ARTICLES

THE JUDICIAL ACTIVISM OF JUSTICE ANTHONY KENNEDY

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Few recent Supreme Court justices have had a greater impact on constitutional law than Anthony Kennedy. Although commentators have explored the substance of Justice Kennedy's jurisprudence in some detail, legal scholars have not systematically analyzed the extent of his judicial activism. This Article uses the term "judicial activism" descriptively rather than normatively to help account for a judge's willingness to strike down federal, state, and local laws on constitutional grounds. It finds that, under a descriptive definition, when compared to the justices with whom he served, Justice Kennedy was a singularly judicial activist judge.

This conclusion rests on three findings. First, employing quantitative analyses of the justices' votes to strike down laws based on a new data set compiled for these purposes, the Article shows how Justice Kennedy chose judicial activism over restraint in judicial review cases to a significantly greater extent than most of the justices with whom he served for extended periods of time. Second, the Article qualitatively analyzes several of Justice Kennedy's judicial review opinions and explains the extent to which they differed from those of justices to his ideological right and left by rarely expressing concerns about the

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importance of accounting for either the policy preferences of legislators or the hazards of judicial overreach.

Finally, the Article explains that Justice Kennedy was an equal opportunity judicial activist in ways that his more conservative and liberal colleagues were not. Justice Kennedy's repeated willingness to strike down laws at the behest of advocates from across the political spectrum made him, in many ways, the perfect justice for his constitutional era. Justice Kennedy repeatedly responded positively to growing efforts by conservative and progressive advocates to gain judicial veto points for government policies they disliked on a wide variety of issues, including gun control, abortion, affirmative action, and LGBTQ rights. In offering legal scholarship's first systematic analysis of Justice Kennedy's judicial activism, the Article shows the extent to which he was a crucial player in the Court's accrual of judicial power to strike down laws in the last few decades.

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INTRODUCTION

Justice Anthony Kennedy's constitutional jurisprudence for three decades simultaneously thrilled and infuriated observers from across the political spectrum. The same Justice who delighted conservatives and angered progressives by voting to strike down a crucial provision of the Voting Rights Act of 1965,[1] a gun control law,[2] and a federal campaign measure limiting the ability of corporations to influence elections,[3] did the opposite by voting to preserve the core of the constitutional right to choose an abortion[4] and to void sodomy laws[5] and same-sex marriage bans.[6] The fact that Justice Kennedy was in the majority in all six of these cases, and in many other controversial and impactful Supreme Court constitutional rulings striking down laws, reflects his sizable influence during his thirty years on the Court.[7]

But Justice Kennedy's influential constitutional jurisprudence also reflected something else: the remarkable extent to which he was a judicial activist. The term "judicial activism" is frequently used to express disapproval of court rulings, including those that strike down laws as unconstitutional.[8] The term implies that the judges in question

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1. Pub. L. No. 89-110, 79 Stat. 424; Shelby County v. Holder, 570 U.S. 529, 557 (2013).

2. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

3. Citizens United v. FEC, 558 U.S. 310, 372 (2010).

4. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 901 (1992) (plurality opinion), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

5. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

6. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

7. Justice Kennedy's influence on the Court has been widely recognized by commentators. For example, twenty years into his tenure on the Court, Lee Epstein and Tonja Jacobi concluded that Justice Kennedy had become a so-called super-median justice. Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 76–78 (2008). Similarly, Paul Edelman and Jim Chen, after conducting a detailed mathematical analysis of the justices' voting records from the 1994 term through the 2000 term, concluded that Justice Kennedy's votes reflected the greatest influence on the Court. Paul H. Edelman & Jim Chen, *The Most Dangerous Justice Rides Again: Revisiting the Power Pageant of the Justices,* 86 MINN. L. REV. 131, 192 (2001).

8. The term "judicial activism" is also frequently used to criticize judges for interpreting statutes according to their policy preferences. This claim was made, for example, after the Supreme Court held in *Bostock v. Clayton County* that Title VII of the Civil Rights Act of 1964 prohibited discrimination based on sexual orientation and gender identity. *See* 140 S. Ct. 1731, 1737 (2020); *see, e.g.*, Julaine Appling, *Judicial Activism: Figment or Fact?*, VCY AM. (June 22, 2020), https://www.vcyamerica.org/

misused their authority by aggrandizing judicial power at the expense of elected officials and majoritarian preferences.[9] Its use dates back to when New Dealers deployed it to criticize the Supreme Court's obstruction of Depression-era legislation.[10] Later in the twentieth century, conservative critics of the Court's liberal rulings, such as those protecting reproductive autonomy and the rights of criminal defendants, repeatedly accused the justices of engaging in judicial activism.[11] As the Court has become more conservative in recent

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wisconsin-family-connection/2020/06/22/judicial-activism-figment-or-fact [https://perma.cc/QZ97-KK85]. The term is also sometimes used to criticize the Court for overturning its own precedents. *See, e.g.*, William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1232–40 (2002). For detailed explorations of the different meanings of judicial activism, see, for example, Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE 237 (1983); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139 (2002).

9. *See, e.g.*, STEFANIE A. LINDQUIST & FRANK B. CROSS, MEASURING JUDICIAL ACTIVISM 9–10 (2009); KEITH E. WHITTINGTON, REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT 4 (2019). There is a large literature on the role that judges' policy preferences play in their judicial decision-making. For the argument that such preferences play a dominant role in Supreme Court adjudication, see, for example, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002). For the claim that the justices' policy preferences are meaningfully constrained by legal doctrine and political institutions, see, for example, MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE (2011). And for the argument that "justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act," see LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE xiii (1998).

10. WHITTINGTON, *supra* note 9, at 236. For extended discussions of the origins and use of the charge of judicial activism, see, for example, Canon, *supra* note 8; Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195 (2009); Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 CAL. L. REV. 1441 (2004). *See also* Jane S. Schacter, *Putting the Politics of "Judicial Activism" in Historical Perspective*, 2017 SUP. CT. REV. 209 (exploring political criticisms and activism aimed at particular understandings of judicial activism).

11. For conservative critiques of judicial activism, see, for example, GREG WEINER, THE POLITICAL CONSTITUTION: THE CASE AGAINST JUDICIAL SUPREMACY (2019); CHRISTOPHER WOLFE, JUDICIAL ACTIVISM (1991). Other commentators have enthusiastically embraced judicial activism as a means of achieving conservative or libertarian policy objectives. *See, e.g.*, RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016); CLINT BOLICK, DAVID'S HAMMER: THE CASE FOR AN ACTIVIST JUDICIARY (2007).

decades, some on the left have claimed that it has become judicially active on behalf of the interests of the Republican party, the rich, and corporations.[12]

Yet, the concept of judicial activism, when deployed normatively, is not particularly helpful because it does little more than signal the speaker's disagreement with particular judicial rulings.[13] Thus, from the way the term is usually used normatively, it seems that judges engage in judicial activism when they decide cases in ways the speaker disapproves, but not in cases that merit the speaker's approval.[14] Indeed, almost no one uses the term to describe a court's striking down of a law or policy that they believe was unconstitutional to begin with.

Rather than using "judicial activism" normatively, as a basis for criticism or praise, this Article deploys the term descriptively to account for whether Supreme Court justices in judicial review cases voted for and, if they wrote judicial opinions, defended the striking down of the law in question.[15] I define judicial review cases as those in which the Court assessed the constitutionality of federal, state, or local legislation. Under a descriptive understanding of judicial activism, the question is not whether a particular judge *correctly* interpreted the Constitution in any given case; instead the question is factual: Did the judge, in exercising the power of judicial review, choose to strike down the statute under consideration? Under this understanding, judges are "judicially active" when they support striking down a statute and "judicially restrained" when they back the upholding of the same.[16]

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12. *See, e.g.*, MARK TUSHNET, TAKING BACK THE CONSTITUTION: ACTIVIST JUDGES AND THE NEXT AGE OF AMERICAN LAW (2020); THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT (Herman Schwartz ed., 2002).

13. *See, e.g.*, Kmiec, *supra* note 10, at 1473–74; WHITTINGTON, *supra* note 9, at 4.

14. *See, e.g.*, Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2019–20 (2002); Cass R. Sunstein, *A Hand in the Matter*, LEG. AFF. (March–April 2003), https://www.legalaffairs.org/issues/March-April-2003/feature_marapr03_sunstein.msp [https://perma.cc/WQK3-D4YG].

15. *See* WHITTINGTON, *supra* note 9, at 5 (noting that the "empirical literature on the behavior of courts . . . has [aimed] to reduce the idea of judicial activism to something that is measurable, relatively objective, and comparable across contexts").

16. As I use the term in this Article, therefore, it is entirely possible for a judge to engage in judicial activism while deciding a case correctly as a matter of constitutional law. And the opposite is true as well: a judge's judicial restraint may lead them to decide the case erroneously as a matter of constitutional law. *See* Sunstein, *supra* note 14 ("[A] decision that is activist is not necessarily wrong . . . . No one thinks that a court should

This Article uses quantitative and qualitative analyses to show that, using a descriptive understanding of judicial activism, Justice Kennedy was singularly activist when compared to other justices of his era. Part I offers quantitative analyses based on a new data set of Supreme Court judicial review cases that I compiled covering forty-one terms (from 1981 through 2021).[17] My evaluation of the data quantifies the extent to which Justice Kennedy chose judicial activism over restraint in judicial review cases when compared to most of the justices with whom he served for extended periods of time, including conservative justices such as Antonin Scalia and Clarence Thomas, and liberal justices such as Ruth Bader Ginsburg and Stephen Breyer.[18] Justice Kennedy was particularly likely to choose judicial activism over restraint in important and consequential cases that closely divided the Court.[19] While Justice Kennedy may have been firmly ensconced in the Court's ideological center as the so-called median justice during most of his tenure,[20] the comparative data show the extent to which his *ideological* moderation did not translate into *judicial* moderation.[21]

Although the numbers are important, they only tell part of the story. As a result, Part II offers a qualitative assessment of a number of Justice

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uphold all actions of the other branches, and so a court that is activist, in this sense, might be something to celebrate."). In the same way that a legislature's repeated enactment of new laws tells us nothing about whether it is legislating in improper or unconstitutional ways, the fact that judges are active in exercising the power of judicial review to strike down laws, by itself, tells us little about whether they are being faithful to their judicial obligations or to the Constitution.

17. I explain the data set's content and methodology in *infra* Section I.A.

18. *See infra* Section I.B.1 & B.2.

19. *See infra* Section I.B.3.

20. The median justice is usually understood to be at the center of the Court's ideological spectrum and thus often serves as the swing voter in cases that closely divide the Court. There is a significant literature on how to identify median justices and to assess their impact. *See, e.g.*, Peter K. Enns & Patrick C. Wohlfarth, *The Swing Justice,* 75 J. POL. 1089, 1090 (2013); Epstein & Jacobi, *supra* note 7; Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002).

According to Neal Devins and Lawrence Baum, who used the Martin-Quinn method for ideologically ordering the justices, Justice O'Connor was the median justice during the following eight terms: 1991; 1992; 1994; and 1999–2004. NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 73 (2019). Devins and Baum found that Justice Kennedy was the median justice during the following twenty terms: 1987–1989; 1993; 1995–1998; and 2005–2017. *Id.* at 72–73.

21. *See infra* Part I.

Kennedy's judicial review opinions and compares them to some of the opinions of conservative and liberal justices with whom he served for long stretches on the Rehnquist and Roberts Courts. Part II shows how, unlike justices situated to his ideological right and left, Justice Kennedy rarely expressed concerns about the importance of accounting for either the policy preferences of elected legislators or the possible dangers of judges overreaching in exercising the power of judicial review.[22] As I explain, Justice Kennedy gave significantly less weight to both of these concerns than justices to his right (such as Justice Scalia) and to his left (such as Justice Ginsburg).[23]

Of course, the more conservative justices and the more liberal ones rarely agreed on when it was appropriate for the Court to exercise judicial restraint by deferring to legislative policy judgments; this was especially true in highly disputed and controversial judicial review cases.[24] But Part II concludes that several of the justices who fell into more ideologically predictable camps than Justice Kennedy were also more likely to argue in favor of judicial restraint. In fact, Justice Kennedy, unlike most of his colleagues to his right and left, rarely emphasized the need to keep the federal judiciary within its proper boundaries as a means of protecting majoritarian policymaking.[25]

This Article does not explore the appropriateness of Justice Kennedy's votes or reasoning in judicial review cases, and does not take a position on whether his judicial activism was proper or misguided.[26]

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22. *See infra* Part II.

23. *See infra* Part II.

24. *See infra* note 143 and accompanying text.

25. *See infra* Part II.

26. There is a robust literature defending Justice Kennedy's constitutional jurisprudence. For a partial list, see ANTHONY D. BARTL, THE CONSTITUTIONAL PRINCIPLES OF JUSTICE KENNEDY: A JURISPRUDENCE OF LIBERTY AND EQUALITY (2014); Randy Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2003 CATO SUP. CT. REV. 21; FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY (2009); HELEN J. KNOWLES, THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY (2009); Nadine Strossen, *Justice Anthony Kennedy's Free Speech Legacy*, 70 HASTINGS L.J. 1317 (2019). *See also* THE RHETORIC OF JUDGING WELL: THE CONFLICTED LEGACY OF JUSTICE ANTHONY M. KENNEDY (David A. Frank & Francis J. Mootz III eds., 2023) (exploring Justice Kennedy's use of rhetoric and his legal philosophy); Charles D. Kelso & R. Randall Kelso, *The Constitutional Jurisprudence of Justice Kennedy on Separation of Powers and Federalism*, 42 CAP. U. L. REV. 531 (2014) (exploring Justice Kennedy's views on separation of powers and

Instead, the third main finding, set forth in Part III, is that Justice Kennedy's jurisprudence evinced an *equal opportunity* judicial activism that was unique among his peers. In many ways, such activism rendered him the perfect justice for a constitutional era largely defined by the repeated efforts of conservative and progressive advocates to seek judicial veto points to void government policies they disliked.[27] Justice Kennedy, time and again, responded positively to these constitutional claims on a wide variety of issues, including gun control, abortion, affirmative action, and LGBTQ rights.[28] At the same time, Justice Kennedy's willingness to interpret the Constitution in ways that, in different cases, greatly pleased or angered advocates on the right or the left makes it unlikely, going forward, that either side of the political spectrum will support the appointment of another equal opportunity judicial activist to the Court anytime soon.[29]

This Article provides legal scholarship's first systematic quantitative and qualitative analyses of Justice Kennedy's judicial activism.[30]

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federalism). For more critical assessments of that jurisprudence, see, for example, Erwin Chemerinsky, *Justice Kennedy: A Free Speech Justice? Only Sometimes,* 70 HASTINGS L.J. 1193 (2019); David S. Cohen, *Justice Kennedy's Gendered World,* 59 S.C. L. REV. 673 (2008); Russell K. Robinson, Essay, *Justice Kennedy's White Nationalism,* 53 U.C. DAVIS L. REV. 1027 (2019). *See also* Eric J. Segall, *Reconceptualizing Judicial Activism as Judicial Responsibility: A Tale of Two Justice Kennedys*, 41 ARIZ. ST. L.J. 709, 739 (2009) ("Some of [Justice Kennedy's] opinions are refreshingly transparent and honest, reflecting fidelity to the past, while others reflect many of the problems with the Court's failure to adhere to minimal levels of judicial behavior."). While much has been written about the substance of Justice Kennedy's constitutional jurisprudence, there has been relatively little attention paid to his overall approach to judicial review and the so-called countermajoritarian difficulty. For an exception that was part of a symposium exploring Justice Kennedy's tenure on the Court, see Orin S. Kerr, *Justice Kennedy and the Counter-Majoritarian Difficulty*, 70 HASTINGS L.J. 1213 (2019) (analyzing and criticizing an interview given by Justice Kennedy in which he defended the power of judicial review).

27. *See infra* notes 313–318 and accompanying text.

28. *See infra* Section III.A.

29. *See infra* Section III.B.

30. In 2004, the political scientist Thomas Keck published an exhaustive review of the Rehnquist Court's judicial activism. THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM (2004). Professor Keck concluded that "Kennedy is the Court's most activist justice." *Id.* at 252. But, obviously, Professor Keck in 2004 could not analyze the last 14 years of Justice Kennedy's tenure. *See also* SEGAL & SPAETH, *supra* note 9, at 412–16 (concluding, in 2002, that Kennedy was the most activist justice then on the Court).

However, it is important to emphasize that there were other members of the Rehnquist and Roberts Courts who were willing to join Justice Kennedy in voting to strike down laws. In fact, in the 224 cases in which Justice Kennedy voted to strike down a law, he *never* did so alone and he joined with one other justice to void a statute in *only five* instances.[31] In other words, it was almost always the case that when Justice Kennedy voted to strike down laws, he had plenty of company among his colleagues. Had Justice Kennedy repeatedly fought lonely battles to strike down laws, he would have had little influence on the Court. Justice Kennedy's judicial activism was particularly significant because he repeatedly found at least four allies, *sometimes to his ideological right and sometimes to his ideological left*, willing to join him in striking down laws.[32] This meant that when more conservative justices were urging the Court to defer to the assessments of legislators in abortion and LGBTQ cases, for example, Justice Kennedy often sided with his more liberal colleagues in striking down the laws in question.[33] At the same time, when more liberal justices were urging the Court to defer to the

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Professor Keith Whittington, in his magisterial examination of the Court's exercise of its judicial review power in assessing federal legislation from the Republic's early days until 2018, concluded that "Kennedy was not unusually activist in his sensibilities; nor was he more likely than the other justices to vote to strike down a law." WHITTINGTON, *supra* note 9, at 258. As will become clear, I reach the opposite conclusion in this Article.

It bears noting that in 2014, Professor Whittington published a law review article, exploring the judicial activism of the early Roberts Court, in which he stated that Justice Kennedy, along with Justice Elena Kagan, evinced an "apparent propensity to vote to strike down both federal and state laws at an above average rate." Keith E. Whittington, *The Least Activist Supreme Court in History? The Roberts Court and the Exercise of Judicial Review*, 89 NOTRE DAME L. REV. 2219, 2247 n.124 (2014). *But see id.* at 2244 (contending that the relative judicial restraint of the Roberts Court, when compared to earlier Courts, was in part due to Justice Kennedy's restraint in judicial review cases).

31. Dep't of Revenue v. Davis, 553 U.S. 328, 365 (2008) (Kennedy, J., dissenting); Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 462 (2008) (Scalia, J., dissenting); Utah v. Evans, 536 U.S. 452, 506 (2002) (Thomas, J., concurring in part and dissenting in part); L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 48 (1999) (Stevens, J., dissenting); Am. Dredging Co. v. Miller, 510 U.S. 443, 462 (1994) (Kennedy, J., dissenting).

32. *See infra* Part III (describing how Justice Kennedy's response to the constitutional claims of advocates from across the political spectrum resulted in equal opportunity judicial activism).

33. *See* i*nfra* Sections III.A.2 & A.4. Justice Kennedy's voting record on abortion rights was mixed, given that he sometimes voted to uphold abortion laws. For a discussion of his abortion jurisprudence, see *infra* Section III.A.2.

assessments of legislators in gun control and affirmative action cases, for example, Justice Kennedy sided with his more conservative colleagues in voting to strike down the laws in question.[34] Justice Kennedy's willingness to repeatedly strike down laws disliked by conservatives and progressives alike accounted for much of the Court's most important and controversial exercises of judicial review during his thirty years as a justice.

The country, for decades, has engaged in vigorous debates over the proper role of the Supreme Court in general, and of judicial review in particular, in our constitutional democracy. Several commentators, participating in those debates, have recently criticized the Roberts Court for its aggressive use of judicial power at the expense of the authority of other branches of government.[35] Although it is likely that the debates over both the general power of judicial review and the particular ways in which the Roberts Court has exercised it will go on

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34. *See infra* Sections III.A.1 & A.3.

