113] The majority concluded that the Vermont statute could not even survive the *Central Hudson* intermediate-scrutiny test applicable to restrictions on commercial speech,[114] and thereby avoided the broader question of whether laws banning the sale of data directly implicated the First Amendment.[115]

Of course, the above is not a complete list of Justice Kennedy's majority opinions in free-speech cases, nor is it a product of any sort of empirical analysis of the importance or influence of particular opinions; instead, it is a product of our judgment. However, it is extremely revealing. The first thing that jumps out from these opinions is the sheer variety of the kinds of speech Justice Kennedy protected. These cases involve everything from religious speech (*Rosenberger*)[116] to campaign expenditures (*Citizens United*)[117] to the speech of government employees and contractors (*O'Hare Trucking*)[118] to legal advocacy (*Legal Services Corp.*)[119] to commercial speech (*Sorrell*)[120] to sexually explicit speech (*Playboy Entertainment* and the two *Ashcroft* cases).[121] Thus, the list confirms what our empirical analysis suggests: unlike many of his colleagues, Justice Kennedy is an equal-opportunity defender of free speech, and does not play favorites among different kinds of speech. Instead, his jurisprudence protects speech uniformly without regard to the perceived value of the speech at issue.

Our analysis of Justice Kennedy's First Amendment opinions also shows that he has helped shape core aspects of free-speech law over the last two decades. For example, the *Rosenberger* decision developed free-speech law in two critical ways. First, *Rosenberger* established that the Court's public forum doctrine, and its critical requirement of viewpoint neutrality, extended not just to access to

110. *Id.* at 2661.

111. *Id.* at 2672.

112. *Id.* at 2663–65.

113. *Id.* at 2667.

114. *Id.* at 2667–68 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980)).

115. *Id.* at 2672.

116. 515 U.S. 819 (1995).

117. 130 S. Ct. 876 (2010).

118. 518 U.S. 712 (1996).

119. 531 U.S. 533 (2001).

120. 131 S. Ct. 2653 (2011).

121. United States v. Playboy Entm't Grp. Ass'n, 529 U.S. 803 (2000); Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); Ashcroft v. ACLU, 542 U.S. 656 (2004).

physical property, but also to funding decisions.[122] Thus, *Rosenberger* identified an important limit on the Court's earlier decision in *Rust v. Sullivan*,[123] holding that when the government speaks itself or pays others to speak on its behalf, its choices are not subject to significant First Amendment scrutiny.[124] Justice Kennedy's opinion in *Legal Services Corp. v. Velazquez* confirmed and extended certain aspects of *Rosenberger*.[125] *Legal Services* applied the nondiscrimination requirement to government funding even when the funding program's "purpose [was] not to 'encourage a diversity of views,'"[126] and so did not constitute a public forum. Second, *Rosenberger* was an important step in the line of cases establishing that discrimination against religious speech constitutes viewpoint-based discrimination.[127] Whatever the pitfalls of this approach may be,[128] there is no doubt that it has had a substantial impact on an important and heavily litigated area of First Amendment law.

Justice Kennedy's jurisprudence has also substantially influenced the development of the commercial speech doctrine. *Edenfield v. Fane*, which struck down Florida's ban on in-person solicitation of clients by CPAs, was not itself a highly contested decision—it was, after all, decided by an 8–1 vote, and in retrospect, it seems like a straightforward result.[129] However, it is important to remember that when the case was decided in 1993, the Court's commercial speech jurisprudence was in deep retreat. As a result of a series of decisions hostile towards commercial speech protections, including *Ohralik v. State Bar Ass'n*, upholding limits on in-person solicitation by lawyers,[130] as well as *Posados de Puerto Rico Associates v. Tourism Co. of Puerto Rico*[131] and *Board of Trustees of State University of New York v. Fox*,[132] it was widely believed that the Court had turned its back on earlier cases promising substantial constitutional protections for commercial speech. *Edenfield v. Fane*, however (along with *City*

122. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830–31 (1995).

123. 500 U.S. 173, 177–78, 203 (1991). This principle has come to be called the "government speech" doctrine.

124. *Id.* at 177–78, 203; *Rosenberger*, 515 U.S. at 833.

125. *See* Legal Servs. Corp. v. Velazquez, 533 U.S. 553, 542 (2001).

126. *Id.*

127. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

128. For a penetrating criticism of the Court's attempt to equate religion with a viewpoint, see Alan Brownstein & Vikram Amar, *Reviewing Associational Freedom Claims in a Limited Public Forum: An Extension of the Distinction Between Debate-Dampening and Debate-Distorting State Action*, 38 HASTINGS CON. L. Q. 505, 536–39 (2011).

129. 507 U.S. 761, 762–63 (1993).

130. 436 U.S. 412 (1978).

131. 478 U.S. 328 (1986) (upholding a Puerto Rico law legalizing casino gambling, but forbidding casino advertising directed at residents of Puerto Rico).

132. 492 U.S. 469 (1989) (upholding a regulation prohibiting commercial enterprises in student dorms, and clarifying that the "narrow tailoring" requirement of the commercial speech doctrine requires only a reasonable fit).

of Cincinnati v. Discovery Network, Inc.,[133] decided just one month earlier), suggested that the Court's interest in commercial speech had been revived. In a series of decisions since 1993, the Court has extended extremely robust protection to commercial speech.[134] Justice Kennedy's most recent contribution to this area of law suggests that this protection has progressed very far indeed.