35. *See, e.g.*, Rebecca L. Brown & Lee Epstein, *Is the U.S. Supreme Court a Reliable Backstop for an Overreaching U.S. President? Maybe, But is an Overreaching (Partisan) Court Worse?*, 53 PRESIDENTIAL STDS. QRTLY. (forthcoming 2023) (manuscript at 32–33), https://www.documentcloud.org/documents/23463365-politicalcourt [https://perma.cc/U6QV-2BZF] (concluding that "there are increasingly frequent indications that the [Roberts] Court is establishing a position of judicial supremacy over the president and Congress" and that "its willingness to check political actors across the board has become intricately intertwined with a tendency to aggrandize the judicial role in all areas of political action"); Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. (forthcoming 2023) (manuscript at 2), https://papers.ssrn.com/sol3/ papers.cfm?abstract_id=4321887 [https://perma.cc/6UDB-36NG] (arguing that "across a range of doctrinal areas, the John Roberts-helmed judiciary has systematically empowered its own institution at the expense of others"); Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022) (arguing that the Roberts Court is "implement[ing] the policy preferences of its conservative majority in a new and troubling way: by simultaneously stripping power from every political entity *except* the Supreme Court itself"); *see also* Adam Liptak, *An "Imperial Supreme Court" Asserts Its Power, Alarming Scholars*, N.Y. TIMES (Dec. 19, 2022), https://www.nytimes.com/ 2022/12/19/us/politics/supreme-court-power.html [https://perma.cc/8PKS-WQCM] (exploring "recent legal scholarship" contending that the Roberts Court "has rapidly been accumulating power at the expense of every other part of the government"); Tejas N. Narechania, *Certiorari in the Roberts Court*, 67 ST. LOUIS U. L.J. (forthcoming 2023) (manuscript at 3) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4291247 [https://perma.cc/W29X-CR6L] (noting a "trend, particular to the Roberts Court, of exercising its certiorari discretion to grant review in cases that present an opportunity to overrule precedent").

for years to come, it is important that they take place with a well-informed understanding of what the Court has done in recent decades. I do not believe it is possible to have such an understanding without closely examining the ways in which Justice Kennedy exercised the power of judicial review. This Article shows the extent to which he was a crucial player in the Court's accrual of power to strike down laws in the last few decades.

I. A QUANTITATIVE ANALYSIS OF JUSTICE KENNEDY'S JUDICIAL ACTIVISM

In order to closely examine the question of how Justice Kennedy's judicial activism compared to that of other justices with whom he served, I compiled my own data set that seeks to identify all the cases, from the 1981 term through the 2021 term, in which the Court assessed the constitutionality of a federal, state, or local law. I used the data set to determine how Justice Kennedy's voting record in judicial review cases compared to that of the eight justices with whom he served for the longest periods of time. Those justices were Antonin Scalia and Clarence Thomas (each of whom overlapped with Kennedy for 27 terms), as well as Ruth Bader Ginsburg (25 terms), Stephen Breyer (24 terms), John Paul Stevens (22 terms), David Souter (19 terms), Sandra Day O'Connor (17 terms), and William Rehnquist (17 terms).[36]

This Part first explains the methodology used in compiling the data set.[37] The Part then analyzes the data in several distinct, and I hope illuminating, ways.[38] Collectively the data make clear that Justice Kennedy voted to strike down federal, state, and local statutes at rates that distinguished him from most of the justices he served with for extended periods of time.

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36. The term numbers listed here account for full terms only. Although there were eight other justices who overlapped with Justice Kennedy, they did so for fewer terms than the justices whom I use as comparators in Part I: John Roberts (13 terms), Samuel Alito (12 terms), Sonia Sotomayor (9 terms), Elena Kagan (8 terms), Harry Blackmun (6 terms), Byron White (5 terms), Thurgood Marshall (3 terms), and William Brennan (2 terms).

37. *See infra* Section I.A.

38. *See infra* Section I.B.

A. The Data Set

The compiled data set covers forty-one Supreme Court terms starting with the 1981 term (Justice O'Connor's first) and ending with the 2021 term (Justice Breyer's last). The data set identifies Supreme Court "judicial review cases" during that period.[39] This Article defines such cases as ones decided on the merits by a majority vote, in which the justices assessed the facial or as-applied constitutionality of at least one federal, state, or local statute.[40]

This Article focuses on judicial review cases because they most clearly pit the Court's power to interpret the Constitution against the policy preferences of elected representatives. It is widely acknowledged that

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39. To create the data set, I began with the term-by-term list of Supreme Court rulings collected by the Cornell Legal Information Institute on its Oyez website. *See* OYEZ, https://www.oyez.org [https://perma.cc/T4FF-462W]. To identify judicial review cases, I examined the syllabus of each signed Supreme Court opinion issued during the forty-one terms in question. I then divided the cases into three categories: (1) cases that clearly met my definition of judicial review; (2) cases that clearly failed to meet that definition; and (3) cases for which the syllabus did not make clear whether they met the definition. For cases that fell in the third category, I read all or part of the Court's opinion to determine whether it should be placed in the first or second category.

Once I identified the cases that met my definition of judicial review, I proceeded to establish whether the Court upheld or struck down the laws in question. It was sometimes possible to make that determination from the syllabus; at other times, it was necessary to read all or part of the Court's opinion. After determining whether the Court voted to strike down at least one statutory provision or, alternatively, to uphold all of the statutory provisions challenged in the case in question, see *infra* note 65 and accompanying text, I proceeded to determine how the justices voted on the judicial review issues. It was sometimes possible to make this determination based on the syllabus and the Court's own tallying of votes at the beginning of the ruling. At other times, it was necessary to read individual opinions to determine how different justices voted on judicial review issues. This was almost always the case when a justice concurred in the Court's judgment, but did not join its opinion. It was also almost always the case when a justice partly concurred in and partly dissented from the Court's ruling. If a particular justice helped decide a case but chose not to reach the constitutional issues in question, I did not count that case as a judicial review case for that justice.

40. The data set also includes the much smaller number of cases in which the Court assessed the validity, under the federal Constitution, of state constitutional amendments. The data set excludes cases in which the Court did not reach a definitive conclusion regarding the constitutionality of the law in question or in which its exploration of the law's constitutionality was tangential or trivial for purposes of deciding the case. The data set also does not include cases in which the justices' votes resulted in a tie, thus leaving in place the lower court's ruling.

striking down statutes constitutes a particularly assertive exercise of judicial power, as judges rely on their understandings of the Constitution to void the policy preferences of legislators.[41] To put it simply, it is this category of cases that most starkly raises the so-called countermajoritarian difficulty of judicial review that places judges in the position of potentially voiding the policy preferences of the people's representatives. As Alexander Bickel famously explained in articulating the countermajoritarian difficulty of judicial review, when a court strikes down a statute, "it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it."[42]

The extent to which statutes actually reflect majoritarian preferences has been much debated. While Bickel assumed, and traditional democratic theory tells us, that laws enacted by legislatures reflect majoritarian preferences, some have questioned that premise by pointing to structural and other mechanisms that complicate the notion that legislation invariably enjoys majoritarian support in the population at large.[43] Some commentators also contend that the countermajoritarian difficulty is lessened or mitigated by what they claim is the Court's sensitivity to the policy preferences of current

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41. *See, e.g.*, WHITTINGTON, *supra* note 9, at 14–15 ("The judicial treatment of unconstitutional legislation is undoubtedly the paradigmatic case of judicial review and poses the hardest questions about the Court's authority.").

42. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 17 (1962). The literature on the power of judicial review, of course, is vast. For an influential critique of the power, see Jeremy Waldron, Essay, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346, 1349–50 (2006). For a thoughtful defense, see Richard H. Fallon, Jr., *The Core of an Uneasy Case* for *Judicial Review*, 121 HARV. L. REV. 1693, 1695–96 (2008).

43. *See, e.g.*, David Watkins & Scott Lemieux, *Compared to What? Judicial Review and Other Veto Points in Contemporary Democratic Theory*, 13 PERSPS. ON POL. 312, 314 (2015) ("The structure and rules of legislatures cannot be counted on to efficiently and effectively translate majority political preferences into legislative outcomes, and courts may at times do a better job of doing exactly that."); Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1735 (2021) (contending that state legislatures, due to districting choices, geographic clustering, and extreme gerrymandering, are often controlled by the minority party and do not reflect majoritarian preferences in their states); WHITTINGTON, *supra* note 9, at 302 ("It might be objectionable for the Court to prevent a committed majority of the people from pursuing their preferred social policies, but the objections raised might be less apt in cases involving legislative logrolling, special-interest rent seeking, legislative ineptitude, policy-maker oversight, or political grandstanding.").

electoral majorities.[44] Some commentators also defend the related claim that when the Court strikes down a law enacted years or decades earlier, it often prioritizes contemporary majoritarian preferences over previous ones.[45]

Despite ongoing disagreements about the extent to which the courts, in exercising the power of judicial review, act in ways that are inconsistent with the people's policy preferences, the tension between judicial review and majoritarian preferences would seem to be greatest when courts assess the constitutionality of laws enacted by the people's elected representatives.[46] Professor Jeremy Waldron puts the point succinctly when he argues that "[b]y privileging majority voting among a small number of unelected and unaccountable judges, [judicial review] disenfranchises ordinary citizens and brushes aside cherished

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44. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 14–15 (2009). For similar explorations, see, for example, Christopher J. Casillas, Peter K. Enns & Patrick C. Wohlfarth, *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI., 74, 74–75 (2011); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1019 (2004).

In the 1950s, Robert Dahl challenged the countermajoritarian understanding of judicial review by questioning whether any institution in a democracy, including the judiciary, would truly defend the preferences of minorities over those of majorities. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 283, 285, 293 (1957). For a thoughtful and comprehensive historical exploration of the relationship between judicial review and the broader political system under which it operates, see generally WHITTINGTON, *supra* note 9. Although Whittington believes that Dahl underestimated the frequency with which the Court has been willing to strike down federal legislation, he adopts a Dahlian position when he argues that "[t]he power of judicial review has been meaningful in American history not because the Court stands against politics but because of how the Court operates within politics." *Id.* at 37. For his part, Mark Graber argues that it would be more accurate to speak of a non-majoritarian difficulty rather than a countermajoritarian one. As he explains, "[h]istorically, the justices have most often exercised their power to declare state and federal practices unconstitutional only when the dominant national coalition is unable or unwilling to settle some public dispute." Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36 (1993).

45. *See, e.g.*, Graber, *supra* note 44, at 71; WHITTINGTON, *supra* note 9, at 33.

46. *See, e.g.*, Robert M. Howard & Jeffrey A. Segal, *A Preference for Deference? The Supreme Court and Judicial Review*, 57 POL. RSCH. Q. 131, 131 (2004) (noting that since *Marbury v. Madison* legitimated the concept of judicial review, judicial power has been the source of "scholarly inquiry, academic debate, and even political outcry").

principles of representation and political equality in the final resolution of issues about rights."[47] Professor Suzanna Sherry's assertion, made in 2001, that "reconciling judicial review and democratic institutions is the goal of almost every major constitutional scholar writing today," still seems entirely accurate more than twenty years later.[48]

My judicial review data set includes Supreme Court cases assessing the constitutionality of laws regardless of whether they were enacted at the federal, state, or local level. It can be argued that the exercise of judicial review is potentially most problematic when it leads the Court to strike down a statute passed by Congress, a co-equal branch of government, a conundrum that does not arise when it determines the constitutionality of state and local laws.[49] This reasoning may account for the fact that much of the empirical literature on the Court's exercise of its judicial review power has been limited to cases involving federal legislation.[50]

There are three reasons why this Article's analysis includes cases in which the Court considered the constitutionality of state and local laws. First, the Court, for decades, has more frequently assessed the constitutionality of state and local laws than of federal ones. In fact, during Justice Kennedy's tenure, challenges to state and local laws accounted for about two-thirds of the Court's judicial review cases,

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47. Waldron, *supra* note 42, at 1353. Eric Segall argues that when "the Supreme Court . . . removes an important policy question from the hands of voters and politically accountable governmental officials, the American people lose some of their power to govern themselves and our representative democracy becomes a little less representative and a little less democratic." ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES 2 (2012); *see also* COREY BRETTSCHNEIDER, DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT 142 (2007) ("[T]he intrinsic democratic value of majoritarian procedures . . . requires that actual persons have a role in deciding which laws will govern them.").

48. Suzanna Sherry, *Too Clever by Half: The Problem with Novelty in Constitutional Law*, 95 NW. U. L. REV. 921, 921 (2001).

49. *See* LINDQUIST & CROSS, *supra* note 9, at 48; WHITTINGTON, *supra* note 9, at 12–13.

50. *See, e.g.*, LINDA CAMP KEITH, THE U.S. SUPREME COURT AND THE JUDICIAL REVIEW OF CONGRESS: TWO HUNDRED YEARS IN THE EXERCISE OF THE COURT'S MOST POTENT POWER 23 (2008); Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43, 44 (2007); WHITTINGTON, *supra* note 9, at 11; LINDQUIST & CROSS, *supra* note 9, at ch. 3. For an empirical analysis of the Court's exercise of judicial review power in state law cases between 1953 and 2004, see LINDQUIST & CROSS, *supra* note 9, at ch. 4.

while challenges to federal laws accounted for only about a third of such cases.[51]

Second, in assessing the constitutionality of state and local laws, the Court in recent decades has grappled with some of the most important and deeply contested policy and governance choices codified into American law. These include state and local statutes implicating gun control,[52] campaign finance reform,[53] abortion,[54] the death penalty,[55] same-sex marriage,[56] congressional term limits,[57] legislative districting,[58] and affirmative action.[59]

And, third, when the Court, in exercising its power of judicial review, strikes down a state or local law on constitutional grounds, it limits the policy choices of government officials throughout the country, thus magnifying the ruling's impact.[60] Therefore, in order to fully understand how the Court in recent decades has exercised its judicial review power, it is both appropriate and necessary to focus not just on its constitutional assessment of federal statutes, but of state and local laws as well.

The Court, of course, also routinely assesses the constitutionality of regulations issued by executive branch agencies at both the federal and state levels.[61] Those agencies are generally overseen by legislatures and

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51. By my calculation, Justice Kennedy participated in 423 judicial review cases. Challenges to the constitutionality of state and local laws accounted for 268 (or 63.36%) of those cases, while challenges to federal laws accounted for 155 (or 36.64%) of such cases. For an exploration of how Justice Kennedy and six comparator justices voted in judicial review cases involving state and local laws as compared to how they did so in lawsuits challenging the constitutionality of federal laws, see *infra* note 107.

52. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

53. *See, e.g.*, Am. Tradition P'ship, Inc. v. Bullock, 567 U.S. 516 (2012) (per curiam).

54. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

55. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002).

56. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015).

57. *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

58. *See, e.g.*, Shaw v. Hunt, 517 U.S. 899 (1996).

59. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

60. LINDQUIST & CROSS, *supra* note 9, at 66 ("[T]he invalidation of a state law may, by implication, invalidate comparable policies in numerous other states. In addition, the decision may influence future policy choices made by all state governments, as well as by the federal government itself.").

61. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 532 (2001) (assessing constitutionality of state regulations of cigarette advertising and sales); Rust v. Sullivan,

an elected executive official—whether the President, in the case of federal agencies, or governors, in the case of state agencies. This means that the actions of executive agencies may reflect the policy preferences of elected officials. This means, in turn, that the exercise of judicial review to strike down agency regulations potentially pits the Court's understanding of what the Constitution requires against the people's policy wishes.[62] Such cases are not included in the data set, however, because the relationship between majoritarian preferences and government action, which can already be attenuated or imprecise in the context of legislation enacted by elected representatives, is even more so when the laws in question are adopted by government officials who are not themselves subject to selection by voters.[63]

I also did not include cases in which the Court interpreted a federal statute narrowly to avoid raising constitutional issues.[64] It can be argued that when the Court does so, it evinces judicial restraint by avoiding the need to grapple with constitutional issues and the possibility of striking down the law in question.[65] However, these cases do not raise the possibility that judges will have to decide between enforcing the Constitution and enforcing a statute, and for that reason I excluded them.

Similarly, I excluded cases in which the Court refused to reach the merits of the constitutional claim on justiciability grounds (such as a lack of standing or ripeness, or the existence of mootness or a political question). While the application of justiciability doctrines in ways that leave substantive constitutional questions unaddressed can also be

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500 U.S. 173, 177–78 (1991) (assessing constitutionality of federal regulations conditioning the award of federal funds to organizations providing family planning services on their not engaging in abortion-related activities).

62. Lindquist and Cross point to the oversight of administrative agencies by elected officials as a reason for examining how the Court has exercised its judicial review power in assessing the constitutionality of actions taken by federal administrative agencies. LINDQUIST & CROSS, *supra* note 9, at 88–89.

63. *Id.* at 87 ("Bureaucrats are appointed rather than elected, and thus the link between majoritarian preferences and bureaucratic action is far less clear [than in judicial review cases involving statutes].").

64. *See, e.g.*, Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–73 (2001).

65. Keith Whittington, in compiling his data set of judicial review cases assessing federal legislation, decided between 1791 and 2018, included cases in which the Court narrowly interpreted federal statutes in order to avoid raising constitutional issues. WHITTINGTON, *supra* note 9, at 23–25.

understood to constitute a form of judicial restraint, it ultimately fails to place the courts in the position of having to decide whether the Constitution voids the policy preferences of legislators.

Finally, in tallying the judicial review cases, I deemed a case to be one in which the Court used its power of judicial review to void a law if the Court struck down at least one statutory provision,[66] even if the Court, in the same ruling, upheld the constitutionality of other statutory provisions.[67]

B. The Judicial Activism Rates of Justice Kennedy and the Comparator Justices

This Section compares Justice Kennedy's voting record in judicial review cases with those of the other justices on the Rehnquist and Roberts Courts with whom he served for the longest periods of time. In doing so, the Section focuses primarily on the *rate* at which the justices voted to strike down laws rather than on the *number* of cases in which they did so. I chose the former and not the latter measurement because a justice who serves for a longer period usually has more opportunities to strike down statutes than a justice who serves for a shorter period. The fact that a justice voted to strike down more laws than another, therefore, does not necessarily demonstrate a greater degree of judicial activism. Instead, the higher number may simply reflect additional opportunities to strike down laws. As a result, the analysis here primarily focuses on the rate as a *percentage* of cases in which individual justices voted to strike down laws rather than on the *number* of such cases.

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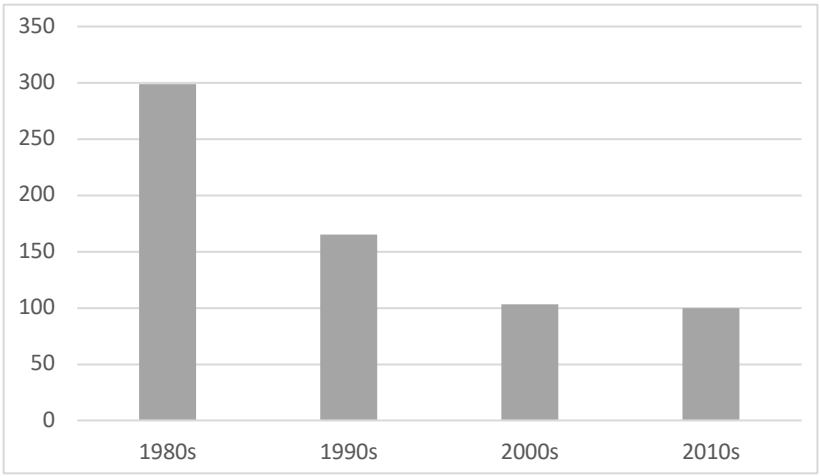
66. For example, given that the Court in *National Federation of Independent Business v. Sebelius* struck down Congress's effort to use its Spending Clause authority to expand the classes of individuals covered by Medicaid through the Patient Protection and Affordable Care Act of 2010, I deemed the case to be one in which the Court struck down a law even though a majority of the justices in the same case upheld the constitutionality of a different provision of the statute (the so-called individual mandate). 567 U.S. 519, 588 (2012).

67. Throughout the Article, the unit of analysis is the number of data set cases in which the Court (or a particular justice) voted to strike down at least one statutory provision rather than the total number of individual provisions struck down in those cases.

In recent decades, the Supreme Court has significantly reduced the number of disputes it agrees to hear, including judicial review cases.[68] As illustrated in Figure 1, the Court decided 299 judicial review cases during the 1980s. In contrast, the Court entertained 165 such cases during the 1990s. And the numbers kept dropping. During the 2000s, the Court decided just 103 judicial review cases. In the 2010s, the Court reached the merits in only 100 judicial review cases.[69] In other words, during this century, the Court has been deciding about two-thirds fewer judicial review cases than it decided as recently as the 1980s.[70]

FIGURE 1: SUPREME COURT JUDICIAL REVIEW CASES (1980-2019 TERMS)



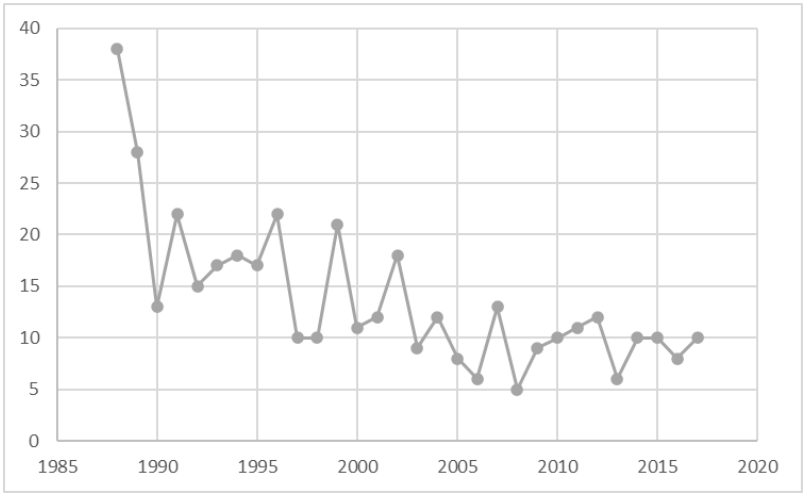
68. On the extent and possible reasons for the Court's shrinking docket, see, for example, Michael Heise, Martin T. Wells, & Dawn M. Chutkow, *Does Docket Size Matter? Revisiting Empirical Accounts of the Supreme Court's Incredibly Shrinking Docket*, 95 NOTRE DAME L. REV. 1565, 1570–73 (2020); Kenneth W. Moffett, Forrest Maltzman, Karen Miranda, & Charles R. Shipan, *Strategic Behavior and Variation in the Supreme Court's Caseload Over Time*, 37 JUST. SYS. J. 20, 23 (2016). On the reasons and implications of the Roberts Court's historically anomalous disinterest in cases that might lead the justices to affirm the constitutionality of federal statutes, see Benjamin Johnson & Keith E. Whittington, *Why Does the Supreme Court Uphold So Many Laws?*, 2018 U. ILL. L. REV. 1001.

69. The by-decade calculations noted in the text cover ten terms, beginning, respectively, with the 1980, 1990, 2000, and 2010 terms.

70. The Court decided only four judicial review cases during the 2020 term. The Court, the following term, decided eleven such cases.

The Court's shrinking judicial review docket is also evident in Figure 2, which diagrams the number of judicial review cases during each of Justice Kennedy's thirty full terms on the Court.

FIGURE 2: SUPREME COURT JUDICIAL REVIEW CASES (1988-2017 TERMS)



The fact that the Court's judicial review docket has shrunk significantly in the last few decades counsels in favor of focusing on the strike-down rate of individual justices rather than on the total number of cases in which they voted to strike down laws. If the latter measure is used, then a justice who served throughout the 1980s, for example, might be deemed to be more judicially active than one who served throughout the 2010s simply because the former participated in a greater number of judicial review cases and therefore had more opportunities to strike down statutes.[71] In my estimation, the strike-

71. Even assuming *arguendo* that a Court that grants certiorari in a larger number of judicial review cases is more judicially active than one that does so in fewer cases, *see generally* Whittington, *supra* note 30, it is difficult to determine what a small judicial review docket tells us about the judicial activism of *individual justices* because, as a general matter, we do not know how justices vote on certiorari petitions. Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PENN. L. REV. 1, 16–17 (2011) ("When a certiorari petition is either granted or denied, the Court does

down rate as a percentage of the number of judicial review cases decided more accurately reflects the justices' judicial activism or restraint, and allows for a more illuminating comparison between justices who served during different terms than does the total number of cases in which they voted to strike down or uphold laws.

Professor Keith Whittington, pointing to the reduced number of judicial review cases, argues that the Roberts Court is the least activist Court of the modern era.[72] From a quantitative perspective that focuses only on the total number of judicial review cases heard in recent years in comparison to the higher number of earlier decades, this conclusion is correct. But from a qualitative perspective, the Roberts Court has been anything but a restrained one. A Court that, during Justice Kennedy's tenure alone, struck down, among other statutes, a gun control law;[73] campaign finance reform statutes;[74] a federal statute criminalizing the commercial creation, sale, or possession of certain depictions of animal cruelty;[75] state laws that impact immigration enforcement;[76] state abortion laws;[77] a crucial provision of the Voting Rights Act;[78] state statutes that permitted the imposition of juvenile life sentences;[79] a federal statute prohibiting states from authorizing sports gambling;[80] part of the Military Commissions Act;[81] the Medicaid

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not routinely disclose the Justices' votes, nor does the Court explain its reasons for granting or denying certiorari.").

72. Whittington, *supra* note 30, at 2225–27; *see also* Johnson & Whittington, *supra* note 68, at 1003 ("[T]he Roberts Court is a historical anomaly . . . in how little it reviews federal statutes . . . ."); WHITTINGTON, *supra* note 9, at 237–38 ("The Roberts Court . . . is perhaps the least active Court of the modern era in terms of nullifying statutes.").

73. District of Columbia v. Heller, 554 U.S. 570, 629 (2008).

74. *See, e.g.*, McCutcheon v. FEC, 572 U.S. 185, 193 (2014); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 728 (2011); Citizens United v. FEC, 558 U.S. 310, 372 (2010).

75. United States v. Stevens, 559 U.S. 460, 482 (2010).

76. Arizona v. United States, 567 U.S. 387, 416 (2012).

77. Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 624 (2016), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

78. Shelby County v. Holder, 570 U.S. 529, 556–57 (2013).

79. Miller v. Alabama, 567 U.S. 460, 489 (2012); Graham v. Florida, 560 U.S. 48, 82 (2010).

80. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1484–85 (2018).

81. Pub. L. No. 109-366, 120 Stat. 2600 (2006); Boumediene v. Bush, 553 U.S. 723, 798 (2008).

expansion under the Patient Protection and Affordable Care Act[82] ("ACA");[83] a provision of the Sarbanes-Oxley Act[84] creating the Public Company Oversight Board;[85] a state law prohibiting the use of drug prescription information for marketing purposes;[86] death penalty statutes;[87] a crucial section of the federal Defense of Marriage Act[88] ("DOMA");[89] a provision of the Lanham Act[90] regulating federal trademark registration;[91] a state law regulating pregnancy counseling centers;[92] the federal Stolen Valor Act;[93] same-sex marriage bans;[94] a state law restricting minors' access to violent video games;[95] and state statutes allowing unions to charge agency fees to non-members[96] is not a Court that exercises its power of judicial review in a restrained way.[97] Justice Kennedy, for better or for worse, *voted to void all of these laws*.

The first subsection compares Justice Kennedy's *tenure-long* judicial activism rate (that is, the rate at which he voted to strike down statutes while on the Court) with the tenure-long rate of several of the justices

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82. Pub. L. No. 111-148, 124 Stat. 119 (2010).

83. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012).

84. Pub. L. No. 107-204, 116 Stat. 745 (2002).

85. Free Enter. Fund v. Public Co. Acct. Oversight Bd., 561 U.S. 477, 514 (2010).

86. Sorrell v. IMS Health Inc., 564 U.S 552, 580 (2011).

87. Kennedy v. Louisiana, 554 U.S. 407, 447 (2008), *modified on denial of rehearing*, 554 U.S. 945 (2008).

88. Pub. L. No. 104-199, 110 Stat. 2419 (1996).

89. United States v. Windsor, 570 U.S. 744, 775 (2013).

90. Pub. L. No. 79-489, 60 Stat. 427 (1946).

91. Matal v. Tam, 137 S. Ct. 1744, 1770–71 (2017).

92. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2378 (2018).

93. Pub. L. 109-437, 120 Stat. 3266 (2005), *invalidated by* United States v. Alvarez, 567 U.S. 709 (2012); *Alvarez*, 567 U.S. at 729–30.

94. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

95. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 821 (2011).

96. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2486 (2018).

97. Since Justice Kennedy retired in 2018, the Roberts Court has struck down, among other statutes, a New York law regulating the carrying of guns in public, *see* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022), the Age Discrimination in Employment Act and the Americans with Disabilities Act as applied to teachers in religious schools, *see* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 (2020), and a provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act instituting a "for-cause" requirement for dismissing the head of the Consumer Financial Protection Bureau, *see* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020). Again, while the Roberts Court may be hearing fewer judicial review cases than the Burger and Rehnquist Courts, it is, by no means, a restrained court. *See* sources cited in *supra* note 35.

in the comparator pool.[98] The second subsection focuses on the 423 judicial review cases that Justice Kennedy helped decide while on the Court and compares his judicial activism rate in those cases with that of the eight comparator justices in *the same cases*.[99] The third subsection analyzes several of the justices' voting patterns in the fifty cases that were among the most pivotal judicial review cases decided during Justice Kennedy's time on the Court.[100]

1. Tenure-long strike-down rates

According to the data set, Justice Kennedy participated in 423 judicial review cases during his three decades on the Court. In those constitutional disputes, he voted to strike down at least one statutory provision in 224 cases, giving him a tenure-long strike-down rate of 52.96%. I also calculated the tenure-long strike-down rates of six other justices who served with Justice Kennedy for close to or more than two decades. Those justices, in the order of their appointment, are O'Connor, Scalia, Souter, Thomas, Ginsburg, and Breyer.[101] The justices' tenure-long strike-down rates, diagramed in Figure 3, were as follows: 40.57% (200 of 493) for Justice O'Connor; 42.43% (185 of 436) for Justice Scalia; 53.75% (136 of 253) for Justice Souter; 45.05% (164 of 364) for Justice Thomas; 48.42% (153 of 316) for Justice Ginsburg; and 48.08% (150 of 312) for Justice Breyer.[102] In other words, only Justice Souter had a (slightly) higher tenure-long strike-down rate in judicial review cases than Justice Kennedy.

98. *See infra* Section I.B.1.

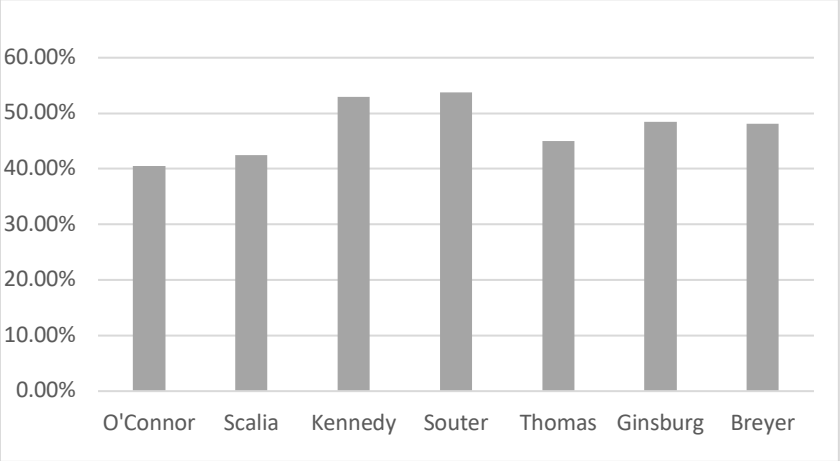
99. *See infra* Section I.B.2.

100. *See infra* Section I.B.3.

101. I did not include Chief Justice Rehnquist and Justice Stevens in this comparison because they served for extended periods of time on the Court before Justice Kennedy joined (Justice Rehnquist for sixteen years and Justice Stevens for twelve). This resulted in both justices participating in a large number of judicial review cases that Justice Kennedy did not help decide.

102. Of the justices being compared, only Justice Thomas remains on the Court. His strike-down rate is based on the judicial review cases, identified in my data set, that he participated in through the 2021 term.

FIGURE 3. TENURE-LONG JUDICIAL REVIEW CASES: STRIKE-DOWN RATE



It is worth noting that Justice Kennedy's strike-down rate was higher than that of conservative justices (such as Justices Scalia and Thomas), as well as of liberal ones (such as Justices Ginsburg and Breyer). It also bears emphasizing that Justice Kennedy's tenure-long strike-down rate (52.96%) was more than 12% higher than Justice O'Connor's rate (40.57%). This is noteworthy because commentators have tended to lump Justices Kennedy and O'Connor together in matters of judicial review,[103] which is in many ways understandable given that both were Reagan appointees;[104] both were viewed as ideological moderates;[105] and both were considered, at different times, to have been the Court's median justice.[106]

Despite these similarities, Justice Kennedy voted to strike down laws in twenty-four more cases than Justice O'Connor despite the fact that the latter helped to decide *seventy more* judicial review cases than the

103. *See, e.g.*, Keck, *supra* note 30 at 203 ("Since their votes are so often decisive, . . . it is O'Connor's and Justice Kennedy's vision of the judicial role . . . that explains the extraordinary activism of the Rehnquist Court."); Whittington, *supra* note 30, at 2244 ("For nearly three decades, O'Connor and Kennedy have held the key votes on the Court and shaped the content and direction of constitutional law.").

104. Michael J. Gerhardt, *What's Old Is New Again*, 86 B.U. L. REV. 1267, 1274 (2006).

105. *See, e.g.*, Joshua B. Fischman, *Politics and Authority in the U.S. Supreme Court*, 104 CORNELL L. REV. 1513, 1588 n.385 (2019) (labeling Justices Kennedy and O'Connor as "moderates").

106. *See* sources cited in *supra* note 20.

former. Interestingly, the difference in the strike-down rate between the two centrist justices was higher than the differences between Justice Kennedy's strike-down rate and those of *both* more conservative justices (Scalia and Thomas) and more liberal ones (Ginsburg and Breyer).[107]

Justice Kennedy was also more likely than any of the comparator justices to strike down laws in judicial review cases that closely divided the Court.[108] This Article defines "close cases" as those decided by three or fewer votes.[109] Using this definition, of the 423 judicial review cases Justice Kennedy helped decide while on the Court, 198 (or 46.81%) were close cases, while 225 (or 53.19%) were unanimous or near unanimous.

Although it would be a mistake to generalize too much, it can be argued that judicial review questions in close cases are generally less

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107. Justice Kennedy's tenure-long strike-down rate was 10.53% higher than Justice Scalia's; 7.91% higher than Justice Thomas's; 4.54 % higher than Justice Ginsburg's; and 4.88% higher than Justice Breyer's.

Justice Kennedy voted to strike down state and local laws in 54.85% (147 of 268) of cases, while he voted to do the same in federal cases 49.68% (77 of 155) of the time, for a difference of 5.18%. Of the six comparator justices, only Justice Thomas (through the 2021 term) voted to strike down federal laws (49.65%, or 71 of 143) at a higher rate than state and local laws (42.08%, or 93 of 221), a difference of 7.57%. For his part, Justice Scalia voted to strike down state and local laws (42.50%, or 119 of 280) at almost the same rate as federal laws (42.31%, or 66 of 156).

The voting records of the other four justices, all of whom voted to strike down state and local laws at higher rates than federal ones, show higher differentials. Justice O'Connor voted to strike down state and local laws in 43.96% of cases (142 of 323), while doing the same in 34.12% (58 of 170) of federal law cases, for a difference of 9.84%. Justice Souter voted to strike down state and local laws in 60% of cases (96 of 160), while doing the same in challenges to federal laws in 43.01% of cases (40 of 93), for a difference of 16.99%. For her part, Justice Ginsburg voted to strike down state and local laws in 53.44% of cases (101 of 189), while voting to strike down federal laws in 40.94% of cases (52 of 127), for a difference of 12.50%. Finally, Justice Breyer voted to strike down state and local laws in 54.95% of cases (100 of 182), while voting to void federal laws in 38.46% of cases (50 of 130), for a difference of 16.49%.

With the exception of Justice Thomas, who is still on the Court, the federal vs. state/local law judicial review data analyzed in this note cover the entire tenures of the relevant justices. For a federal vs. state comparison of how some of the justices voted in judicial review cases in a narrower subset of cases involving some of the most important and impactful disputes that closely divided the justices during Justice Kennedy's time on the Court, see *infra* Figure 10 and accompanying text.

108. *See infra* Figure 4 and Figure 5 accompanying texts.

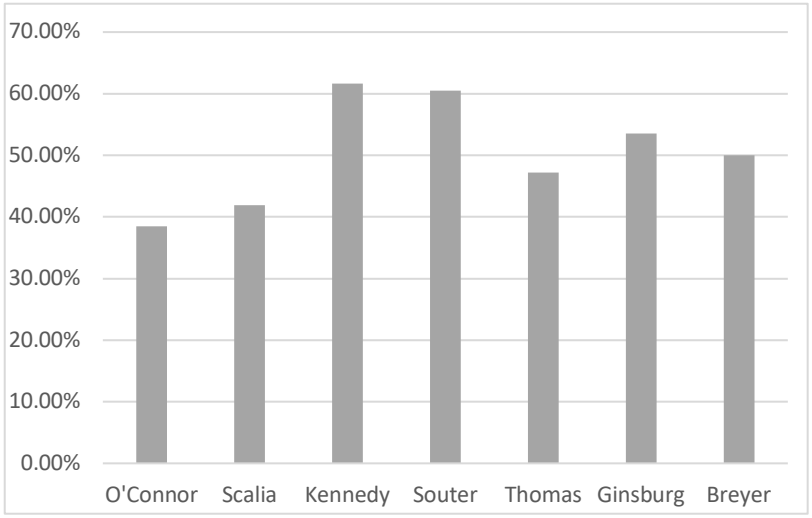
109. In determining whether a case closely divided the Court, I looked only to how the justices divided on the constitutional issues impacting judicial review.

straightforward, or at least more open to debate, than ones raised in unanimous or near-unanimous rulings.[110] Some justices, therefore, may evince a greater willingness to strike down laws in close cases because they may perceive the legal issues to be more open to reasonable disagreement and thus more amenable to varying forms of judicial discretion, including the discretion to void legislative enactments. To see if this was true of Justice Kennedy, I compared his tenure-long strike-down rate in close cases with those of the six justices whom I am using as comparators in this Section.

As already noted, Justice Kennedy participated in 198 judicial review cases that divided the Court by three or fewer votes. In those cases, he voted to strike down laws in 122 of them, for a strike-down rate of 61.62%. The tenure-long strike-down rates in close judicial review cases of the six comparator justices, diagramed in Figure 4, were as follows: 38.46% (85 of 221) for Justice O'Connor; 41.95% (86 of 205) for Justice Scalia; 60.50% (72 of 119) for Justice Souter; 47.19% (84 of 178) for Justice Thomas; 53.50% (84 of 157) for Justice Ginsburg; and 50% (81 of 162) for Justice Breyer. In short, Justice Kennedy had a higher tenure-long strike-down rate in close judicial review cases than any of the other six justices (though the difference with Justice Souter was quite small).

110. *Cf.* J. Clark Kelso & Charles D. Kelso, *Statutory Interpretation: Four Theories in Disarray*, 53 SMU L. REV. 81, 89 n.36 (2000) (noting, in the context of statutory interpretation, that unanimous cases "may not be complex and the decision[s] may be supported by all of the various factors that are given weight by the various methodologies of interpretation. . . . Debate on interpretation methodology is likely only where the Court is more sharply divided").