That contribution was his 2011 majority opinion in *Sorrell v. IMS Health Inc*.[135] *Sorrell*, though a recent opinion, is also likely in its time to have a very significant influence on commercial speech, as well as on First Amendment doctrine more generally.[136] First, Justice Kennedy's *Sorrell* opinion takes important steps towards merging the commercial speech doctrine with general free-speech law, thus abandoning the long-held notion that truthful, non-misleading commercial speech is low-value speech.[137] By criticizing the Vermont statute as content- and speaker-based, even when applying the commercial speech doctrine, the Court strongly suggested that such laws should be subject to strict scrutiny.[138] Ultimately, Justice Kennedy did not take this final step of abandoning intermediate scrutiny because he concluded it was unnecessary in this case. However, the writing certainly seems to be on the wall—as the dissent explicitly recognizes (and bemoans).[139] The second, and perhaps even more significant contribution of this opinion, is Justice Kennedy's strong suggestion that the sale of data is in itself a speech act, a fully protected form of speech, because "[f]acts . . . are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs."[140] The implications of this premise, if followed in later cases, are profound for the burgeoning field of data privacy, and more generally for the shape of First Amendment doctrine.[141]

Far removed from religious and commercial speech, but also critical to the development of free-speech law, is the trilogy of cases authored by Justice Kennedy dealing with sexually explicit speech: *Playboy Entertainment*,[142]

133. 507 U.S. 410 (1993).

134. *See, e.g.*, Rubin v. Coors Brewing Co., 514 U.S. 514 U.S. 476 (1995); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002). In cases during this period where the Court has rejected commercial speech claims, Justice Kennedy has tended to dissent. *See, e.g.*, Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995).

135. 131 S. Ct. 2653 (2011).

136. For a more detailed discussion of the potential significance of *Sorrell*, see Ashutosh Bhagwat, Sorrell v. IMS Health*: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855 (2012).

137. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562–63 (1980).

138. *Sorrell*, 131 S. Ct. at 2663–65.

139. *Id.* at 2677–79 (Breyer, J., dissenting).

140. *Id.* at 2666–67.

141. For a fuller development of this issue, see Bhagwat, Sorrell v. IMS Health*: Details, Detailing, and the Death of Privacy*, *supra* note 136.

142. United States v. Playboy Entm't Grp. Ass'n, 529 U.S. 803 (2000).

Ashcroft v. Free Speech Coalition,[143] and *Ashcroft v. ACLU*.[144] These cases clearly establish that sexually explicit speech that falls short of the obscenity standard is fully protected by the First Amendment, and therefore content-based regulations of such speech trigger strict scrutiny.[145] *Playboy* and *Ashcroft v. ACLU* also establish the important principle that when the state seeks to shield minors from "indecent" materials, the First Amendment creates a strong preference for regulatory strategies that empower parents to make choices, as opposed to regulations that simply impose the government's will.[146] Finally, and perhaps most significantly, the *Free Speech Coalition* decision announced the modern Court's hostility toward creating or expanding categories of unprotected speech by declining to extend the unprotected category of child pornography to include virtual child pornography.[147] That approach has been applied in recent years to fundamentally restructure First Amendment law, by abandoning the technique of "categorical balancing" to create new such categories.[148]

The *O'Hare* trucking case,[149] while perhaps less epochal than the other doctrinal developments we have discussed, is also an important decision. The issue in *O'Hare* was the reach of earlier decisions by the Supreme Court holding that patronage hiring and firing of public employees, that is, the conditioning of public employment on the provision of political support to office holders, violated the First Amendment.[150] The earlier decisions were highly controversial and decided over strong dissents from more conservative justices.[151] Therefore, the Court's willingness to extend the scope of these holdings to independent contractors[152] sent a strong signal that despite the more conservative turn of the Court in intervening years, the Court remained committed to those earlier decisions and to protecting the speech and associational rights of public employees.

143. 535 U.S. 234 (2002).

144. 542 U.S. 656 (2004).

145. Even when the Court has not fully adhered to this position, Justice Kennedy has. *See, e.g.*, Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 780–812 (1996) (Kennedy, J., concurring in part, concurring in judgment in part, and dissenting in part).

146. For a detailed discussion of this aspect of these cases, see Ashutosh Bhagwat, *What If I Want My Kids to Watch Pornography?: Protecting Children from "Indecent" Speech*, 11 WM. & MARY BILL RTS. J. 671 (2003).

147. 535 U.S. at 249.

148. *See* Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2734 (2011); United States v. Stevens, 130 S. Ct. 1577, 1585 (2010).

149. O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996).

150. *Id.* at 720 (discussing *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980), and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990)).

151. *See Elrod*, 427 U.S. at 375–76 (providing Burger, C.J., and Powell, J., dissenting opinions); *Branti*, 445 U.S. at 520–21 (providing Stewart, J., and Powell, J., dissenting opinions); *Rutan*, 497 U.S. at 92 (providing Scalia, J., dissenting opinion).

152. *O'Hare*, 518 U.S. at 726.

Finally, we come to *Citizens United*.[153] For all the controversy it has provoked,[154] no one doubts the significance of this decision. It has fundamentally restructured the law of campaign finance reform. The holding itself, banning any and all restrictions on independent expenditures by corporations and unions funding political speech,[155] was significant enough. But perhaps even more so were the broader themes of Justice Kennedy's opinion, which expressed deep skepticism about campaign finance regulation generally,[156] and expressed skepticism more specifically about concerns that campaign spending threatens to create corruption, or the appearance of corruption, even when there is no apparent danger of *quid pro quo* bribery.[157] Lower courts have relied on this part of the opinion to strike down a broad range of restrictions on political spending and contributions, not involving direct contributions to candidates, including restrictions on contributions to political action committees which are (at least purportedly) run independently of candidates and campaigns.[158] It has been argued that this legal development has led to the rise and significance of so-called Super PACs in the 2012 presidential election.[159] It cannot seriously be doubted that these organizations have fundamentally changed the tone and dynamics of the campaign.[160] Thus, Justice Kennedy's opinion has not only upended the law of campaign finance, it has very probably upended national politics more generally.

In short, Justice Kennedy's majority opinions, applying and extending the Free Speech Clause of the First Amendment, have had a profound influence on the development of the law in this area. But not every important free-speech opinion Justice Kennedy has authored has upheld a constitutional claim. An

153. Citizens United v. FEC, 130 S. Ct. 876 (2010).

154. *See* Barak Obama, President of the United States, Remarks by the President in State of the Union Address (Jan. 27, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address (on file with the *McGeorge Law Review*) (criticizing the *Citizens United* decision).

155. *Citizens United*, 130 S. Ct. at 917.

156. *Id.* at 895.

157. *Id.* at 908–09.

158. *See, e.g.*, Thalheimer v. City of San Diego, 645 F.3d 1109 (9th Cir. 2011); Wis. Right to Life State PAC v. Barland, 664 F.3d 139 (7th Cir. 2011); Farris v. Seabrook, 667 F.3d 1051 (9th Cir. 2010); Speechnow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010) (en banc).

159. *See, e.g.*, Fred Wertheimer, Citizens United *and Contributions to Super PACs: A Little History Is in Order*, HUFFINGTON POST (Feb. 21, 2012, 4:35 PM), http://www.huffingtonpost.com/fred-wertheimer/citizens-united-and-contr_b_1291465.html (on file with the *McGeorge Law Review*); Peter Overby, *As "*Citizens United*" Turns 2, Super PACs Draw Protests*, NPR (Jan. 20, 2012), http://www.npr.org/2012/01/20/145500168/superpacs-celebrate-anniversary-of-citizens-united-case (on file with the *McGeorge Law Review*).

160. *See, e.g.*, Nicholas Confessor & Michael Luo, *Obama Campaign Fears Uphill Climb Raising 'Super PAC' Money*, N.Y. TIMES, Mar. 14, 2012, at A1, *available at* http://www.nytimes.com/2012/03/14/us/politics/obama-campaign-fears-uphill-climb-raising-super-pac-money.html?_r=1&scp=2&sq=SuperPAcs&st=cse (on file with the *McGeorge Law Review*); Jeremy W. Peters, *'Super PACs,' Not Campaigns, Do Bulk of Ad Spending*, N.Y. TIMES (Mar. 2, 2012), http://www.nytimes.com/2012/03/03/us/politics/super-pacs-not-campaigns-do-bulk-of-ad-spending.html?scp=7&sq=Super%20PAcs&st=cse (on file with the *McGeorge Law Review*).

examination of three critical Kennedy opinions rejecting free speech claims reveals a very interesting pattern.[161] The first is *Turner Broadcasting System, Inc. v. FCC*.[162] In this case (along with its earlier incarnation in the Court, also authored by Justice Kennedy),[163] the Court, by a 5–4 vote, upheld a federal statute that required cable television operators to dedicate up to one-third of their total channel capacity to carrying the signals of local television broadcast stations free of charge.[164] The denial of the cable operators' First Amendment claims was, of course, a defeat for *their* free-speech rights.[165] Interestingly, however, the impact of this statute was not to simply silence or censor speech, it was to enhance the speech of some speakers—broadcast stations—at the expense of others—cable television programmers.[166] Furthermore, the justification the federal government offered for the regulation, which the Court accepted, was that it was necessary to ensure the continuing survival of the free over-the-air broadcast television industry, which allegedly faced financial challenges because of discriminatory carriage decisions by cable operators.[167] In other words, the impact of the law upheld by the Court was to preserve a particular, distinct voice—local broadcast stations—and to ensure that the millions of Americans who do not subscribe to pay television retained access to speech via television. Therefore, the net effect of the law was to (at least arguably) enhance rather than reduce the total amount of speech in the marketplace.[168] Describing this as an anti-speech decision is highly questionable.

Consider also *Arkansas Educational Television Commission v. Forbes*,[169] where the Court upheld the right of a public television station hosting a debate among congressional candidates to exclude a candidate who had not attracted substantial public support.[170] In reaching its conclusion, Justice Kennedy's majority opinion makes a critical point, arguing that restricting the debate organizers' discretion on these sorts of matters "would result in less speech, not more."[171] If the organizers are unable to focus the debate on viable candidates, the debate's expressive and educational value may well be reduced, and organizers may decide not to hold such a debate at all under such conditions.[172] Once again, Justice Kennedy rejecting a First Amendment claim was based at least in part on

161. Garcetti v. Ceballos, 547 U.S. 410 (2006); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).

162. 520 U.S. 180.

163. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

164. *Turner Broad. Sys., Inc.*, 520 U.S. at 185.

165. *See id.*

166. *See id.* at 191.