FIGURE 4: TENURE-LONG JUDICIAL REVIEW CLOSE CASES: STRIKE-DOWN RATE



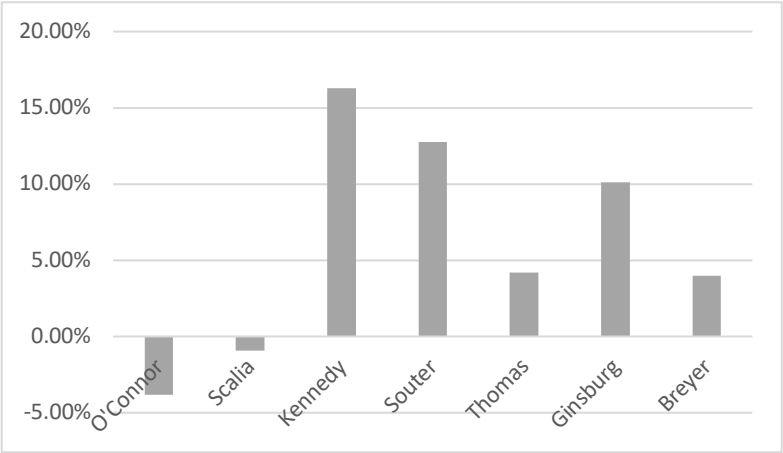
It bears emphasizing that Justice Kennedy's tenure-long strike-down rate in close cases was higher than that of both conservative justices (19.67% higher than Justice Scalia's and 14.43% higher than Justice Thomas's) and liberal ones (8.12% higher than Justice Ginsburg's and 11.62% higher than Justice Breyer's). It is also worth highlighting, again, the difference in judicial activism between Justices Kennedy and O'Connor. In judicial review cases that closely divided the Court during their respective tenures, Justice Kennedy's strike down rate was almost a quarter higher (23.16%) than Justice O'Connor's. This resulted in Justice Kennedy voting to strike down laws in close cases in thirty-seven more instances than Justice O'Connor despite the fact that she helped decide twenty-three more such cases than he did. Both justices may have been similarly situated near the Court's ideological center,[111] but there were significant differences between them in their rates of judicial activism.

To further examine the justices' willingness to strike down laws in closely contested cases, I compared the rates at which they voted to strike down laws in close cases with the rates at which they did the same in cases that divided the Court less deeply. As Figure 5 shows, two of

111. *See* sources cited in *supra* note 20.

the Justices, O'Connor and Scalia, were *less* likely to vote to strike down laws in close cases than in non-close ones. In contrast, Justice Kennedy was more than 16% more likely to vote in favor of voiding laws in close cases as compared to unanimous or near-unanimous ones. The data show, in other words, that Justice Kennedy was particularly prone to choose judicial activism over judicial restraint in cases in which the justices were more divided on the proper constitutional outcome. This tendency is also reflected in the data presented in the next section.[112]

FIGURE 5: TENURE-LONG JUDICIAL REVIEW CASES: PERCENTAGE CHANGE IN STRIKE-DOWN RATES IN CLOSE CASES V. NON-CLOSE CASES



It also bears noting that the data presented so far show Justice Souter as having judicial activism rates that were comparable to Justice Kennedy's. However, there was an important difference in the *impact* of the two justices' judicial activism. In striking down laws, Justice Souter was almost twice as likely to be in dissent than Justice Kennedy. To be specific, only 12.95% (29 of 224) of Kennedy's votes to strike down laws were in dissents. In contrast, one-quarter (34 of 136) of Justice Souter's votes to strike down laws were in dissents. In addition, as noted in the next section, Justice Souter's so-called pent-up judicial restraint rate was about twice that of Justice Kennedy's, evincing a

112. *See infra* Table 2 and Figure 6, and accompanying texts.

greater willingness to abide by judicial restraint when a majority of the Court instead chose to strike down a statute.[113]

To summarize, an examination of tenure-long voting records in judicial review cases shows that Justice Kennedy was more likely to strike down laws than five other justices of varying ideological stripes (O'Connor, Scalia, Thomas, Ginsburg, and Breyer) with whom he served for extended periods of time. Justice Kennedy was also more likely than any of the comparator justices to strike down laws in judicial review cases that closely divided the Court.

2. Justice Kennedy's judicial review cases

There is an important limitation in comparing tenure-long judicial activism rates given that the tenures of any two justices never seem to overlap perfectly. This means that justices frequently end up deciding a significant number of judicial review cases that their colleagues, with whom they partially overlapped, did not. Since the substantive constitutional questions addressed in judicial review cases can vary greatly, the fact that one justice voted to strike down a statute raising one set of constitutional issues in one case does not mean that they would have done the same when confronted with a different statute raising distinct constitutional issues in another dispute. A comparison of judicial activism rates, therefore, can be particularly illuminating when it is based on how the justices voted *in the same cases*. With this in mind, I proceed to compare Justice Kennedy's judicial activism to that of eight other justices, with whom he served for at least seventeen years, as reflected in their votes in the same judicial review cases.[114]

As already noted, Justice Kennedy participated in 423 judicial review cases in his three decades on the Court. In analyzing the data set, I determined how many of those cases were also decided, in the order of their appointment, by Justices Rehnquist, Stevens, O'Connor, Scalia, Souter, Thomas, Ginsburg, and Breyer. I then calculated the strike-down rates of each of the comparator justices in the judicial review cases that they decided alongside Justice Kennedy and

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113. *See infra* notes 116–17 and accompanying text (discussing the rates of so-called pent-up judicial restraint). Furthermore, Justice Kennedy was more willing than Justice Souter to strike down laws in some of the most important and impactful judicial review cases that came before the Court during their tenures. *See infra* note 140.

114. I did not include instances in which the comparator justices helped to decide a case but did not reach the merits of the constitutional questions before the Court.

compared them to Justice Kennedy's strike-down rate in the same cases.

As Table 1 makes clear, a head-to-head comparison of how the comparator justices voted in the same judicial review cases that Justice Kennedy participated in shows that Justice Kennedy had a higher strike-down rate than all of the comparator justices except for Justices Stevens and Souter. (The former voted to strike down laws in only two more cases than Justice Kennedy; the latter did so in just one more.)

TABLE 1**:** STRIKE-DOWN RATE IN JOINTLY DECIDED JUDICIAL REVIEW CASES

Comparator Justice	Number of Cases Decided with Justice Kennedy	Comparator Justice's Strike-Down Rate	Justice Kennedy's Strike-Down Rate	Difference in Strike-Down Rates
Rehnquist	304	30.92%	49.34%	18.42%
Stevens	337	50.45%	49.85%	-0.60%
O'Connor	302	43.71%	48.01%	4.30%
Scalia	392	43.11%	50.77%	7.66%
Souter	253	53.75%	53.36%	-0.39%
Thomas	326	44.79%	58.59%	13.80%
Ginsburg	293	47.78%	57.68%	9.90%
Breyer	275	48.00%	57.45%	9.45%

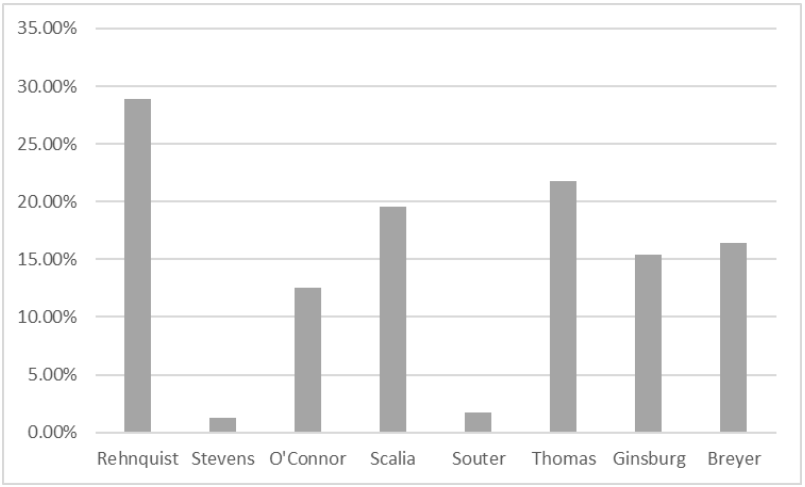
It bears noting that Justice Kennedy's strike-down rate in jointly decided judicial review cases was at least 7% higher than that of five of the comparator justices: 18.42% higher than Chief Justice Rehnquist's; 7.66% higher than Justice Scalia's; 13.80% higher than Justice Thomas's; 9.90% higher than Justice Ginsburg's; and 9.45% higher than Justice Breyer's. These differences are significant. A justice's strike-down rate that, for example, is 9% higher than that of another justice, from a pool of 300 jointly decided cases, translates into the striking down of laws in an additional 27 cases.

TABLE 2: STRIKE-DOWN RATE
IN JOINTLY DECIDED JUDICIAL REVIEW CLOSE CASES

Comparator Justice	Number of Close Cases Decided with Justice Kennedy	Comparator Justice's Strike-Down Rate	Justice Kennedy's Strike-Down Rate	Difference in Strike-Down Rates
Rehnquist	135	28.89%	57.78%	28.89%
Stevens	160	56.60%	57.86%	1.26%
O'Connor	137	45.59%	58.09%	12.50%
Scalia	185	42.93%	62.50%	19.57%
Souter	120	60.50%	62.18%	1.68%
Thomas	157	46.79%	68.59%	21.80%
Ginsburg	144	52.45%	67.83%	15.38%
Breyer	141	50.35%	66.67%	16.43%

The extent of Justice Kennedy's judicial activism can also be gleaned by comparing it to that of the other justices in jointly decided judicial review cases that closely divided the Court. As Table 2 and Figure 6 show, Justice Kennedy, in such cases, had a higher strike-down rate than all the comparator justices.

FIGURE 6: PERCENTAGE BY WHICH JUSTICE KENNEDY'S



STRIKE-DOWN RATE IN JOINTLY DECIDED CLOSE JUDICIAL REVIEW CASES EXCEEDED THE RATE OF COMPARATOR JUSTICES

It bears noting that Justice Kennedy's strike-down rate in such cases was at least 12% higher than that of six comparator justices: 28.89% higher than Chief Justice Rehnquist's; 12.50% higher than Justice O'Connor's; 19.57% higher than Justice Scalia's; 21.80% higher than Justice Thomas's; 15.38% higher than Justice Ginsburg's; and 16.43% higher than Justice Breyer's. Although Justice Kennedy also had higher strike-down rates in jointly decided close cases than either Justice Stevens or Souter, the differences were quite small. [115]

It is helpful to translate the strike-down rates in jointly decided close cases to the actual number of times that Justice Kennedy, in comparison to the other justices, voted to strike down laws. Interestingly, Justice Kennedy did so more frequently than justices to *both* his ideological right and left.

The differences between Justice Kennedy and the conservative justices were considerable. In the 135 close judicial review cases that Justice Kennedy and Chief Justice Rehnquist helped decide, the former voted to strike down laws 39 more times than the latter. For their part, Justices Kennedy and Scalia jointly decided 184 close judicial review cases; in those disputes, the former voted to strike down statutes 36 more times than the latter. And Justice Kennedy voted to strike down laws in 34 more instances than Justice Thomas in the 156 close judicial review cases that they jointly decided.

Although they were less pronounced, the differences between Justice Kennedy and some of the liberal justices were also considerable. Justices Kennedy and Ginsburg jointly decided 143 judicial review cases that closely divided the Court; the former voted to strike down laws 22 more times than the latter. And in the 140 close judicial review cases that Justices Kennedy and Breyer together helped decide, the former voted to strike down laws 23 more times than the latter.

It is also helpful to determine the number of times that the justices, in dissent, voted to *uphold* statutes when the Court chose to *strike them down*. To put it differently, it is useful to examine how many times the justices voted for judicial restraint when a majority of their colleagues chose judicial activism instead. This category of judicial review cases is

115. Justice Kennedy voted to strike down a law in only two additional close cases decided with Justice Stevens and also two more in close cases adjudicated alongside Justice Souter.

informative because it reflects the justices' pent-up demand, so to speak, for judicial restraint.[116]

For purposes of examining the justices' pent-up demand for judicial restraint, I determined the number of times in which they dissented by voting to uphold a statute that the majority struck down. I then compared Justice Kennedy's pent-up demand for judicial restraint to that of each of the eight comparator justices in jointly decided judicial review cases.

For example, Justices Stevens and Kennedy jointly decided 337 judicial review cases. In those cases, the liberal Justice Stevens voted more than three times more often (48 times or 14.24%) to uphold a law in cases in which the majority voted to strike down the statute under review than Justice Kennedy (15 times or 4.45%). For their part, Justices Scalia and Kennedy together helped decide 392 judicial review cases. In those cases, the conservative Justice Scalia also voted in dissent to uphold laws more than three times more often (58 times or 14.80%) than Justice Kennedy (14 times or 3.57%). As Figure 7 shows, Justice Kennedy had a lower pent-up demand for judicial restraint, in jointly decided judicial review cases, than all eight comparator justices.[117]

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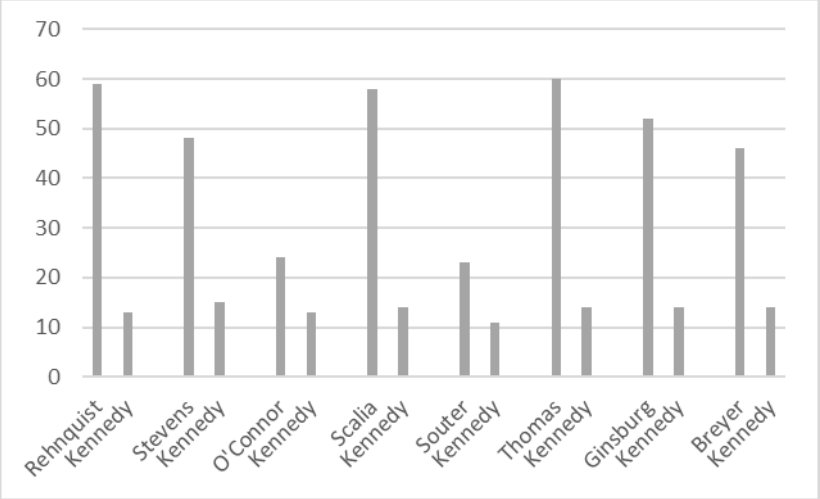
116. Keith Whittington makes a similar point about the other side of the judicial review coin by noting that when a justice votes to strike down a law that a majority upholds, it shows "a pent-up demand for greater judicial activism." Whittington, *supra* note 30, at 2247–48 (footnote omitted).

117. The differences in the pent-up demand for judicial restraint in jointly decided cases with the other six comparator justices were as follows: Chief Justice Rehnquist voted to uphold laws in dissent in 59 (19.41%) of the 304 judicial review cases he decided jointly with Justice Kennedy, while the latter did so in only 13 instances (4.28%). Justices O'Connor and Kennedy decided 302 judicial review cases together; the former voted to uphold laws in dissent in 24 instances (7.95%), while the latter did so in just 13 cases (4.30%). Justice Souter voted to uphold laws in dissent about twice as often as Justice Kennedy in jointly decided judicial review cases: 23 out of 253 cases (9.09%) for Justice Souter as compared to 11 times (4.35%) for Justice Kennedy.

Justice Thomas voted to uphold laws in dissent in 60 (18.40%) of the 326 judicial review cases he decided jointly with Justice Kennedy, while the latter did so in only 14 of those cases (4.29%). Justices Ginsburg and Kennedy decided 293 judicial review cases together; the former voted to uphold laws in dissent 52 times (17.75%), while the latter did so just 14 times (4.78%). Finally, Justices Breyer and Kennedy jointly decided 275 judicial review cases. Justice Breyer voted to uphold laws in dissent 46 times (16.73%); Justice Kennedy did the same in only 14 cases (5.09%).

FIGURE 7: PENT-UP DEMAND FOR JUDICIAL RESTRAINT:
NUMBER OF DISSENTS FROM RULINGS STRIKING DOWN STATUTES
IN JOINTLY DECIDED JUDICIAL REVIEW CASES



In short, head-to-head comparisons of how Justice Kennedy voted in jointly decided judicial review cases with the eight justices with whom he served the longest reveal that he had a higher strike-down rate than most of the other justices. When the comparison is narrowed to jointly decided close cases, the data show that Justice Kennedy had a higher strike-down rate than all the comparator justices. In addition, in comparison to the other eight justices, Justice Kennedy manifested significantly less pent-up demand for judicial restraint as reflected in the number of dissents from rulings striking down statutes.

3. Pivotal judicial review cases

In order to further examine Justice Kennedy's judicial activism, this Section focuses on fifty close cases that, in my estimation, were among the most important and impactful judicial review rulings issued by the Court during his tenure. I recognize that legal commentators, if tasked with creating a list of pivotal judicial review cases decided during Justice Kennedy's time on the Court, would undoubtedly disagree on its precise content once we move beyond the not inconsiderable number of rulings—such as *Planned Parenthood of Southeastern*

Pennsylvania v. Casey[118] (abortion), *Lawrence v. Texas*[119] (sodomy laws), *Citizens United v. FEC*[120] (free speech rights of corporations), *District of Columbia v. Heller*[121] (gun control), *Shelby County v. Holder*[122] (voting rights), *National Federation of Independent Business v. Sebelius*[123] (ACA), and *Obergefell v. Hodges*[124] (same-sex marriage)—that almost everyone would agree should be included. I acknowledge, therefore, that my list is a subjective one that reflects my sense of which judicial review cases were among the most important and impactful ones decided during Justice Kennedy's time on the Court. Although other commentators would undoubtedly exclude some of the cases I have included, and include others I have excluded, I nonetheless believe there is value in creating and analyzing such a list because it allows for a further examination of the impact and extent of Justice Kennedy's judicial activism.[125] My claim in this Section is that that activism was particularly pronounced when it seemed to matter most.

As I do throughout the Article, I examine the degree of Justice Kennedy's judicial activism in comparison to the activism of other justices with whom he served for extended periods of time. In this Section, the justices whom I use as comparators are Scalia, Thomas, Ginsburg, and Breyer. I chose these four justices as comparators because they helped decide the largest number of the fifty judicial review cases in question. Of the fifty cases, Justice Scalia participated in forty-seven; Justice Thomas in forty-five; and both Justices Ginsburg and Breyer in forty-three.

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118. 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

119. 539 U.S. 558 (2003).

120. 558 U.S. 310 (2010).

121. 554 U.S. 570 (2008).

122. 570 U.S. 529 (2013).

123. 567 U.S. 519 (2012).

124. 576 U.S. 644 (2015).

125. An appendix to the *Guide to the U.S. Supreme Court* lists what it calls "major" Supreme Court rulings from 1790 through 2010. DAVID G. SAVAGE, GUIDE TO THE U.S. SUPREME COURT 1276–40 (5th ed. 2010). There is significant overlap between my list and the *Guide*'s list for the relevant years (1989–2010). My list includes thirty-six pivotal judicial review cases decided during that period, thirty of which are also listed in the *Guide*. The six cases that are on my list but not on the *Guide*'s list are *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *New York v. United States*, 505 U.S 144 (1992); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Nguyen v. INS*, 533 U.S. 53 (2001); *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001); and *Graham v. Florida*, 560 U.S. 48 (2010).

The Appendix lists the fifty cases that I believe were among the most important and impactful judicial review rulings during Justice Kennedy's tenure on the Supreme Court. All the disputes were ones that closely divided the justices.

Justice Kennedy's significant influence on the Court is reflected in the fact that he *was in the majority in forty-eight of the fifty pivotal judicial review cases* (or 96%).[126] This was a remarkable feat of judicial influence given both the wide scope of the laws under review in the cases—everything from abortion regulations[127] to free speech rights[128] to congressional term limits[129] to campaign finance reform[130] to LGBTQ rights[131] to the application of death penalty statutes[132] to gun control

126. The two exceptions were *Apprendi*, 530 U.S. at 523 (Kennedy, J., dissenting), and *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 744 (2003) (Kennedy, J., dissenting).

127. Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 583 (2016), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Gonzales v. Carhart, 550 U.S. 124, 125–30 (2007); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 833–34 (1992) (plurality opinion), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

128. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2365–67 (2018); Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2456–59 (2018); Sorrell v. IMS Health Inc., 564 U.S. 552, 552–55 (2011); Ashcroft v. ACLU, 542 U.S. 656, 656–59 (2004); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 533–35 (2001); Boy Scouts of Am. v. Dale, 530 U.S. 640, 640–42 (2000); Texas v. Johnson, 491 U.S. 397, 397–98 (1989).

129. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 779–81 (1995).

130. McCutcheon v. FEC, 572 U.S. 185, 185 (2014); Citizens United v. FEC, 558 U.S. 310, 311–16 (2010).

131. Obergefell v. Hodges, 576 U.S. 644, 644–48 (2015); United States v. Windsor, 570 U.S. 744, 744–47 (2013); Lawrence v. Texas, 539 U.S. 558, 558–60 (2003); Romer v. Evans, 517 U.S. 620, 620–21 (1996).