167. *Id.* at 193.

168. *Id.* at 203.

169. 523 U.S. 666 (1998).

170. *Id.* at 669.

171. *Id.* at 680.

172. *Id.* at 681.

his view that the challenged regulation's effect was speech-enhancing rather than limiting.

Finally, we must consider *Garcetti v. Ceballos*.[173] In this case, the Court held that the First Amendment did not protect the speech of government employees if the expression was pursuant to an employee's official duties.[174] Unlike *Turner*[175] and *Arkansas Educational Television Commission*,[176] it is less clear that the net effect of the *Garcetti* decision was to enhance speech. However, it is clear that when a public employee speaks pursuant to his or her official duties (as opposed to when the employee speaks as a citizen, even if the topic touches upon the employee's job), the employee is not making a personal contribution to public debate.[177] Indeed, in *Garcetti*, the relevant speech was an internal memo, which made *no* contribution to public debate.[178] Even when the speech at issue is public, however, it is not his or her contribution to public debate when it is made in the course of an employee's duties; it is the government's contribution. Indeed, a government's inability to control its employees' speech on the government's behalf would obviously have a serious negative impact on the government's own ability to speak at all, since governments are juridical entities which always speak through agents. Thus, it is not clear that the net impact of *Garcetti* is to substantially reduce the quantity and quality of public debate.

B. Separate Opinions

An examination of Justice Kennedy's majority opinions in free-speech cases demonstrates the important contributions he has made to the development of free-speech law in the modern era.[179] A similar and even more striking pattern emerges when one looks at free-speech cases where Justice Kennedy wrote separate concurring or dissenting opinions. These cases demonstrate that even when Justice Kennedy joins a majority in accepting or rejecting a First Amendment claim, he often does so on grounds that are far more speech-protective than those adopted by other justices. There are many examples of those opinions from Justice Kennedy's tenure on the Court, but we will focus on an illustrative few.[180]

173. 547 U.S. 410 (2006).

174. *Id.* at 420–21.

175. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997).

176. 523 U.S. 666.

177. *Garcetti*, 547 U.S. at 421–22.

178. *Id.*

179. *See supra* Part III.A.

180. United States v. Am. Library Ass'n, 539 U.S. 194 (2003); Republican Party of Minn. v. White, 536 U.S. 765 (2002); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992); Lee v. Int'l Soc'y for Krishna Consciousness Inc., 505 U.S. 830 (1992); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991).

Probably the most striking example of the phenomenon described above is the Court's decision in *International Society for Krishna Consciousness, Inc. v. Lee*.[181] The parties to the case took issue with regulations prohibiting the sale or distribution of literature or the solicitation of funds within the public areas of the three New York City airports.[182] The Court ultimately struck down the first regulation prohibiting the distribution of literature, but upheld the ban on solicitation.[183] Justice Kennedy concurred in both of those results (he and Justice O'Connor were the only two members of the Court to agree with both results).[184] So seemingly, Justice Kennedy's First Amendment position was the median one on the Court.[185] But appearances can be deceptive. The critical doctrinal issue in the case was not the validity of the specific regulations, but rather what sort of a public forum the public spaces of airports constitute.[186] Here, the majority took a highly restrictive stance and denied airports public forum status because airports were not spaces traditionally open to speech (given their recent provenance), nor had the government intentionally opened airports up to speech.[187] Justice Kennedy (joined by three other justices) took a very different tack and argued that the public forum "inquiry must be an objective one, based on the actual, physical characteristics and uses of the property."[188] More broadly, he decried the direction the Court's public forum doctrine was taking, complaining that "[o]ur public forum doctrine ought not to be a jurisprudence of categories rather than ideas or convert what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat."[189] Justice Kennedy thus found the ban on distribution of literature clearly constitutional.[190] He voted to uphold the ban on solicitation only because he found its focus on the in-person solicitation and receipt of money to be akin to a regulation of conduct, or the manner of speech, rather than a direct regulation of speech itself.[191] On the primary issue before the Court, however, Justice Kennedy took one of the most speech-protective approaches to the public forum doctrine in the history of the

181. 505 U.S. 672.

182. *Id.* at 675–76.

183. *Id.* at 683–85.

184. *Id.* at 686–87 (O'Conner, J., concurring); *id.* at 693 (Kennedy, J., concurring in judgment); *Lee*, 505 U.S. 830.

185. *See Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. at 686–87 (O'Connor, J., concurring); *id.* at 693 (Kennedy, J., concurring in the judgment).

186. *Id.* at 680–81.

187. *Id.*

188. *Id.* at 695 (Kennedy, J., concurring in judgment).

189. *Id.* at 694–95.

190. *Lee*, 505 U.S. 830; *see also Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. 672 (providing the rationale for the decision in *Lee*).

191. *Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. at 703–09 (Kennedy, J., concurring in the judgment).

Court. If his approach had prevailed, that doctrine would look very different, and far more speech-protective, than it does today.

Another area of First Amendment doctrine where Justice Kennedy has taken a significantly more speech-protective approach than the majority (indeed, on this issue Justice Kennedy has moved beyond any other member of the Court) is illustrated by two decisions spanning a decade: *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*[192] and *Republican Party of Minnesota v. White*.[193] In both cases, a majority (in *Simon & Schuster*, a unanimous majority) voted to strike down restrictions on speech: in *Simon & Schuster*, a law requiring proceeds from books written by convicted criminals describing their crimes to be held in escrow for crime victims,[194] and in *White*, a Minnesota ethical rule banning candidates in judicial elections from speaking about their views on legal or political issues.[195] In both cases, the majority found the law to be content-based and applied strict scrutiny.[196] Justice Kennedy wrote separately in both cases to argue that content-based restrictions on speech (other than regulations of the public forum) should not be subject to strict scrutiny, but should be per se unconstitutional.[197] Particularly in *Simon & Schuster*, Justice Kennedy pointed out that incorporating the strict-scrutiny test into free-speech analysis was essentially a historical accident, which occurred when the Court quoted a case involving the Equal Protection Clause without realizing what it was doing.[198] He also argued that leaving open even the possibility that a content-based restriction on private speech might be upheld undermined the fundamental premise of the First Amendment that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[199] Once again, if the Court had followed Justice Kennedy's lead, free speech law would have been significantly liberalized.

Consider also *United States v. American Library Ass'n*.[200] In this case, the Court upheld, against a facial challenge, a federal statute that conditioned receipt of federal funds for public libraries on the libraries installing filtering software on Internet-accessible computers that blocked minors from accessing visual images harmful to them.[201] The plurality opinion broadly defended the right of libraries to

192. 502 U.S. 105 (1991).

193. 536 U.S. 765 (2002).

194. 502 U.S. at 108.

195. 536 U.S. at 768.

196. *See Simon & Schuster*, 502 U.S. at 119; *White*, 536 U.S. at 774.

197. *Simon & Schuster*, 502 U.S. at 124–28 (Kennedy, J., concurring in judgment); *White*, 536 U.S. at 793 (Kennedy, J., concurring).

198. *Simon & Schuster*, 502 U.S. at 125 (Kennedy, J., concurring in judgment).

199. *Id.* at 126 (quoting Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972)).

200. 539 U.S. 194 (2003).

201. *Id.* at 199, 201.

filter access to the Internet and the right of the federal government to condition funding as it chooses.[202] Justice Kennedy declined to join this opinion, which would have granted libraries extraordinarily broad censorship powers.[203] Instead, he wrote separately, emphasizing that in this case, the government had asserted that upon the request of an adult, librarians could unblock computers with little delay.[204] As Justice Kennedy said, given this concession, "there is little to this case."[205] Importantly, however, Justice Kennedy emphasized that if some libraries did not have the capacity to unblock computers, then an as-applied challenge to the statute would be available.[206] In other words, he declined to join the plurality's broad rejection of serious First Amendment issues in the case, and thereby preserved the possibility that censorship of library computers for adult patrons might be challenged in the future.[207]

The above discussion does not fully explore the contexts in which Justice Kennedy has sought, in his separate opinions, to push free-speech law in more speech-protective directions. For example, we have not discussed Justice Kennedy's consistent and vigorous defense of the rights of abortion protestors in the face of general hostility on the Court.[208] Nor have we mentioned the many separate opinions Justice Kennedy filed in campaign finance cases prior to his path-breaking decision in *Citizens United*.[209] Even limiting ourselves to the highlights, what is abundantly clear is that Justice Kennedy's separate opinions in free-speech cases, even more so than his majority opinions, place him firmly on the most consistently speech-protective end of the spectrum of Justices who have served with him on the Supreme Court.

IV. CONCLUSION

Our task here was to explore whether a quantitative and qualitative analysis of the Supreme Court's free-speech decisions during Justice Kennedy's tenure on the Court tends to confirm or disprove Justice Kennedy's reputation as perhaps the foremost defender of free-speech principles on the modern Court. Our conclusion: his reputation is fully deserved. It is not that Justice Kennedy always

202. *Id.* at 208, 211–12.

203. *Id.* at 214 (Kennedy, J., concurring in judgment).

204. *Id.* at 214–15.

205. *Id.* at 214.

206 *Id.* at 215.

207. *Id.* at 214–15.

208. *See* Hill v. Colorado, 530 U.S. 703, 765–92 (2000) (Kennedy, J., dissenting); *see also* Schenck v. Pro-Choice Network, 519 U.S. 357, 385–95 (1997) (Scalia, J., concurring in part and dissenting in part); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 784–820 (1994) (Scalia, J., dissenting).

209. *See, e.g.*, Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 695–713 (1990) (Kennedy, J., dissenting); McConnell v. FEC, 540 U.S. 93, 286–341 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part); Randall v. Sorrell, 548 U.S. 230, 264–65 (2006) (Kennedy, J., concurring in the judgment).

votes to accept free-speech claims; our quantitative analysis demonstrates that he clearly does not. He does, however, vote in favor of free-speech claims more consistently than the Court as a whole.[210] It is also noteworthy that Justice Kennedy's receptivity to free-speech arguments is not limited to specific substantive areas such as campaign finance reform, abortion protestors, commercial speech, or sexually explicit speech—it runs across the range of First Amendment claims and issues. There also does not appear to be any temporal pattern to Justice Kennedy's voting in free-speech cases. From his (albeit reluctant) crucial fifth vote to strike down a ban on flag burning during his first full term on the Court[211] to his recent decisions in *Citizens United*[212] and *Sorrell*,[213] he has been a consistent voice for free speech, especially for the protection of speech despised by society at large. This is an area where Justice Kennedy's jurisprudence has not evolved.