132. Kennedy v. Louisiana, 554 U.S. 407, 407–11 (2008), *modified on denial of rehearing*, 554 U.S. 945 (2008); Roper v. Simmons, 543 U.S. 551, 551–54 (2005); Atkins v. Virginia, 536 U.S. 304, 304–05 (2002).

laws[133] to Congress's legislative authority[134] to voting rights[135] to affirmative action[136] to legislative districting[137] to the division of power between Congress and the President[138]—and the fact that the rulings were issued over the course of three decades.

In contrast to Justice Kennedy, who was in the majority in almost all fifty pivotal judicial review cases, Justices Scalia and Thomas were in the majority in only a little more than half the disputes (57.45%, or 27 of 47, for Justice Scalia, and 57.78%, or 26 of 45, for Justice Thomas) they helped decide. For their part, Justices Ginsburg and Breyer were in the majority in fewer than half the cases (48.84%, or 21 of 43, for Justice Ginsburg, and 44.19%, or 19 of 43, for Justice Breyer) they participated in.

Justice Kennedy's remarkable influence is also reflected in the fact that he wrote the majority opinion in eighteen of the fifty cases and co-wrote the deciding plurality opinion in a nineteenth case.[139] The nineteen cases in which Justice Kennedy wrote or co-wrote the Court's deciding opinion accounted for more than a third (38%) of the cases in question. In contrast, Justice Scalia wrote *only four* of the majority opinions in the forty-seven cases he helped decide, while Justices Thomas, Ginsburg, and Breyer each wrote *only one* such opinion in the more than forty cases they participated in.

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133. District of Columbia v. Heller, 554 U.S. 570, 570–72 (2008).

134. Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519, 520–24 (2012); Boumediene v. Bush, 553 U.S. 723, 724–30 (2008); Gonzales v. Raich, 545 U.S. 1, 2–3 (2005); Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 721–23 (2003); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 356–58 (2001); United States v. Morrison, 529 U.S. 598, 598–600 (2000); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 62–65 (2000); Alden v. Maine, 527 U.S. 706, 706–10 (1999); Printz v. United States, 521 U.S. 898, 898–900 (1997); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 44–46 (1996); United States v. Lopez, 514 U.S. 549, 549–50 (1995).

135. Shelby County v. Holder, 570 U.S. 529, 530–32 (2013); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 181–82 (2008).

136. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 200–02 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 470–74 (1989).

137. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 787–90 (2015); Shaw v. Hunt, 517 U.S. 899, 899–900 (1996).

138. Zivotofsky v. Kerry, 576 U.S. 1, 1–4 (2015); Clinton v. City of New York, 524 U.S. 417, 417–20 (1998).

139. Justice Kennedy's co-written plurality opinion was in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. 505 U.S. 833, 843 (1992) (plurality opinion), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

An analysis of the votes in the fifty judicial review cases reveals not only Justice Kennedy's immense influence, but also the extent to which he chose judicial activism over restraint in important and impactful disputes that closely divided the Court. Of the fifty cases, Justice Kennedy voted to strike down laws in 80% (or 40) of them. The rates at which the other four justices chose judicial activism over restraint were considerably lower than Justice Kennedy's: 48.94% for Justice Scalia (23 of 47); 55.56% for Justice Thomas (25 of 45); 51.16% for Justice Ginsburg (22 of 43); and 41.86% (18 of 43) for Justice Breyer.

To further refine the analysis, I calculated Justice Kennedy's strike-down rate in the slightly smaller subset of pivotal cases that he decided along with each of the four comparator justices. In the forty-seven pivotal cases that Justice Kennedy decided with Justice Scalia, the former had a strike-down rate of 78.72% (37 of 47), which was 29.78% higher than the latter's rate in the same cases. Justice Kennedy's strike-down rate in the forty-five cases he jointly decided with Justice Thomas was 84.44% (38 of 45), a number that was 28.88% higher than Justice Thomas's strike-down rate in the same cases. And Justice Kennedy decided forty-three of the fifty cases alongside Justices Ginsburg and Breyer. Justice Kennedy's strike-down rate was 83.72% (36 of 43), a number that was 32.56% higher than Justice Ginsburg's rate and 41.86% higher than Justice Breyer's rate.

In other words, as illustrated in Figure 8, when it seemed to matter most, Justice Kennedy voted to strike down laws at a rate that was *about a third higher* than the rates of Justices Thomas, Scalia, and Ginsburg, and *twice higher* than Justice Breyer's rate. The more important the judicial review cases, the less inclined Justice Kennedy seems to have been, in absolute terms and in comparison to his colleagues, to vote to uphold the law at issue.[140]

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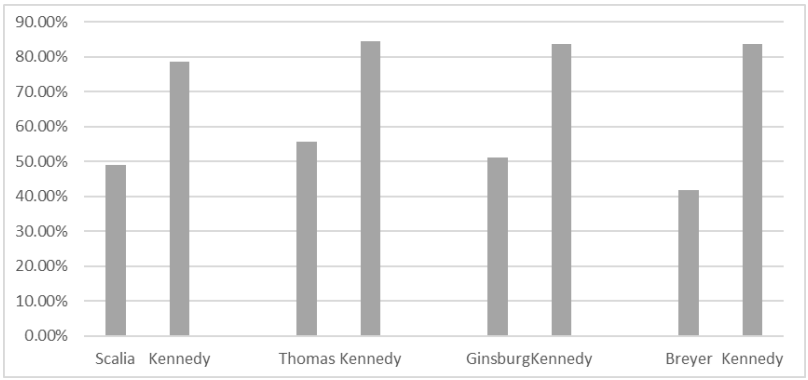
140. I did not include other justices as comparators in this Section because they did not help decide as many of the pivotal judicial review cases listed in the Appendix as Justices Scalia, Thomas, Ginsburg, and Breyer. It is worth noting, however, that *all* the other justices who served alongside Justice Kennedy for extended periods of time had lower strike-down rates than he did in the pivotal cases in question. Chief Justice Rehnquist, for example, participated in twenty-nine of the fifty cases. He voted to strike down laws in 48.28% (14 of 29) of the cases, a strike-down rate that was 31.03% (79.31%, or 23 of 29) lower than Justice Kennedy's rate in the same cases. For his part, Justice Stevens helped decide thirty-six of the fifty cases. He voted to strike down laws

FIGURE 8: STRIKE-DOWN RATES IN
JOINTLY DECIDED PIVOTAL JUDICIAL REVIEW CASES (1988-2018)



Not surprisingly, conservative Justices Scalia and Thomas, on the one hand, and liberal Justices Ginsburg and Breyer, on the other, almost always disagreed on the appropriate constitutional outcome of highly contested and important judicial review cases. In fact, of the forty pivotal cases listed in the Appendix in which all four of the comparator justices participated, there was a cross-ideological overlap in the votes of at least one of the two conservatives and one of the two liberal justices in only five disputes (12.5%).[141] And yet, despite their significant substantive disagreements regarding which laws they believed were unconstitutional, the rates at which Justices Scalia and Thomas, on the one hand, and Justices Ginsburg and Breyer, on the other, struck down laws in some of the most important and impactful constitutional disputes during their tenures were considerably closer to each other than to Justice Kennedy's rate of judicial activism. In

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in sixteen of those cases, or 44.44%, a strike-down rate that was a little more than a third lower than Justice Kennedy's rate in the same cases (28 of 36 cases, or 77.78%).

Justice O'Conner participated in twenty-nine of the cases. She voted to strike down laws in eighteen of them, or 62.07%, a strike-down rate that was 17.24% lower than Justice Kennedy's (79.31%, or 23 of 29) in the same cases. Also, like Chief Justice Rehnquist and Justice O'Connor, Justice Souter joined Justice Kennedy in helping to decide twenty-nine of the pivotal judicial review cases. He voted to strike down laws in sixteen of them, or 55.17%, a strike-down rate that was 27.58% lower than Justice Kennedy's rate (82.76%, or 24 of 29) in the same disputes.

141. Maryland v. King, 569 U.S. 435 (2013); Gonzales v. Raich, 545 U.S. 1 (2005); Ashcroft v. ACLU, 542 U.S. 656 (2004); Apprendi v. New Jersey, 530 U.S. 466 (2000); Clinton v. City of New York, 524 U.S. 417 (1998).

other words, the judicial activism outlier in these pivotal cases was not a judicial conservative or a judicial liberal but was instead the ideologically moderate Justice Kennedy.

Justice Kennedy's ideological moderation gave him the opportunity to be the swing vote in scores of crucial cases during his tenure.[142] But it was his proclivity for judicial activism that made him a frequent supporter of using the Constitution to void the policy preferences of legislators in pivotal and deeply contested judicial review cases.[143] I explore this point in further detail in Part II.

As explained earlier, the rate at which a justice is willing to dissent from the Court's decisions to strike down laws reflects a pent-up demand for judicial restraint.[144] I already noted how Justice Kennedy's pent-up restraint rate in judicial review cases was lower than those of Justices Rehnquist, Stevens, O'Connor, Scalia, Souter, Thomas, Ginsburg, and Breyer in cases in which Justice Kennedy and each of the eight comparator justices jointly decided.[145]

The differences between Justice Kennedy's pent-up judicial restraint rate and those of the four justices I am using as comparators in this Section was even starker when we narrow our focus to the pivotal judicial review cases examined here. In the fifty cases listed in the Appendix, Justice Kennedy voted to uphold a law in a case in which the majority decided to strike it down *in only one instance* (2%).[146] In contrast, as shown in Figure 9, the pent-up judicial restraint rates of the other four justices in the relevant cases were much higher: 36.17% (17 of 47) for Justice Scalia; 35.56% for Justice Thomas (16 of 45); 41.86% (18 of 43) for Justice Ginsburg; and 48.84% (21 of 43) for Justice Breyer.

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142. *See supra* note 20 and accompanying text.

143. Richard Fallon makes a similar point when he notes that:

> [W]e should not mistake what today passes for "moderation" for restraint. Some of history's most celebrated moderate or "swing" Justices have shown very little restraint . . . . Anthony Kennedy furnishes a case in point. In newspaper headlines, Kennedy is a judicial moderate . . . [and] is easily seen as the Court's center of gravity. But that description would be misleading. It would be more accurate to say that Kennedy swings from what liberals deride as conservative judicial activism in one case to what conservatives castigate as liberal judicial activism in another.

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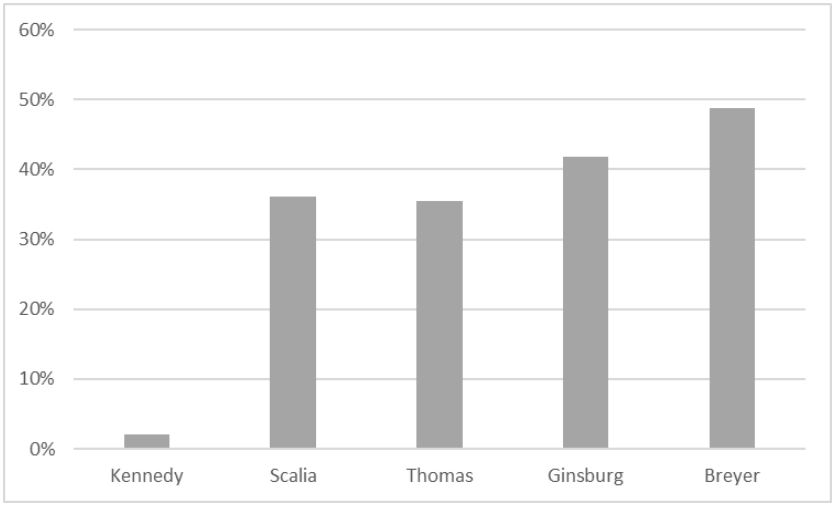
144. *See supra* note 116 and accompanying text.

145. *See supra* Figure 7 and accompanying text.

146. Apprendi v. New Jersey, 530 U.S. 466, 468 (2000).

FIGURE 9: JUDICIAL REVIEW CASES (1988–2018): PENT-UP JUDICIAL RESTRAINT RATE



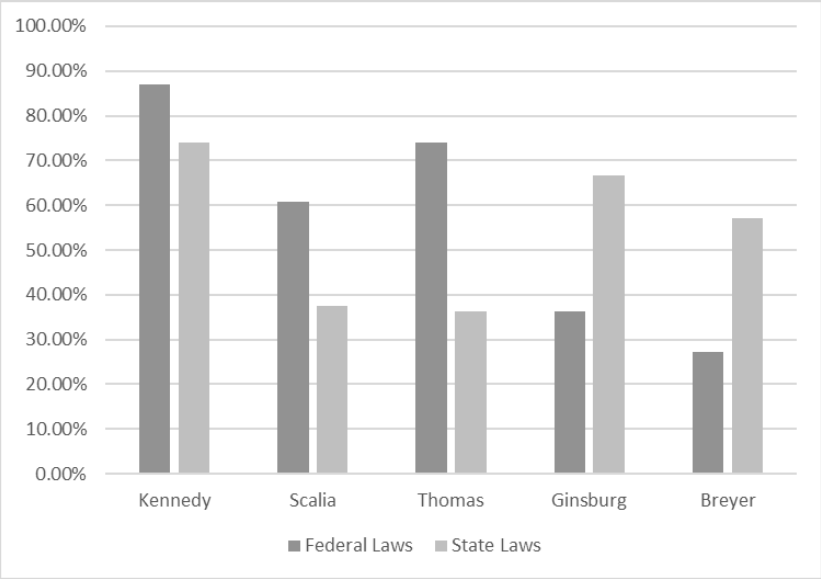
A little less than half (twenty-three) of the fifty judicial review cases involved challenges to federal statutes and a little more than half (twenty-seven) consisted of challenges to state laws.[147] Although Justice Kennedy was more likely to strike down federal laws (20 of 23, or 86.96%) than state laws (20 of 27, or 74.07%) in these pivotal cases, the difference in the strike-down rates in the two categories of cases was less than those of the comparator justices. In other words, in striking down laws in the pivotal cases, Justice Kennedy seemed to care less than the other justices on whether they originated at the federal or state level.

Like Justice Kennedy, Justices Scalia and Thomas voted to strike down more federal than state laws in the pivotal cases, though they both did so at lower rates than Justice Kennedy: Justice Scalia at 60.87% (14 of 23) and Justice Thomas at 73.91% (17 of 23). But unlike Justice Kennedy, Justices Scalia and Thomas were more likely to uphold than

147. I grouped *District of Columbia v. Heller* with the state cases rather than the federal ones because, "[a]lthough *Heller* involved constitutional limits on federal power, the policy at stake in the case was endorsed by the city leaders of the District of Columbia and not by Congress." Whittington, *supra* note 30, at 2242 n.105 (citing *Heller*, 554 U.S. at 574–75). I also grouped *City of Richmond v. J.A. Croson Co.*, a case challenging a local ordinance, with the state cases.

strike down state laws in the relevant state cases. Justice Scalia's strike-down rate in those cases was 41.67% (10 of 24), a little more than half of Justice Kennedy's rate; Justice Thomas's rate was 36.36% (8 of 22), also about a half lower than Justice Kennedy's rate in pivotal state law cases. The data are diagrammed in Figure 10.

FIGURE 10: PIVOTAL CASES (1988-2018):
FEDERAL V. STATE STRIKE-DOWN RATES



Like Justices Scalia and Thomas, but unlike Justice Kennedy, the liberal Justices Ginsburg and Breyer showed a marked difference in their strike-down rates in the pivotal cases depending on whether the law being challenged was a federal or a state one. But, unlike Justices Scalia and Thomas, the two liberal justices, as also shown in Figure 10, were significantly more likely to strike down state laws than federal ones in the pivotal cases. Justice Ginsburg's strike-down rate of state laws was 66.67% (14 of 21), while her federal strike-down rate was only 36.36% (8 of 22). For his part, Justice Breyer's federal strike-down rate was 27.27% (6 of 22), while his state strike-down rate was more than two times higher: 57.14% (12 of 21). It bears noting that Justice Ginsburg's strike-down rate of federal laws in the pivotal cases was less

than half of Justice Kennedy's rate, while Justice Breyer's rate was more than two-thirds lower.

The data relating to some of the most impactful and important judicial review cases that closely divided the Court during Justice Kennedy's tenure show stark differences between the degree of judicial activism that Justice Kennedy engaged in when compared to the conservative Justices Scalia and Thomas, as well as to the liberal Justices Ginsburg and Breyer. For each set of justices positioned closer to the ends of the Court's ideological spectrum, there was at least one important sub-category of pivotal cases—challenges to state laws for Justices Scalia and Thomas and challenges to federal laws for Justices Ginsburg and Breyer—in which they interpreted the Constitution in ways that *deferred* to the policy preferences of legislators *in more than half of the legal disputes*. But not so for Justice Kennedy: whether the pivotal cases involved challenges to federal or state laws made little difference to him. In the vast majority of the cases, Justice Kennedy's understanding of judicial power required the voiding of legislative policy preferences based on a judicial judgment of unconstitutionality regardless of whether those preferences originated at the federal or state levels.

This first Part of the Article provided quantitative analyses of Justice Kennedy's judicial activism by examining his voting record in judicial review cases and contrasting it to various sets of comparative justices. Whether the focus is tenure-long strike-down rates, or voting records in jointly decided judicial review cases, or on how the justices voted in some of the most important and impactful judicial review cases of their tenures, Justice Kennedy evinced more robust forms of judicial activism than did most of the other justices with whom he served for close to or more than twenty years on the Court.

II. A QUALITATIVE ANALYSIS OF JUSTICE KENNEDY'S JUDICIAL ACTIVISM

The judicial activism data tell an important part of the story, but not all of it. While the previous Part sought to quantify Justice Kennedy's judicial activism, this Part provides a qualitative assessment showing the extent to which his judicial review opinions rarely expressed concern

about the pitfalls or hazards of judicial overreach.[148] It also details how Justice Kennedy, with some frequency, either (1) failed to acknowledge the importance of accounting for the policy preferences of elected legislators or (2) did so briefly before concluding that the Constitution nonetheless required the Court to void those preferences. In contrast, other justices, sometimes to Justice Kennedy's ideological left and sometimes to his ideological right, repeatedly and forcefully disagreed with his robust judicial activism by contending that the Constitution, and respect for democratic processes, demanded judicial restraint.

This Part's purpose, like that of the Article as a whole, is not to address the question of whether Justice Kennedy correctly applied the Constitution in any given case. It may very well be that Justice Kennedy, in voting to void the statutes in all the cases examined below, had better constitutional arguments than his colleagues who voted to uphold the laws. But the focus here is not on the question of whether Justice Kennedy correctly applied the Constitution; instead, it is on the low priority he gave to the benefits of judicial restraint and to the dangers of judges granting themselves undue power through constitutional interpretation. Although more conservative and more liberal justices routinely disagreed between themselves about constitutional issues, both sets of justices frequently defended an understanding of the Constitution that, at least some of the time,

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148. In a 2005 interview, Justice Kennedy addressed the counter-majoritarian component of judicial review by noting that "[i]t may be true that when we set aside a particular congressional enactment or a state law—which is an awful function, awful in the sense of powerful—it's true that we, for the moment, may displease the majority." *Interview with Justice Anthony M. Kennedy: The Essential Right to Human Dignity*, AM. ACAD. ACHIEVEMENT (June 3, 2005), http://www.achievement.org/achiever/anthony-m-kennedy/#interview [https://perma.cc/RF8S-VDBQ]. But Justice Kennedy, during the interview, as he frequently did in his judicial opinions, quickly pivoted to robustly defend judicial review, arguing that a majority of Americans want courts to strike down unconstitutional laws. As he put it,

> if you look over time, if you ask what the American people—the majority of the American people—want over time, over our history, they want judicial review. They want to make sure that the promises of the Constitution are honored, that the commitments we made basically over time with our ancestors are followed.

Id. For a critical assessment of Justice Kennedy's defense of judicial review in this interview, see Kerr, *supra* note 26.

called for jurisprudential modesty and the staying of the judicial hand. In contrast, Justice Kennedy almost never did.

A representative example of Justice Kennedy's approach to judicial review was his 5 to 4 majority opinion in the 1995 case of *Miller v. Johnson*.[149] *Miller* involved an equal protection challenge, brought by five white voters, to a decision by the Georgia legislature to redraw the state's congressional districts to create a third majority-Black district.[150] The Georgia legislature voted to do so after the Department of Justice, exercising authority it then had under section 5 of the Voting Rights Act of 1965,[151] refused to grant preclearance approval to a congressional district map that would have created only two majority-Black districts.[152]

Two years earlier, the Supreme Court in *Shaw v. Reno*,[153] a case involving a challenge brought by a group of white voters in North Carolina to a majority-Black congressional district, had held, also in a 5 to 4 opinion with Justice Kennedy in the majority, that legislative districting could be successfully challenged under the Equal Protection Clause if it could be shown that race was the predominant factor in the line drawing.[154] Earlier successful challenges to legislative districting had linked unconstitutional uses of race to the dilution of the voting power of racial minorities.[155] But the Court in *Shaw v. Reno* seemed to have held that legislative districting can violate the Equal Protection Clause even absent a vote dilution claim.[156]

In his majority opinion striking down the congressional district line drawing approved by Georgia legislators in *Miller*, Justice Kennedy acknowledged the need for courts to tread carefully in these types of cases. He explained that "[e]lectoral districting is a most difficult subject for legislatures, and so the [s]tates must have discretion to

149. 515 U.S. 900 (1995).

150. *Id.* at 909.

151. 42 U.S.C. § 1973c. Eighteen years after *Miller*, Justice Kennedy joined four other justices in striking down the formula provision of the Voting Rights Act that made the preclearance requirement enforceable. Shelby County v. Holder, 570 U.S. 529, 557 (2013); *see infra* notes 170–77 and accompanying text.

152. *Miller*, 515 U.S. at 906–07.

153. 509 U.S. 630 (1993).

154. *Id.* at 649.

155. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 627 (1982).

156. *See Miller*, 515 U.S. at 934 (Ginsburg, J., dissenting) ("Two Terms ago, in *Shaw v. Reno*, this Court took up a claim 'analytically distinct' from a vote dilution claim." (quoting *Shaw*, 509 U.S. at 652)).

exercise the political judgment necessary to balance competing interests."[157] He added that "[t]he courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus."[158] But, as was often the case with Justice Kennedy, especially in disputes like *Miller* that closely divided the Court,[159] arguments regarding the need for judges to tread carefully in order not to trample on legislative preferences quickly gave way to the challengers' constitutional claims.[160] In the end, Justice Kennedy agreed with the challengers' contention that Georgia legislators had impermissibly taken race into account in creating a third majority-Black congressional district.[161]

Justice Ginsburg wrote a dissent in *Miller* on behalf of herself and Justices Stevens, Souter, and Breyer.[162] Justice Ginsburg's dissent took more seriously the need for courts to adjudicate carefully in redistricting challenges, emphasizing questions of judicial competence.[163] As she explained, "[d]istrict lines are drawn to accommodate a myriad of factors—geographic, economic, historical, and political—and state legislatures, as arenas of compromise and electoral accountability, are best positioned to mediate competing claims; courts, with a mandate to adjudicate, are ill equipped for the task."[164] Although it was true that courts had "ventured into the political thicket of apportionment when necessary to secure to members of racial minorities equal voting rights,"[165] Justice Ginsburg reasoned that *Miller* was different because the white challengers, unlike minority plaintiffs in the earlier cases, were not claiming that they lacked the political power to seek redress (specifically, congressional districts with different geographic boundaries) through traditional democratic processes.[166] Justice Ginsburg ultimately concluded that

157. *Id.* at 915.
158. *Id.* at 915–16.
159. *See id.* at 902.
160. *See, e.g.*, *infra* notes 210–12 and accompanying text.
161. *Miller*, 515 U.S. at 917.
162. *Id.* at 934 (Ginsburg, J., dissenting).
163. *Id.* at 936.
164. *Id.*
165. *Id.*
166. *Id.* at 948.

the challengers were not constitutionally entitled to have the Court void the congressional districts approved by the Georgia legislature.[167]

As already noted, my objective here is not to claim that Justice Ginsburg's interpretation of the Equal Protection Clause in *Miller* was better or more persuasive than Justice Kennedy's. Instead, my point is that Justice Ginsburg—along with three other dissenting justices—thought it inappropriate for federal courts to interfere with the democratic and political processes that had resulted in the legislature's creation of a third majority-Black district.[168] In contrast, Justice Kennedy, as he frequently did in judicial review cases that closely divided the Court, rejected arguments for judicial restraint and instead pursued and defended a judicially active course of action.[169]

A similar divide between Justice Kennedy and Justice Ginsburg (among other justices) on the appropriate exercise of judicial review in the context of voting rights can be found in the pivotal and controversial case of *Shelby County v. Holder*, decided almost two decades after *Miller*. The five-justice majority in *Shelby County* engaged in a vigorous form of judicial review by rendering section 5 of the Voting Rights Act of 1965 unenforceable.[170] Congress, through the so-called coverage formula, had mandated in section 5 that jurisdictions with a long history of racial discrimination in voting, located primarily but not exclusively in the South, receive preclearance approval from either the Department of Justice or a federal court before instituting new voting requirements.[171] Although he did not write an opinion in *Shelby County*, Justice Kennedy joined Chief Justice John Roberts's majority ruling voiding Congress's judgment, codified most recently eight years earlier, that the combination of the coverage formula and the section 5 preclearance requirement served as a crucial statutory mechanism for addressing racial discrimination in voting.[172] Even though Congress believed it had found sufficient evidence of ongoing voter discrimination by the jurisdictions in question to merit the

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167. *Id.* at 949.

168. *See id.*

169. *See id.* at 922 (majority opinion); *e.g.*, *infra* notes 179–212 (exploring how Justice Kennedy frequently chose judicial activism over judicial restraint).

170. 570 U.S. 529, 557 (2013) (holding section 4b of the Voting Rights Act of 1965 to be unconstitutional and concluding that "[t]he formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance" under section 5).

171. *Id.*

172. *Id.* at 538–39, 557.

coverage formula's reauthorization, a bare majority of the Court disagreed with that congressional assessment before proceeding to strike down the formula as unconstitutional on federalism grounds.[173]

As she had done in *Miller*, Justice Ginsburg in her *Shelby County* dissent (on behalf of herself, Justices Breyer, Sonia Sotomayor, and Elena Kagan) vigorously criticized the use of judicial power to overturn legislative judgments regarding the steps needed to prevent dilution in the voting power of minority citizens.[174] From Justice Ginsburg's perspective, the Constitution, through the Civil War amendments that had explicitly granted legislative authority to Congress to protect civil rights, *required* that the Court defer to Congress on voting rights measures aimed at addressing racial discrimination at the ballot box.[175] "Until today," Justice Ginsburg noted, "in considering the constitutionality of the [Voting Rights Act], the Court has accorded Congress the full measure of respect its judgments in this domain should garner."[176] Rather than making its own independent judgment of whether a viable section 5 was still needed, as the majority (including Justice Kennedy) had done, Justice Ginsburg reasoned that the Court should have deferred to Congress's assessment given that it was grounded in rational considerations of ongoing concerns about voting equality.[177]

Justice Kennedy also rejected the appropriateness of deferring to Congress's judgments in joining a 6 to 3 majority to strike down the Line Item Veto Act[178] ("LIVA") in 1998.[179] In order to address significant problems that legislators believed were caused by ever-growing federal deficits, Congress had enacted LIVA to authorize the President to cancel individual budgetary allocations contained in larger spending bills that the President had already signed.[180] The statute then allowed Congress, through majority votes in each chamber, to overturn the presidential cancellation of the budgetary

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173. *Id.* at 553, 557.
174. *Id.* at 559–60 (Ginsburg, J., dissenting).
175. *Id.* at 566–67.
176. *Id.* at 568.
177. *Id.* at 570.
178. Pub. L. No. 104-130, 110 Stat. 1200 (1996), *invalidated by* Clinton v. City of New York, 524 U.S. 417 (1998).
179. *Clinton*, 524 U.S. at 421 (1998).
180. *Id.* at 436–37.

allocation.[181] A majority of the Court, in *Clinton v. City of New York*,[182] concluded that LIVA violated the Presentment Clause, reasoning that the only constitutional way for the President to object to a bill approved by both houses of Congress was to veto it in its entirety.[183]

Justice Kennedy wrote a concurrence in *Clinton* specifically to reject Justice Breyer's call, in dissent, for a more modest judicial approach that emphasized deference in cases in which "the two political branches are adjusting their own powers between themselves."[184] As was true in other disputes that called on the Court to judicially review the scope of Congress's authority to legislate, Justice Kennedy was acutely concerned in *Clinton* with the perils of allowing the federal legislature to overstep its constitutional boundaries.[185] By seeking to expand the President's power beyond what he claimed the Constitution allowed, Justice Kennedy believed that the "statute compromises the political liberty of our citizens, liberty which the separation of powers seeks to secure."[186]

In Justice Kennedy's view, the threat to political liberty arising from the controversy in question came not from the judicial voiding of legislation supported by a majority of Congress and signed by the President.[187] Instead, Justice Kennedy seemed cognizant only of the ways in which the federal government's *other* two branches might imperil liberty by overstepping their constitutional boundaries.[188] By taking this position, Justice Kennedy went beyond even the majority in *Clinton*, which had at least acknowledged, before striking down the statute, that "[w]hen this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and

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181. *Id.*

182. 524 U.S. 417 (1998).

183. *Id.* at 438–41, 448–49.

184. *Id.* at 449 (Kennedy, J., concurring) (citing majority opinion).

185. For examples of Justice Kennedy's majority opinions striking down federal statutes on the ground that Congress exceeded its constitutional authority, see Zivotofsky v. Kerry, 576 U.S. 1 (2015); Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002); and Alden v. Maine, 527 U.S. 706 (1999).

186. *Clinton*, 524 U.S. at 452.

187. *See id.* at 450–51.

188. *Id.* at 451–52 ("It is no answer, of course, to say that Congress surrendered its authority by its own hand; nor does it suffice to point out that a new statute, signed by the President or enacted over his veto, could restore to Congress the power it now seeks to relinquish. That a congressional cession of power is voluntary does not make it innocuous.").

signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons."[189] Nothing in Justice Kennedy's concurrence suggested he agreed with the proposition that it was necessary or appropriate for the justices to show that level of deference to the federal government's political branches in these types of disputes.

Following a later agreement between Congress and the President on how to confront a different "deeply vexing national problem,"[190] Justice Kennedy took a similar non-deferential approach in voting, in 2012, to strike down the Patient Protection and Affordable Care Act ("ACA") *in its entirety*.[191] Congress enacted the statute (colloquially known as "Obamacare"), following earlier failed efforts to reform health care, with the aim of addressing the social and human costs engendered by the inability of tens of millions of Americans to access the health insurance market and to receive adequate medical care.[192]

In *National Federation of Independent Business v. Sebelius*, Justice Kennedy joined a 5 to 4 majority striking down Congress's effort, through the ACA, to expand the number of individuals covered by Medicaid.[193] The Court concluded that Congress's attempt to condition the states' receipt of all federal Medicaid funds on their agreeing to the expansion went beyond its powers under the Spending Clause and violated federalism principles because it was coercive of the states.[194] Justice Kennedy also aligned himself with a bare majority of the Court in concluding that the ACA's individual mandate, which required some individuals to make an annual payment to the federal government if they failed to obtain health insurance, was not authorized by the Commerce Clause.[195] (A different majority of the Court, with Justice Kennedy in dissent, concluded that the mandate

189. *Id.* at 447 n.42 (quoting Bowsher v. Synar, 478 U.S. 714, 736 (1986) (Stevens, J., concurring in judgment)).

190. *Id.*

191. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 646, 649 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

192. *See generally* DANIEL E. DAWES, 150 YEARS OF OBAMACARE (2016) (examining the ACA within the historical context of previous healthcare reform efforts).

193. 567 U.S. 519, 576–80 (2012).

194. *Id.*

195. *Id.* at 574.

was authorized by the Tax Clause.[196]) And, in a breath-taking assertion of judicial power, Justice Kennedy joined three other Justices (Scalia, Thomas, and Samuel Alito) in contending that the unconstitutionality of the Medicaid expansion provision (along with what the four justices believed was the unconstitutionality of the individual mandate) meant that the Court had the power to strike down *all* of the ACA, including the dozens of provisions that had nothing to do with the Medicaid expansion (or the individual mandate).[197]

It was left to Justice Ginsburg in *Sebelius* to raise concerns about the ways in which the constitutional challenges to Obamacare relied on an unduly expansive (and, in her opinion, dangerous and misguided) understanding of judicial power at the expense of congressional authority.[198] In objecting to the Court's view that Congress lacked the Commerce Clause power to enact the individual mandate, Justice Ginsburg reasoned that "[w]hatever one thinks of the policy decision Congress made, it was Congress'[s] prerogative to make it. Reviewed with appropriate deference, the minimum coverage provision, allied to the guaranteed-issue and community-rating prescriptions, should survive measurement under the Commerce and Necessary and Proper Clauses."[199]

Similarly, Justice Ginsburg rejected the notion that Congress could not seek to expand Medicaid coverage by conditioning the states' receipt of all federal Medicaid funds on their agreeing to implement that expansion.[200] In doing so, Justice Ginsburg criticized the Court for giving itself the power to conclude, despite Congress's assertions to the contrary, that the Medicaid expansion was a new program and that it was therefore unconstitutional to condition the receipt of federal subsidies to the states for the "old" program on the state's willingness to embrace the "new" one.[201] As far as Justice Ginsburg was concerned, in seeking to expand Medicaid through the ACA, Congress had done nothing more than craft and adjust federal spending programs, as it was constitutionally entitled to do, in ways that it believed advanced the

196. *Id.* at 575.
197. *Id.* at 691, 706 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).
198. *Id.* at 599 (Ginsburg, J., concurring in part and dissenting in part).
199. *Id.*
200. *Id.* at 635–36.
201. *Id.*

general welfare while offering states the option to join in the attainment of that objective.[202]

For Justice Ginsburg, the majority's approach to the constitutionality of Congress's effort to expand Medicaid failed to keep federal judicial power within responsible and manageable boundaries.[203] Again, the point is not that Justice Ginsburg was necessarily correct on this question of constitutional law and that the majority, including Justice Kennedy, was wrong. Instead, the point, worth noting for our purposes, is that Justice Ginsburg called for a form of jurisprudential modesty and judicial restraint that she believed was both required and appropriate in order not to interfere with legislative expertise and compromises. This call, whatever its substantive merits in the specific context of the *Sebelius* litigation, was rarely asserted by Justice Kennedy in his judicial opinions or supported in his votes on the Court.[204]

To further illustrate this point, it is helpful to briefly review another controversial instance in which Justice Kennedy found it constitutionally necessary to displace vital congressional policy preferences with independent judicial judgments: his 2010 ruling in *Citizens United v. FEC*, on behalf of a 5 to 4 Court, striking down a crucial provision of the Bipartisan Campaign Reform Act of 2002[205] ("BCRA") that restricted the ability of corporations and unions to influence federal elections in the weeks leading up to primaries and general elections.[206] As with the ACA, Congress enacted the measure in question to address what it believed was a vexing problem with significant deleterious consequences for the country: the ways in which the federal electoral system seemed to be increasingly saturated with corporate and union money.[207] The BCRA's congressional supporters believed this saturation discourages participation in elections by individuals and entities with fewer financial resources while strengthening the corrosive perception that the rich and powerful have a greater voice in our democracy than others.[208] At issue in *Citizens United* was whether Congress, to protect the integrity of the federal electoral system, could prohibit corporations and unions from

202. *Id.* at 635.
203. *Id.* at 643.
204. *See supra* notes 18–19 and accompanying text.
205. Pub. L. No. 107-155, 116 Stat. 81.
206. Citizens United v. FEC, 558 U.S. 310, 321, 372 (2010).
207. *Id.* at 454–55 (Stevens, J., concurring in part and dissenting in part).
208. *Id.* at 470.

expending funds from their general treasuries to influence the outcomes of federal elections in the weeks before voters went to the polls.[209]

In writing for the majority striking down the statute, Justice Kennedy addressed the question of deference to Congress in the first half of one sentence; but by the end of the same sentence, he had already turned to his usual practice of prioritizing the judicial judgment of purported unconstitutionality over the congressional judgment that there was a significant problem that needed to be addressed through legislation. As he put it, "[w]hen Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy."[210] Justice Kennedy, in addressing Congress's concern that the process of setting federal legislative priorities can be corrupted by unconstrained corporate expenditures aimed at promoting the re-election prospects of its members, reasoned as follows:

> If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy.[211]

In the end, as he did in so many judicial review cases that closely divided the Court, Justice Kennedy in *Citizens United* rejected calls for judicial restraint by concluding that the Constitution required the displacement of legislative preferences with judicial judgments of unconstitutionality.[212]

As already noted, my objective here is not to argue that Justice Kennedy's understanding of the Constitution in these cases, including *Citizens United*, was either correct or incorrect. Instead, I want to draw attention to the extent to which Justice Kennedy, in many of his most important opinions and votes, gave little consideration to the pitfalls

209. *Id.* at 337–38 (majority opinion).
210. *Id.* at 361.
211. *Id.*
212. *Id.*; *see supra* notes 18–19 and accompanying text.

or hazards of judicial overreach.[213] In addition, I argue that while Justice Kennedy sometimes acknowledged the importance of accounting for the views of legislators in policy matters, he almost always concluded—as in *Citizens United*—that the Constitution required that the judiciary void the policy choices of legislators.[214]

In *Citizens United*, the arguments for jurisprudential modesty and judicial restraint were made by Justice Stevens in dissent. It was Justice Stevens, and not Justice Kennedy, who expressed concern for how the striking down of the federal campaign finance reform statute would impact the judicial branch's reputation. As Justice Stevens succinctly put it early in his dissent, "[t]he Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will [also], I fear, do damage to this institution."[215]

Justice Stevens was particularly concerned with the breadth of the Court's ruling given that it had insisted in facially striking down the provision in question. Justice Stevens noted that the Court could have concluded either (1) that the documentary movie produced and distributed by the non-for-profit plaintiff (Citizens United) about presidential candidate Hillary Clinton was not, as a matter of statutory interpretation, covered by the prohibition in question, or (2) that the *application* of the provision to Citizens United was unconstitutional.[216] Instead, Justice Kennedy, in his majority opinion, insisted that there *could be no possible* constitutional application of the statute.[217] This was the case regardless of whether the provision was applied to a political advocacy non-for-profit (like Citizens United) or a for-profit corporation.[218]

In emphasizing just how broadly Justice Kennedy had ruled on behalf of the majority, Justice Stevens noted that the Court had itself invited the facial challenge by asking the parties, the previous term, for a new briefing after the plaintiffs initially raised only an as-applied claim.[219] For Justice Stevens, this was judicial review on steroids—Justice Kennedy and the other four justices in the majority had

213. *See supra* notes 148–151.
214. *Citizens United*, 558 U.S. at 361.
215. *Id.* at 396 (Stevens, J., concurring in part and dissenting in part).
216. *Id.* at 398–99, 405–07.
217. *Id.* at 353–54 (majority opinion).
218. *Id.* at 352–53.
219. *Id.* at 404 (Stevens, J., concurring in part and dissenting in part).

maneuvered their adjudication of the litigation in ways that allowed them to issue the broadest possible ruling by rendering *all* restrictions on corporate financing of electioneering constitutionally suspect.[220] A more judicially restrained ruling would have permitted Citizens United to distribute its documentary movie in the weeks before the 2008 presidential primaries while leaving other questions, such as whether the statute could be applied to for-profit corporations, for another day.[221]

In addition, Justice Stevens argued that the Court gravely erred in so easily dismissing Congress's concerns about why limiting the use of general corporate funds to influence elections in the weeks before voters went to the polls was necessary to prevent corruption, whether actual or perceived.[222] As he explained, "it is the height of recklessness to dismiss Congress'[s] years of bipartisan deliberation and its reasoned judgment on this basis, without first confirming that the statute in question was intended to be, or will function as, a restraint on electoral competition."[223] In short, according to Justice Stevens, the Court in *Citizens United* committed a momentous mistake in deeming Congress's views on the need for campaign finance reform to be constitutionally irrelevant.[224]

There is a pattern in most of the cases discussed so far in this Part. Most disputes involved the constitutionality of federal statutes, in which Justice Kennedy joined more conservative justices in striking down the laws in question, over the objections of more liberal ones. But Justice Kennedy sometimes joined liberal justices in striking down federal laws, over the objections of more conservative justices. An example of this alternative pattern of vigorous judicial review was the Court's 5 to 4 ruling striking down a section of the Defense of Marriage Act ("DOMA") in *United States v. Windsor*.[225] The Court decided *Windsor* in 2013, only one day after it voided the provision of the Voting Right Act of 1965, already discussed in *Shelby County v. Holder*.[226] Justice

220. *Id.* at 403–04.
221. *Id.* at 404–05.
222. *Id.* at 461.
223. *Id.* at 462.
224. *Id.* at 463–64.
225. 570 U.S. 744 (2013).
226. Shelby County v. Holder, 570 U.S. 529, 534–36 (2013). For a discussion of *Shelby County*, see *supra* notes 170–77 and accompanying text.