If any pattern emerges from an examination of Justice Kennedy's free-speech jurisprudence, it is that his views in this area are deeply rooted in his libertarian distrust of government and his firm conviction that the liberties protected by the First Amendment are an integral aspect of the process of democratic self-governance through which "We the People" ensure that government respects our liberties. Most clearly, this results in his interpreting the First Amendment to maximize the scope of and opportunities for democratic discourse, as illustrated by cases such as *International Society for Krishna Consciousness, Inc.*[214] and *Citizens United*.[215] His opinions also seek to ensure that no voice, no matter how disruptive or unpopular, is excluded from public debate, as illustrated by decisions such as *Rosenberger*,[216] *Velasquez*,[217] the abortion protestor decisions, and *Citizens United*.[218] Finally, and most broadly, Justice Kennedy's views in this area reflect an overarching desire to ensure that government is not in a position to legislate the moral values of its citizens, as demonstrated by his willingness in cases such as *Playboy Entertainment*[219] and the *Ashcroft* decisions[220] to strike down regulations of even sexually explicit speech. This principle connects Justice Kennedy's free-speech opinions with his important decisions in the areas of privacy and the rights of sexual minorities, notably *Planned Parenthood of*

210. *See supra* Table 1 (summarizing Justice Kennedy's voting record in finding a First Amendment violation as compared to the Court as a whole).

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

212. Citizens United v. FEC, 130 S. Ct. 876 (2010).

213. Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011).

214. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992).

215. 130 S. Ct. 876.

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

217. Legal Servs. Corp. v. Velasquez, 521 U.S. 533 (2001).

218. 130 S. Ct. 876.

219. United States v. Playboy Entm't Grp. Ass'n, 529 U.S. 803 (2000).

220. Ashcroft v. ACLU, 542 U.S. 656 (2004); Aschroft v. Free Speech Coal., 535 U.S. 234 (2002).

Southeastern Pennsylvania v. Casey,[221] *Romer v. Evans*,[222] and *Lawrence v. Texas*,[223] in that both sets of cases reflect Justice Kennedy's abiding belief in the value of liberty, and in the primacy of the individual over the State. As jurisprudential legacies go, that is not a bad one.

221. 505 U.S. 833 (1992).
222. 517 U.S. 620 (1996).
223. 539 U.S. 558 (2003).

APPENDIX

CASE	KENNEDY'S ROLE
ABORTION	
Hill v. Colorado, 530 U.S. 703 (2000).	Dissenting, would have found a violation.
Schenck v. Pro-Choice Network, 519 U.S. 357 (1997).	The Court found no First Amendment violation; Justice Kennedy joined Justice Scalia's opinion concurring in part and dissenting in part.
Madsen v. Women's Health Ctr., Inc., 512. U.S. 753 (1994).	The Court found no First Amendment violation; Justice Kennedy joined Justice Scalia's opinion concurring in part and dissenting in part.
Rust v. Sullivan, 500 U.S. 173 (1991).	Joined the majority, finding no violation.
ASSOCIATION	
Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008).	The Court found no First Amendment violation; Justice Kennedy joined Justice Scalia's dissent and would have found a violation.
Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad., 551 U.S. 291 (2007).	Filed a separate opinion, concurring in part and judgment in upholding the restriction.
Clingman v. Beaver, 544 U.S. 581 (2005).	Joined with the majority in upholding the restriction.
Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).	Joined with the majority in finding a violation.
Cal. Democratic Party v. Jones, 530 U.S. 567 (2000).	Filed a separate concurring opinion that struck down the restriction.
Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995).	Joined with the Court in finding a violation.
City of Dallas v. Stanglin, 490 U.S. 19 (1989).	Joined with the majority in upholding the restriction.
N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988).	The Court found no First Amendment violation; Justice Kennedy joined Justice O'Connor's concurring opinion.

CHARITABLE DONATIONS	
Illinois ex rel. Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600 (2003).	Joined with the majority in upholding the restriction.
Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988).	Joined with the majority in striking down all restrictions as violating the First Amendment.
COMMERCIAL SPEECH	
Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011).	Writing for the majority, found a violation.
Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002).	Joined with the majority in finding a violation.
Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).	Filed a separate concurring opinion, found a violation for two of the four regulations.
Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999).	Joined with the majority in finding a violation.
44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).	Joined with the majority in finding a violation.
Fla. Bar v. Went for It, Inc., 515 U.S. 618 (1995).	Filed a separate dissenting opinion, would have found a violation.
Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).	Joined with the majority in finding a violation.
United States v. Edge Broad. Co., 509 U.S. 418 (1993).	Joined with the majority in part and Justice Souter's concurrence in part, in which both found a violation.
Edenfield v. Fane, 507 U.S. 761 (1993).	Writing for the majority, found a violation.
City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993).	Joined with the majority in finding a violation.
Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91 (1990).	Joined with the majority in finding a violation.
Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988).	Joined with the plurality in finding a violation.
COMPELLED SPEECH	
Pleasant Grove City v. Summum, 555 U.S. 460 (2009).	Joined with the majority in finding no violation.
Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).	Writing a dissenting opinion and joining Justice Souter's dissenting opinion, would have found a violation.