Kennedy was the only justice who voted to strike down the federal statutes in both instances.[227]

The provision at issue in *Windsor* required the federal government to recognize only the state-sanctioned marriages of men and women, denying all federal rights and benefits to same-sex couples who were married under state laws.[228] The measure was challenged by the widow of a deceased woman—the couple's same-sex marriage had been recognized by New York state—on constitutional equality grounds after the Internal Revenue Service denied her an estate tax benefit available to surviving spouses of different-sex marriages.[229]

Before the *Windsor* Court could reach the merits of the constitutional claim, it had to determine whether the federal government's and the plaintiff's positions were sufficiently adverse to justify Supreme Court adjudication.[230] This question arose after the Obama administration refused to defend DOMA's constitutionality.[231] As he frequently did, Justice Kennedy, writing for the majority, prioritized the courts' power of judicial review over other considerations.[232] This was true in *Windsor* even though the exercise of that power meant the Court would address the substance of a constitutional question on which the two main parties in the case agreed. As Justice Kennedy put it,

> if the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become [subordinated] to the President's.[233]

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227. *Shelby County*, 570 U.S. at 532; *Windsor*, 570 U.S. at 747.

228. *Windsor*, 570 U.S. at 752.

229. *Id.* at 749–52.

230. *Id.* at 756.

231. *Id.* at 753–54.

232. *Id.* at 762.

233. *Id.* Justice Kennedy explained that "[t]his would undermine the clear dictate of the separation-of-powers principle that 'when an Act of Congress is alleged to conflict with the Constitution, "[i]t is emphatically the province and duty of the judicial department to say what the law is."'" *Id.* (quoting Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012), in turn quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)); *see also* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (concluding, in an opinion written by Justice Kennedy, that Congress lacked the authority to mandate the

After deciding that it was proper for the Court to reach the merits of the plaintiff's challenge, Justice Kennedy concluded that the DOMA provision violated the Constitution's equal protection guarantees because it had been motivated by animus toward same-sex couples.[234] This was evident, he reasoned, from the statute's title, statements found in a congressional committee report, and the fact that the provision imposed significant harms on same-sex couples (and their children) whose marital status already had been recognized under state law.[235] According to Justice Kennedy, "[t]he Act's demonstrated purpose is to ensure that if any [s]tate decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. This raises a most serious question under the Constitution's Fifth Amendment."[236]

As was frequently the case following majority opinions written by Justice Kennedy in judicial review cases that closely divided the Court, there was a vigorous dissent—in this instance written by Justice Scalia—in *Windsor* taking issue with his robust understanding of the Court's power of judicial review.[237] Justice Scalia opened his dissent (which was joined in part by Chief Justice Roberts and in full by Justice Thomas) as follows: "This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former."[238]

Justice Scalia characterized the Court's assertion of its judicial review power in *Windsor* as "jaw-dropping."[239] He further complained that "[i]t is an assertion of judicial supremacy over the people's Representatives in Congress and the Executive. It envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere 'primary' in

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application of strict scrutiny to neutral and generally applicable state and local laws that substantially burdened the exercise of religion after the Court had ruled otherwise under the Free Exercise Clause), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* Ramirez v. Collier, 142 S. Ct. 1264 (2022).

234. *Windsor*, 570 U.S. at 769–70.
235. *Id.* at 770–71.
236. *Id.* at 771.
237. *Id.* at 778–79 (Scalia, J., dissenting).
238. *Id.* at 778.
239. *Id.* at 779.

its role."[240] Justice Scalia noted that some countries' constitutions grant courts the power to decide constitutional issues outside of adversarial lawsuits.[241] In contrast, the U.S. Constitution only permits federal courts to opine on constitutional questions when there are litigants who disagree on the answers and can therefore vigorously advocate opposing views before the judiciary.[242] It is then and only then, Justice Scalia explained, that federal courts have the power

> to say what the law is . . . . In other words, declaring the compatibility of state or federal laws with the Constitution is not only not the "primary role" of this Court [as Kennedy claimed in *Windsor*], it is not a separate, free-standing role *at all*. We perform that role incidentally—by accident, as it were—when that is necessary to resolve the dispute before us.[243]

In short, while Justice Kennedy worried that refusing to reach the constitutional merits in *Windsor* would unduly diminish the judiciary's role, Justice Scalia complained that reaching the merits dangerously expanded that role. After forcefully making this point, Justice Scalia proceeded to address the substance of the plaintiff's constitutional equality claim, rejecting the notion that the statute had been driven by animus toward an unpopular group.[244] Rather than allowing for the possibility that a bill, which had been supported by large majorities in Congress and signed into law by Democratic President Bill Clinton,[245] was motivated by constitutionally permissible purposes, Justice Scalia claimed that the Court chose instead to "affirmatively conceal[]" the bill's justifications put forward by its congressional supporters.[246]

DOMA was not the only federal law that Justice Kennedy voted to strike down with the support of more liberal justices and over the objections of more conservative ones. He did the same, for example, in voting to enjoin the enforcement of the Child Online Protection Act,[247] a statute aimed at protecting minors from sexually explicit

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240. *Id.*
241. *Id.* at 780.
242. *Id.* at 781.
243. *Id.* at 780–81.
244. *Id.* at 796–97.
245. CARLOS A. BALL, FROM THE CLOSET TO THE COURTROOM: FIVE LGBT RIGHTS LAWSUITS THAT HAVE CHANGED OUR NATION 190–91 (2010).
246. *Windsor*, 570 U.S. at 796 (Scalia, J., dissenting).
247. Pub. L. No. 105-277, 112 Stat. 2681 (1998), *invalidated by* Ashcroft v. ACLU, 542 U.S. 656 (2004).

materials on the Internet.[248] He also voted to strike down a provision of the Legal Services Corporation Act[249] prohibiting the federal government from funding legal advocacy organizations that challenged welfare laws.[250] And he voted to strike down a statute forbidding individuals from falsely claiming that they had received the Congressional Medal of Honor.[251] In all these cases, Justice Kennedy concluded, in writing for the Court, that Congress had violated (or likely violated) the First Amendment.[252]

One of the reasons Justice Kennedy frequently gave for supporting rigorous judicial review of federal legislation was that the Constitution required courts to vigorously protect state sovereignty from federal encroachment. In *Windsor*, for example, he emphasized that states, and not the federal government, traditionally regulated marriage, rendering DOMA a historical anomaly.[253] But DOMA was by no means the only congressional statute that raised federalism concerns for Justice Kennedy. Indeed, he frequently joined with justices to his ideological right, over opposition by justices to his ideological left, to strike down federal laws on the ground that they exceeded Congress's constitutional authority to legislate to the detriment of state sovereignty. For example, he repeatedly voted in favor of limiting Congress's power under the Commerce Clause;[254] denying Congress the authority to use its Article I powers to abrogate states' sovereign immunity, insulating them from lawsuits seeking monetary damages under federal law in both federal and state courts;[255] rejecting claims that Congress had abrogated states' sovereign immunity under Section

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248. *Ashcroft*, 542 U.S. at 659–60.

249. Pub. L. No. 93-355, 88 Stat. 378 (1974).

250. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 535–36 (2001).

251. United States v. Alvarez, 567 U.S. 709, 713–16 (2012) (plurality opinion).

252. *Ashcroft*, 542 U.S. at 673; *Legal Servs. Corp.*, 531 U.S. at 537; *Alvarez*, 567 U.S. at 715.

253. *Windsor*, 570 U.S. at 766–68 (majority opinion).

254. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 617–18 (2000); United States v. Lopez, 514 U.S. 549, 551, 567–68 (1995). *But see* Gonzales v. Raich, 545 U.S. 1, 5, 9 (2005) (Justice Kennedy joined in upholding Congress's power under the Commerce Clause to criminalize the possession of home-grown medicinal marijuana).

255. *See e.g.*, Alden v. Maine, 527 U.S. 706, 711–12 (1999); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 47 (1996). *But see* Missouri v. Jenkins, 491 U.S. 274, 275, 284 (1989) (Justice Kennedy joined in holding that the Eleventh Amendment did not prohibit the enforcement of the Civil Rights Attorney's Fees Awards Act against a state).

5 of the Fourteenth Amendment;[256] and accepting claims that federal statutes had sought to commandeer state officials in violation of the Tenth Amendment.[257] And in instances when a majority of the Court exercised judicial restraint by refusing to strike down federal statutes on the ground that they interfered with states' constitutional prerogatives, Justice Kennedy was frequently in dissent.[258]

Justice Kennedy, however, did not show a similar concern for state sovereignty when doing so would limit the federal courts' power to assess the constitutionality of state laws. If matters of state sovereignty were often constitutionally weighty enough, in Justice Kennedy's view, to require courts to restrict Congress's authority, they were rarely weighty enough to limit the federal courts' powers.[259] In Justice Kennedy's view, the Constitution's federalism protections routinely required the Court to restrain Congress's powers, but they rarely compelled the Court to limit its own authority.[260]

Justice Kennedy, for example, had no trouble concluding in 2011 that the Vermont legislature had violated the First Amendment when it enacted a statute prohibiting pharmacies from selling doctors' prescription-writing histories when that information was to be used for drug marketing purposes.[261] The state argued that its law protected the privacy of medical information and diminished the likelihood that the marketing of pharmaceutical drugs would be inconsistent with patients' welfare.[262] But the state's policy positions and regulatory preferences had little chance of surviving judicial review once Justice Kennedy, in writing for a 5 to 4 majority in *Sorrell v. IMS Health Inc.*,[263] concluded that laws restricting particular types of marketing are content-based regulations that merit the most vigorous (and therefore

256. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 66–67 (2000).

257. *See, e.g.*, Printz v. United States, 521 U.S. 898, 902, 919, 935 (1997); New York v. United States, 505 U.S 144, 149 (1992).

258. *See, e.g.*, Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 744 (2003) (Kennedy, J., dissenting); Pennsylvania v. Union Gas Co., 491 U.S. 1, 29 (1989) (Scalia, J., concurring in part and dissenting in part), *overruled by* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

259. *See infra* notes 272–81 and accompanying text (discussing cases in which Justice Kennedy joined a majority in striking down state laws).

260. *See infra* notes 272–81 and accompanying text.

261. Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011).

262. *Id.*

263. 564 U.S. 552 (2011).

least deferential) form of judicial review under the First Amendment.[264]

Justice Kennedy, in *Sorrell*, ignored the implications, for both judicial power and state legislative authority, of using the Free Speech Clause to strictly scrutinize economic regulations.[265] More specifically, there was no exploration in his majority opinion of what the Court's robust exercise of judicial review meant for the government's ability to regulate the commercial marketplace and protect the public's health and safety.[266] In short, Justice Kennedy in *Sorrell* failed to acknowledge, much less grapple with, the ways in which the Court's resolution of the case expanded judicial power and diminished legislative authority.

But this was precisely the theme around which Justice Breyer framed his dissent in *Sorrell*, one joined by Justices Ginsburg and Sotomayor. As Justice Breyer explained, "to apply a 'heightened' First Amendment standard of review whenever [an ordinary regulatory] program burdens speech would transfer from legislatures to judges the primary power to weigh ends and to choose means, threatening to distort or undermine legitimate legislative objectives."[267]

Justice Breyer pointed out that economic regulations implicating speech, by definition, drew content distinctions depending on the characteristics of the entities subject to regulation.[268] For example, the Federal Reserve Board regulates statements and advertisements disseminated by financial institutions (and not drug manufacturers) and the Federal Drug Administration does the same for pharmaceutical companies (and not banks).[269] But if the common-sense necessity of having specialized agencies regulate the speech of only certain participants in the economic marketplace triggers the most vigorous and least deferential form of judicial review under the First Amendment, it results in judicial interventions and aggrandizement that threaten to overwhelm (or void or crowd out) legislative and regulatory processes and priorities.[270] For Justice Breyer, the type of robust judicial review that Justice Kennedy defended in *Sorrell* was analogous to the misguided and harmful extension of

264. *Id.* at 564–66.
265. *See id.* at 557.
266. *See id.*
267. *Id.* at 584–85 (Breyer, J., dissenting).
268. *Id.* at 589.
269. *Id.*
270. *Id.* at 590.

judicial power, in the name of protecting economic liberties, seen during the *Lochner* era.[271]

In *Sorrell*, it was liberal justices who objected to the invocation, by Justice Kennedy and others in the Court's majority, of a vigorous form of judicial review to strike down a state or local law. The same was true in other cases, such as *District of Columbia v. Heller*, in which the Court struck down a Washington, D.C. gun control law;[272] *Janus v. AFSCME, Council 31*,[273] in which the Court voided a state statute allowing unions to charge non-members a fee to help pay for collective-bargaining costs;[274] and *National Institute of Family Life Advocates v. Becerra*,[275] in which the Court struck down a state statute requiring pregnancy crisis centers to post notices about the availability of publicly-funded family-planning services, including contraception and abortion.[276] Justice Kennedy voted with the majority to strike down the laws in all of these cases.[277]

But at other times, it was conservative justices who objected to the Court's exercise of judicial power, with Justice Kennedy's support, at the expense of state legislatures. This is what occurred in a series of Eighth Amendment cases in which Justice Kennedy voted with the Court's liberal members to prevent states from imposing the death penalty on offenders who were cognitively disabled[278] or minors,[279] as well as life sentences without the possibility of parole on minors.[280] Justice Kennedy wrote for the majority in most of these cases, taking the position that the Eighth Amendment granted judges the power to

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271. *Id.* at 591–92.
272. 554 U.S. 570, 573–76 (2008).
273. 138 S. Ct. 2448 (2018).
274. *Id.* at 2459–60.
275. 138 S. Ct. 2361 (2018).
276. *Id.* at 2378.
277. *Heller*, 554 U.S. at 573–76; *Janus*, 138 S. Ct. at 2459–60; *Becerra*, 138 S. Ct. at 2367.
278. Atkins v. Virginia, 536 U.S. 304, 306–07 (2002).
279. Roper v. Simmons, 543 U.S. 551, 555–56 (2005); *see also* Kennedy v. Louisiana, 554 U.S. 407, 412–13 (2008) (holding that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not, and was not intended to, result in the victim's death).
280. Graham v. Florida, 560 U.S. 48, 52–53 (2010); Miller v. Alabama 567 U.S. 460, 465 (2012).

make their "own independent judgment" of whether the punishments in question were disproportionate to the crimes.[281]

But for conservatives like Justice Scalia, allowing for independent judicial judgments of proportionality in punishment unmoored the judicial function from its essential character in ways that threatened democratic self-governance.[282] More specifically, Justice Scalia argued that it was one thing for the Court to hold, as it had done in cases from earlier decades, that the meaning of the Eighth Amendment changed according to society's "evolving standards of decency."[283] But for Justice Scalia, it "makes no sense" to claim, as he believed Justice Kennedy did, that federal courts had the constitutional power

> to *prescribe* those standards rather than discern them from the practices of our people. On the evolving-standards hypothesis, the only legitimate function of this Court is to identify a moral consensus of the American people. By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?[284]

As they did in *Windsor*, conservative justices also vigorously objected to Justice Kennedy's robust exercise of judicial review power in three other crucial LGBTQ rights cases: *Romer v. Evans*,[285] *Lawrence v. Texas*,[286] and *Obergefell v. Hodges*.[287] In *Romer*, Justice Kennedy wrote for a 6 to 3 majority striking down a Colorado constitutional amendment prohibiting the state and local governments from providing anti-discrimination protections to lesbians, gay men, and bisexuals.[288] In *Lawrence*, Justice Kennedy wrote for a 6 to 3 Court striking down Texas's sodomy statute as a violation of substantive due process.[289] And in *Obergefell*, Justice Kennedy wrote for a 5 to 4 majority striking down same-sex marriage bans as unconstitutional.[290]

Justice Kennedy did not address questions related to the tension between courts exercising the power of judicial review and the ability of citizens to govern themselves in either *Romer* or *Lawrence*.

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281. *See, e.g.*, *Graham*, 560 U.S. at 61; *Kennedy*, 554 U.S. at 421; *Roper*, 543 U.S. at 564.
282. *Roper*, 543 U.S. at 608 (Scalia, J., dissenting).
283. *Id.* (quoting majority opinion).
284. *Id.* at 616.
285. 517 U.S. 620 (1996).
286. 539 U.S. 558 (2003).
287. 576 U.S. 644 (2015).
288. 517 U.S. at 632–35.
289. 539 U.S. at 561, 578–79.
290. 576 U.S. at 648, 680–81.

Nonetheless, it is clear he believed that the targeting of sexual minorities through the constitutional amendment in *Romer* and interfering with the liberty and dignity interests of lesbians, gay men, and bisexuals through the sodomy statute in *Lawrence* justified the judicial voiding of the majoritarian preferences reflected in the laws in question.[291]

It was in *Obergefell* that Justice Kennedy explicitly addressed the tension between democratic self-governance and the exercise of the Court's judicial review power. In fact, toward the end of that ruling, after explaining why same-sex marriage bans offended constitutional principles of liberty and equality, Justice Kennedy did something unusual for him: he discussed at some length the possibility that the Court, in exercising its power of judicial review, might be overstepping its authority to the detriment of democratic processes.[292] As he put it, "[t]here may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage."[293] But, in characteristic fashion, Justice Kennedy quickly moved past such concerns by contending that judicial restraint was inappropriate both because there already had been significant national debates over marriage equality and because under "our constitutional system . . . individuals need not await legislative action before asserting a fundamental right."[294] Elaborating on the latter point, Justice Kennedy explained:

> Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. . . . Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But . . . "[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power." Thus, when the rights of persons are violated, "the Constitution requires redress by the courts," notwithstanding the more general value of democratic

291. *Lawrence*, 539 U.S. at 566–67; *Romer*, 517 U.S. at 627.
292. *Obergefell*, 576 U.S. at 676.
293. *Id.*
294. *Id.* at 677.

> decisionmaking. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.[295]

In contrast to Justice Kennedy's forceful defense of judicial intervention in *Obergefell*, Justice Scalia in his dissent claimed, as he had done in the other LGBTQ rights cases, that the Constitution allowed the law to reflect majoritarian preferences in areas of social policy implicating sexuality. That was the position, as we have seen, he took in *Windsor*,[296] and it was the position he took in *Romer* and *Lawrence*. In *Romer*, Justice Scalia reasoned that

> [t]he people of Colorado have adopted an entirely reasonable provision . . . designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before. Striking it down is an act, not of judicial judgment, but of political will.[297]

And in *Lawrence*, Justice Scalia wrote that "[w]hat Texas has chosen to do [by criminalizing sodomy] is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new 'constitutional right' by a Court that is impatient of democratic change."[298]

But it was in *Obergefell* that Justice Scalia most forcefully critiqued Justice Kennedy's conclusion that the Constitution took LGBTQ policy issues away from legislatures and gave them to unelected federal judges. Indeed, it is fair to say that Justice Scalia's *Obergefell* dissent was searing in his criticism of Justice Kennedy's position that the Due Process and Equal Protection clauses required states to offer same-sex couples the opportunity to marry. As he put it:

> Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. . . . This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.[299]

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295. *Id.* at 676–77 (alteration in original) (quoting Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 311, 313 (2014) (plurality opinion)).