United States v. United Foods, Inc., 533 U.S. 405 (2001).	Writing for the majority, found a violation.
Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997).	Joined with the majority in finding no violation.
Keller v. State Bar of Cal., 496 U.S. 1 (1990).	Joined with the majority in finding a violation.
CONTENT-NEUTRALITY	
Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150 (2002).	Joined with the majority in finding a violation.
City of Ladue v. Gilleo, 512 U.S. 43 (1994).	Joined with the majority in finding a violation.
COPYRIGHT	
Golan v. Holder, 132 S. Ct. 873 (2012).	Joined with the majority in finding no violation.
Eldred v. Ashcroft, 537 U.S. 186 (2003).	Joined with the majority in finding no violation.
DEFAMATION	
Harte-Hanks Commc'ns, Inc. v. Conaughton, 491 U.S. 657 (1989).	Writing a concurring opinion and joining with the Court, would have found no violation.
Tory v. Cochran, 544 U.S. 734 (2005).	Joined with the majority in finding no violation.
Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991).	Writing for the Court, finding no violation.
Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).	Joined with the majority in finding no violation.
ELECTION LAW	
Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).	Joined with the majority in finding a violation.
Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343 (2011).	Writing a concurring opinion, would have found no violation.
Doe v. Reed, 130 S. Ct. 2811 (2010).	Joined with the majority in finding no violation.
Citizens United v. FEC, 130 S. Ct. 876 (2010).	Writing for the Court, found a violation but upheld other challenged portions.
Davis v. FEC, 554 U.S. 724 (2008).	Joined with the majority in finding a violation.
FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).	Joined with the majority and Justice Scalia's concurring opinion, finding a violation.

Randall v. Sorrell, 548 U.S. 230 (2006).	Writing a concurring opinion, would have found a violation.
McConnell v. FEC, 540 U.S. 93 (2003).	Writing an opinion concurring in judgment in part and dissenting in part, would have found a violation.
FEC v. Beaumont, 539 U.S. 146 (2003).	Writing an opinion concurring in judgment, found no violation.
Republican Party of Minn. v. White, 536 U.S. 765 (2002).	Writing a concurring opinion and joining with the Court, would have found a violation.
FEC v. Col. Republican Fed. Campaign Comm., 533 U.S. 431 (2001).	Joined Justice Thomas's dissenting opinion, would have found a violation.
Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).	Writing a dissenting opinion, would have found a violation.
Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, (1999).	Joined with the majority in finding a violation.
Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997).	Joined with the majority in finding no violation.
Col. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996).	Writing an opinion concurring in judgment and dissenting in part, would have found a violation.
Morse v. Republican Party of Va., 517 U.S. 186 (1996).	Writing an opinion dissenting, would have found a violation.
McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).	Joined with the majority, found a violation.
Burson v. Freeman, 504 U.S. 191 (1992).	Writing an opinion concurring and joining with the majority, found no violation.
Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).	Writing an opinion dissenting, would have found a violation
Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214 (1989).	Joined with the majority in finding a violation.
Meyer v. Grant, 486 U.S. 414 (1988).	Joined with the majority in finding a violation.
FREEDOM OF THE PRESS	
Presley v. Georgia, 130 S. Ct. 721 (2010).	Joined with the majority in finding a violation.
Bartnicki v. Vopper, 532 U.S. 514 (2001).	Joined with the majority in finding a violation.
L.A. Police Dep't v. United Reporting Pub. Corp., 528 U.S. 32 (1999).	Joined Justice Stevens' dissenting opinion, would have found a violation.

Cohen v. Cowles Media Co., 501 U.S. 663 (1991).	Joined with the majority, in finding no violation.
Florida Star v. B.J.F., 491 U.S. 524 (1989).	Joined with the majority in finding a violation.
HATE SPEECH	
Snyder v. Phelps, 131 S. Ct. 1207 (2011).	Joined with the majority in finding a violation.
Virginia v. Black, 538 U.S. 343 (2003).	Joined Justice Souter's opinion concurring in judgment in part and dissenting in part, found a violation (would have violated the law in its entirety).
Wisconsin v. Mitchell, 508 U.S. 476 (1993).	Joined with the majority in finding a violation.
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).	Joined with the majority in finding a violation.
JUDICIAL PROCESS	
Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).	Writing for the Court, found a violation.
El Vocero de Puerto Rico (Caribbean Intern. News Corp.) v. Puerto Rico, 508 U.S. 147 (1993).	Joined with the majority, finding a violation.
Gentile v. State Bar of Nev., 501 U.S. 1030 (1991).	Wrote for the majority in part and dissented in part, would have had a violation.
Butterworth v. Smith, 494 U.S. 624 (1990).	Joined with the majority, finding a violation.
FTC v. Super. Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990).	Joined with the majority, finding a violation.
Univ. of Penn. v. EEOC, 493 U.S. 182 (1990).	Writing for the Court, found no violation
LABOR LAW	
Chamber of Commerce of U.S. v. Brown, 554 U.S. 60 (2008).	Joined with the majority, finding a violation.
Davenport v. Wash. Educ. Ass'n, 551 U.S. 177 (2007).	Joined with the majority, finding no violation.
BE & K Const. v. NLRB, 536 U.S. 516 (2002).	Joined with the majority, finding a violation.
Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991).	Writing an opinion concurring in judgment in part and dissenting in part, finding a violation.

NATIONAL SECURITY	
Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).	Joined with the majority, finding a violation.
Rumsfeld v. Forum for Academic & Inst. Rights, 547 U.S. 47 (2006).	Joined with the majority, finding a violation.
OBSCENITY	
Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011).	Joined with the majority, finding a violation.
United States v. Stevens, 130 S. Ct. 1577 (2010).	Joined with the majority, finding a violation.
United States v. Williams, 553 U.S. 285 (2008).	Joined with the majority, finding no violation.
Ashcroft v. ACLU, 542 U.S. 656 (2004).	Writing for the majority, found a violation.
Ashcroft v. ACLU, 535 U.S. 564 (2002).	Writing an opinion concurring in judgment and joining with the majority in finding no violation.
Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).	Writing for the majority, found a violation.
Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).	Joined with the majority, finding no violation.
Reno v. ACLU, 521 U.S. 844 (1997).	Joined with the majority, finding a violation.
United States v. X-Citement Video, Inc., 513 U.S. 64 (1994).	Joined with the majority, finding no violation.
Alexander v. United States, 509 U.S. 544 (1993).	Writing an opinion dissenting, would have found a violation.
Ohio v. Osborne, 495 U.S. 103 (1990).	Joined with the majority, finding no violation.
Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989).	Joined with the majority, finding a violation.
Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989).	Joined with the majority, finding a violation and joined with the plurality.
OBSCENITY/TELECOMMUNICATIONS	
United States v. Playboy Entm't Grp. Ass'n, 529 U.S. 803 (2000).	Writing for the majority, found a violation.
OVERBREADTH	
Virginia v. Hicks, 539 U.S. 113 (2003).	Joined the Court; found no violation.

Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989).	Joined with the majority in finding no First Amendment violation on overbreadth grounds, but remanded the case for a determination consistent with *Central Hudson*.
PRISONERS' SPEECH	
Beard v. Banks, 548 U.S. 521 (2006).	Joined with the majority, finding no violation.
Shaw v. Murphy, 532 U.S. 223 (2001).	Joined with the majority, finding no violation.
Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991).	Writing an opinion concurring, found a violation.
Thornburgh v. Abbott, 490 U.S. 401 (1989).	Joined with the majority, finding no violation.
PUBLIC EMPLOYEES	
Borough of Duryea v. Guarnieri, 131 S. Ct. 2488 (2011).	Writing for the majority, found no violation.
Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353 (2009).	Joined with the majority, finding no violation.
Garcetti v. Ceballos, 547 U.S. 410 (2006).	Writing for the majority, found no violation.
City of San Diego v. Roe, 543 U.S. 77, (2004).	Joined with the majority, finding no violation.
Bd. of Cnty. Comm'rs v. Umberh, 518 U.S. 668 (1996).	Joined with the majority, finding a violation.
United States v. Nat'l Treasury Emps. Union, 513 U.S. 454 (1995).	Joined with the majority, finding a violation.
Waters v. Churchill, 511 U.S. 661 (1994).	Joined Justice Scalia's opinion concurring in judgment, found no violation.
Rutan v. Republican Party of Ill., 497 U.S. 62 (1990).	Joined Justice Scalia's opinion dissenting, would have found no violation.
PUBLIC EMPLOYEES/ASSOCIATION	
O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996).	Writing for the majority, found a violation.
PUBLIC FORUM	
Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971 (2010).	Writing an opinion concurring and joined with the majority, found no violation.

Thomas v. Chicago Park Dist., 534 U.S. 316 (2002).	Joined with the majority, finding no violation.
Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).	Joined with the majority, finding a violation.
Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).	Writing for the majority, found no violation.
Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).	Writing for the majority, found a violation.
Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).	Writing an opinion concurring in part and concurring in the judgment, found a violation.
Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992).	Writing an opinion concurring in judgment, found no violation.
Lee v. Int'l Soc'y for Krishna Consciousness, Inc., 505 U.S. 830 (1992).	Joined with the majority, found a violation.
Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992).	Joined with the majority, found a violation.
United States v. Kokinda, 497 U.S. 720 (1990).	Writing an opinion concurring in judgment, found no violation.
Ward v. Rock Against Racism, 491 U.S. 781 (1989).	Writing for the majority, found no violation.
Frisby v. Schultz, 487 U.S. 474 (1988).	Joined with the majority, found no violation.
PUBLIC FORUM/COMPELLED SPEECH	
Bd. of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217 (2000).	Writing for the majority, found no violation.
PUBLIC FORUM/OBSCENITY	
United States v. American Library Ass'n, 539 U.S. 194 (2003).	Writing an opinion concurring in judgment, found no violation.
STUDENTS' SPEECH	
Morse v. Frederick, 551 U.S. 393 (2007).	Joined with the majority and Justice Alito's concurring opinion, found no violation.
SYMBOLIC CONDUCT	
City of Erie v. Pap's A.M., 529 U.S. 277 (2000).	Joined with the majority, found no violation.
United States v. Eichman, 496 U.S. 310 (1990).	Joined with the majority, found a violation.
Texas v. Johnson, 491 U.S. 397 (1989).	Writing an opinion concurring, found a violation.

TELECOMMUNICATIONS	
Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997).	Writing for the majority, found no violation.
Leathers v. Medlock, 499 U.S. 439 (1991).	Joined with the majority, found no violation.
TELECOMMUNICATIONS/OBSCENITY	
Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996).	Writing an opinion concurring in part, concurring in judgment in part, and dissenting in part, found a violation.
ZONING OF ADULT ESTABLISHMENTS	
City of Littleton v. Z.J. Gifts D-4, LLC, 541 U.S. 774 (2004).	Joined with the majority and Justice Souter's opinion concurring in part and concurring in part, found no violation.
City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002).	Writing an opinion concurring in judgment, finding no violation.
Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).	Joined with the majority, found no violation.