296. *See supra* notes 239–43 and accompanying text.

297. Romer v. Evans, 517 U.S. 620, 653 (1996) (Scalia, J., dissenting).

298. Lawrence v. Texas, 539 U.S. 588, 603 (2003) (Scalia, J., dissenting).

299. *Obergefell*, 576 U.S. at 713–14 (Scalia, J., dissenting).

For Justice Scalia, the national debate over same-sex marriage, prior to the Court's intervention, had reflected American democracy at its best as each side forcefully defended its positions in trying to persuade the people and their representatives.[300] "That is exactly how our system of government is supposed to work," Justice Scalia wrote.[301] But the Court in *Obergefell* had short-circuited that democratic process by aggressively deploying its understanding of constitutionally-protected "liberty" to shut down political and policy debates.[302]

Chief Justice Roberts, in his *Obergefell* dissent, similarly condemned Justice Kennedy's and the Court's lack of judicial restraint which, in his opinion, improperly replaced the views of elected officials on how to define and understand the legal institution of marriage with the policy preferences of five justices.[303] Chief Justice Roberts explained that

> [t]he majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice."[304]

As Justice Breyer had done in critiquing Justice Kennedy's majority opinion in *Sorrell* (the pharmaceutical marketing case),[305] Chief Justice Roberts chastised Justice Kennedy's majority opinion in *Obergefell* for reflecting the type of unbounded judicial review power that had led to the misguided and harmful rulings of the *Lochner* era.[306] According to the Chief Justice, the *Obergefell* Court failed its responsibilities as a constitutional adjudicator by commandeering the roles of policymaker and promoter of social change.[307] This took the Court far afield from its proper judicial role in ways that threatened the ability of the people to govern themselves.[308]

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300. *Id.* at 714.
301. *Id.* (citation omitted).
302. *Id.* at 716–17.
303. *Id.* at 687 (Roberts, C.J., dissenting).
304. *Id.* (quoting majority opinion).
305. *See supra* notes 270–271 and accompanying text.
306. *Obergefell*, 576 U.S. at 694, 696–99 (Roberts, C.J., dissenting).
307. *Id.* at 687.
308. *Id.* at 709.

Two judicial review patterns emerge from the cases discussed in this Part. First, either liberal or conservative justices urged judicial restraint in all the controversies examined here.[309] Although ideologically-opposed justices disagreed vehemently on which constitutional disputes merited judicial restraint, justices to Justice Kennedy's right and left, in taking issue with some of his most important majority opinions and votes, repeatedly argued for the need to defer to democratic processes and the policy judgments of elected officials.[310] Unlike Justice Kennedy, these ideologically-diverse justices vigorously defended the value and necessity of judicial restraint, albeit at different times and on different issues.

Second, in all the cases explored in this Part (and in many more), Justice Kennedy chose judicial intervention that voided laws over judicial restraint and deference to legislative policy choices.[311] In doing so, he either did not find it necessary to grapple with the implications of his preference for robust judicial review for democratic self-governance or quickly dismissed those implications because, in his view, the claimed constitutional rights in question trumped the policy preferences of legislators.[312] This resulted in Justice Kennedy, at different times and on different issues, repeatedly joining either a coalition of liberal justices to strike down laws supported by conservatives (such as death penalty statutes and same-sex marriage bans)[313] or of conservative justices to strike down laws supported by liberals (such as health care reforms and restrictions on the corporate financing of elections).[314]

Of course, Justice Kennedy sometimes voted to uphold the constitutionality of legislation. And, in doing so, he sometimes concluded that it was appropriate to defer to legislative policy choices. For example, he wrote the majority opinion in *Gonzales v. Carhart*,[315] which deferred to Congress's judgment that there was no medical necessity for physicians to ever perform a particular type of second-trimester abortion procedure, which opponents called "partial-birth"

309. *See supra* notes 149–326 and accompanying text.
310. *See supra* notes 33–34 and accompanying text.
311. *See supra* notes 73–308 and accompanying text.
312. *See supra* notes 73–308 and accompanying text.
313. *See supra* notes 273–306 and 292–95 and accompanying texts.
314. *See supra* notes 191–224 and 205–12 and accompanying texts.
315. 550 U.S. 124 (2007).

abortions.[316] Justice Kennedy also, in *Nguyen v. INS*,[317] wrote for the Court in concluding that there were valid, non-discriminatory reasons behind Congress's decision to make it easier for unwed mothers to transmit U.S. citizenship to their children born abroad than for unmarried fathers to do the same.[318]

But my claim in this Article is not that Justice Kennedy, in exercising the power of judicial review, never deferred to the policy judgments of legislators. Instead, my claim is that, in comparison to other justices with whom he served for extended periods of time, Justice Kennedy more consistently defended a simultaneously assertive and benign understanding of the power of judicial review. Although he may have been positioned in the middle of the Court's ideological spectrum,[319] Justice Kennedy was an outlier in manifesting a deep and abiding trust in the ability of judges to constitutionally void legislation without unduly expanding the judiciary's power or negatively affecting the people's ability to govern themselves.

It bears emphasizing that Justice Kennedy was by no means alone in enthusiastically embracing the power of judicial review, or to put it differently, he was not the only judicial activist on the Court. In fact, none of his colleagues defended judicial restraint across the board in the ways, for example, that Justice Felix Frankfurter had done decades earlier.[320] As Professor Keith Whittington notes about the Court in recent years,

> [c]onservative and liberal justices might disagree about which laws should be struck down and why, but they both accept a robust role for the judiciary in monitoring and checking the other branches of

316. *Id.* at 164–65. A few years before *Gonzales*, Justice Kennedy dissented from a ruling in which the Court struck down a state statute banning the same abortion procedure. Stenberg v. Carhart, 530 U.S. 914, 956–57 (2000) (Kennedy, J., dissenting).

317. 533 U.S. 53 (2001).

318. *Id.* at 73*; see also* Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291, 311–13 (2014) (plurality opinion) (finding that the Constitution did not deprive voters of the ability to prohibit state officials from implementing affirmative action programs); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 185 (1997) (upholding the constitutionality of a federal statute requiring cable companies to carry the signals of local broadcast television stations).

319. *See supra* note 20 and accompanying text.

320. On the judicial restraint of Justice Frankfurter, see, for example, KECK, *supra* note 30, at 39–48.

> government, and they reject the idea that legislatures should be corrected only or primarily by voters at the ballot box.[321]

As we have seen, conservative members of the Rehnquist and early Roberts Courts were judicially active on some questions, while liberal members were active on others.[322] What distinguished Justice Kennedy from his peers was that he was a judicial activist across the board, siding with robust exercises of judicial power to strike down statutes in just about every important area of constitutional law, including federalism,[323] free speech,[324] affirmative action,[325] separation of

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321. WHITTINGTON, *supra* note 9, at 236; *see also* KECK, *supra* note 30, at 286 ("[T]here is no realistic sense in which [the Rehnquist] Court can be described as a tribunal committed to restraint. Supreme Court justices appointed by Republican presidents have been no more restrained than those appointed by Democrats. They exercise judicial review just as frequently, and they are no more reluctant to enter political thickets.").

322. *See supra* notes 149–326 and accompanying text. After conducting an empirical analysis of the Rehnquist Court's exercise of the power of judicial review in the context of federal legislation, Lori Ringhand concluded that "conservative justices as well as their more liberal counterparts actively 'replace' legislative choices with their own preferred outcomes, and they do so at a roughly equal pace, although . . . they do so in different types of cases." Ringhand, *supra* note 50, at 45 (footnote omitted). Another empirical study of Supreme Court judicial review cases decided between 1986 and 2000 reached the same conclusion. Rorie Spill Solberg & Stephanie A. Lindquist, *Activism, Ideology, and Federalism: Judicial Behavior in Constitutional Challenges Before the Rehnquist Court, 1986–2000*, 3 J. EMPIRICAL LEGAL STUD. 237, 259–60 (2006).

323. *See, e.g.*, Printz v. United States, 521 U.S. 898, 935 (1997) (holding that the federal government cannot commandeer state and local officials to carry out federal programs); New York v. United States, 505 U.S. 144, 187–88 (1992) (holding that the federal government cannot require states to take title of nuclear waste).

324. *See, e.g.*, Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2459–60 (2018) (holding that statute authorizing unions to charge agency fees to non-members violates the First Amendment); Citizens United v. FEC, 558 U.S. 310, 318–19 (2010) (holding that statute prohibiting corporations and unions from engaging in electioneering activities in the weeks leading up to elections violates the First Amendment).

325. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 231–35 (1995) (requiring strict scrutiny in analyzing affirmative action laws); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 510–11 (1989) (finding a local ordinance requiring city contractors to award a minimum percentage of subcontracts to minority-owned business to violate the Equal Protection Clause).

powers,[326] substantive due process,[327] the Eighth Amendment,[328] the Commerce Clause,[329] and the Second Amendment.[330] As I explore next, Justice Kennedy's openness to expansively use the Constitution to void legislative judgments and preferences in a wide array of policy areas made him, in many ways, the perfect Supreme Court justice for his time.

III. JUSTICE KENNEDY'S EQUAL OPPORTUNITY JUDICIAL ACTIVISM

In the early part of the twentieth century, progressives repeatedly called for judicial restraint while conservatives supported an active judicial role in striking down laws implementing economic and social reforms.[331] Later in the century, progressives embraced the Warren Court's judicial activism that protected individual rights to personal autonomy and the constitutional rights of criminal defendants, while conservatives denounced it.[332] It was not until around the time that Justice Kennedy joined the Court that advocates from both the right and the left *simultaneously* demanded and promoted judicial activism

326. *See, e.g.*, Zivotofsky v. Kerry, 576 U.S. 1, 32 (2015) (holding that only the President has the power to recognize the legitimacy of foreign governments or territories); Clinton v. City of New York, 524 U.S. 417, 420–21 (1998) (holding that a statute authorizing line-item vetoes violated the Presentment Clause).

327. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (finding that the Constitution protects same-sex couples' right to marry); Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (finding that the Constitution protects consensual same-sex sexual conduct).

328. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 412–13 (2008) (holding that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not, and was not intended to, result in the victim's death), *modified on denial of rehearing*, 554 U.S. 945 (2008); Roper v. Simmons, 543 U.S. 551, 578–79 (2005) (barring imposition of the death penalty on defendants who were minors at the time of the crime).

329. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 627 (2000) (holding that the Commerce Clause did not authorize Congress to enact the Violence Against Women Act's civil remedy provision); United States v. Lopez, 514 U.S. 549, 567–68 (1995) (holding that the Commerce Clause did not authorize Congress to regulate the possession of guns in schools).

330. District of Columbia v. Heller, 554 U.S. 570, 635–36 (2008) (holding ordinance prohibiting the possession of guns at home unconstitutional).

331. *See supra* note 10 and accompanying text.

332. *See supra* note 10 and accompanying text.

(albeit on different issues and with strikingly different policy preferences) with roughly equal frequency and vigor.[333]

In recent decades, policy advocates from across the political spectrum have routinely sought judicial veto points in the hope of blocking the policy choices of legislators, as reflected in new or established laws,[334] while promoting their alternative policy preferences. In his book *Judicial Politics in Polarized Times*, political scientist Thomas Keck explains how conservative activists, starting in the 1990s, joined progressive activists in repeatedly using constitutional litigation to advance their political and policy objectives.[335] As Professor Keck notes,

> [o]n both the left and the right, policy advocates turn to litigation when faced with newly-enacted, rights-restricting policies that they were unable to block in the electoral and legislative arenas. On both the left and the right, policy advocates also litigate when they think the courts might be willing to dismantle rights-restricting policies that are already in place. And both on the left and the right, policy

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333. The civil rights movement relied heavily on constitutional litigation, as did the women and reproductive rights movements and the LGBTQ rights movement. *See generally* BALL, *supra* note 245 (analyzing five lawsuits that encouraged the country to take LGBTQ rights seriously); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 290–442 (2004) (discussing the effects of civil rights litigation from *Plessy* through the 1960s); NANCY MACLEAN, THE AMERICAN WOMEN'S MOVEMENT, 1945–2000: A BRIEF HISTORY WITH DOCUMENTS (2009) (detailing the women's rights movement in the decades following World War II). For explorations of how different parts of the conservative movement, starting at the end of the last century, routinely turned to constitutional litigation to challenge progressive laws and policies and to promote conservative ones, see, for example, MICHAEL AVERY & DANIELLE MCLAUGHLIN, THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS (2013) (explaining the origins and role of the Federalist Society in the conservative movement); JEFFERSON DECKER, THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT (2016) (describing the conservative introduction to public interest law); AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION (2015) (analyzing how the Federalist Society influenced the Supreme Court); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008) (describing the rise and success of conservative public interest law).

334. *See infra* Section III.A.

335. THOMAS M. KECK, JUDICIAL POLITICS IN POLARIZED TIMES 124 (2014).

> advocates litigate when their own legislative and electoral campaigns might be aided by some judicial assistance.[336]

As a general matter, liberal justices serving alongside Justice Kennedy were willing to grant judicial veto points to progressive advocates, but not to conservative ones.[337] The same, in reverse, was true of conservative justices.[338] In contrast, Justice Kennedy was generally willing to grant judicial veto points to advocates *across the political spectrum.*[339] Although it might have been a coincidence that Justice Kennedy was appointed to the Court at around the time that policy advocates on the right joined those on the left in insisting that the Constitution required courts to void an ever-increasing list of legislative policy preferences, the growing demands for judicial intervention arising from diverse ideological camps made Justice Kennedy's "equal opportunity" judicial activism well-suited (or well-attuned) to the constitutional era in which he served.

Several commentators have noted that Justice Kennedy's constitutional jurisprudence was grounded in libertarian values that highly prioritized considerations of individual autonomy and liberty.[340] In future work, I hope to explore the relationship between Justice Kennedy's libertarianism and his judicial activism. But my focus here is not on *why* he was an equal opportunity judicial activist. Instead, the first Section examines *the extent* to which he interpreted the Constitution in ways that granted judicial veto points to advocates from both the right and left in the four areas of constitutional litigation explored by Professor Keck in *Judicial Politics in Polarized Times*: gun control, abortion, affirmative action, and LGBTQ rights.[341] The second Section explains why we are unlikely to see another justice like Justice

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336. *Id.* Similarly, Gordon Silverstein describes what he calls the juridification of American politics, whereby politicians and policy advocates seek to achieve ideological objectives by "relying on legal process and legal arguments, using legal language, substituting or replacing ordinary politics with judicial decisions and legal formality." GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS 5 (2009).

337. *See supra* Part II.

338. *See supra* Part II.

339. *See infra* Section III.A.

340. *See generally* COLUCCI, *supra* note 26; KNOWLES, *supra* note 26.

341. *See* KECK, *supra* note 335, at 19–125 (describing constitutional litigation pursued by both liberal and conservative activists).

Kennedy—an equal opportunity judicial activist—appointed to the Court any time soon.

A. Embracing Conservative and Progressive Judicial Activism

This Section provides brief explorations of how Justice Kennedy embraced many of the constitutional claims of advocates from across the political spectrum in ways that repeatedly vetoed or blocked the policy preferences of legislators in several highly disputed areas of government policy: gun control, abortion, affirmative action, and LGBTQ issues. Conservative and progressive advocates who succeeded in getting their claims before the Supreme Court in these deeply contested social policy matters could almost always count on Justice Kennedy to take their side against the efforts of government lawyers to defend the policy preferences of legislators.

1. Gun control laws

At around the time that Justice Kennedy joined the Court, conservative policy advocates returned to more frequently using constitutional litigation to try to restrict the federal government's regulatory power.[342] They did so, in part, by urging the Court to limit Congress's legislative authority under the Commerce Clause, even though it had been decades since the justices had struck down a federal statute on the ground that it exceeded Congress's power to regulate interstate commerce.[343]

Gun rights proponents were among the conservative policy advocates who, as the twentieth century was drawing to a close, challenged federal laws on the ground that they exceeded Congress's constitutional authority to legislate.[344] After Congress attempted to use its Commerce Clause power to enact the Gun-Free School Zones Act

342. For scholarly defenses of such litigation, see, for example, Richard A. Epstein, *Constitutional Faith and the Commerce Clause,* 71 NOTRE DAME L. REV. 167, 189–91 (1996); Saikrishna B. Prakash, *Are the Judicial Safeguards of Federalism the Ultimate Form of Conservative Judicial Activism?,* 73 U. COLO. L. REV. 1363, 1367 (2002). On the role of the Federalist Society in promoting constitutional understandings of limited congressional power, see HOLLIS-BRUSKY, *supra* note 333, at 93–103.

343. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 187 (6th ed. 2020) ("In 1995, in *United States v. Lopez*, the Supreme Court for the first time in almost 60 years found that a federal law exceeded Congress's Commerce Clause authority.").

344. *See* KECK, *supra* note 335, at 71–72.

of 1990[345] to criminalize the possession of firearms in schools, a criminal defendant, with the support of conservative groups, challenged the legislation by arguing that the mere possession of a handgun did not constitute commercial activity and was, therefore, beyond the regulatory reach of Congress.[346] Conservative advocates claimed it was important to limit congressional authority in this policy area because doing so preserved the states' ability to take the lead in regulating the harms associated with students bringing guns to schools.[347]

When the case, *United States v. Lopez*,[348] reached the Court in 1995, a five-justice majority, with Justice Kennedy joining in, accepted the conservative advocates' constitutional claims.[349] The *Lopez* Court struck down the Gun-Free School Zones Act on the ground that it exceeded Congress's authority to regulate interstate commerce.[350]

Two years later, Justice Kennedy joined the same five-justice majority in striking down part of another federal gun control law—the Brady Handgun Violence Prevention Act of 1993[351] ("Brady Act")—on the ground that it violated the Tenth Amendment in *Printz v. United States*.[352] For conservative advocates seeking to protect state sovereignty from what they saw as federal government overreach, the Tenth Amendment was a crucial constitutional tool.[353] Gun rights supporters used the Amendment to challenge the Brady Act's enforcement provisions requiring state and local officials to help conduct

345. Pub. L. No. 101-647, 104 Stat. 4789.

346. United States v. Lopez, 514 U.S. 549, 552 (1995). Several conservative groups filed amicus briefs with the Supreme Court on behalf of the constitutional challenge to the Gun-Free School Zones Act. *See, e.g.*, Brief Amicus Curiae of Pacific Legal Foundation in Support of Respondent, United States v. Lopez, 514 U.S. 549 (1995) (No. 93–1260) [hereinafter Brief for the Pacific Legal Foundation]*;* Brief of Texas Justice Foundation as Amicus Curiae in Support of Respondent, United States v. Lopez, 514 U.S. 549 (1995) (No. 93–1260).

347. *See, e.g.*, Brief for the Pacific Legal Foundation, *supra* note 346, at 10.

348. 514 U.S. 549 (1995).

349. *Id.* at 565–68.

350. *Id.* at 567–68. In concurring with the Court, Justice Kennedy acknowledged that the role of the political branches "in maintaining the federal balance is their own in the first and primary instance." *Id.* at 577 (Kennedy, J., concurring). But that still left a crucial role for the courts to police federalism boundaries. *Id.* at 578.

351. Pub. L. No. 103-159, 107 Stat. 1536 (1993).

352. 521 U.S. 898, 933 (1997).

353. *See, e.g.*, HOLLIS-BRUSKY, *supra* note 333, at 118–26.

background checks for firearms purchased from gun dealers during the five years it would take the Department of Justice to create and oversee a national background check system.[354] According to the challengers, the Brady Act constituted an unconstitutional effort by the federal government to commandeer state employees and resources to try to achieve federal goals over the objections of state officials in violation of the Tenth Amendment.[355] The Court, with Justice Kennedy in the majority, accepted that claim and struck down the provisions in question.[356]

Although constitutional federalism doctrine allowed gun rights advocates to challenge some gun control statutes enacted by Congress, most gun control laws are passed at the state and local level.[357] To challenge those laws, gun rights advocates, starting around the time that Justice Kennedy joined the Court, began to more forcefully claim that the Second Amendment recognized a constitutional right of individuals to possess firearms independently of their participation in a "well regulated militia."[358] Although the Supreme Court seemed to have rejected that claim decades earlier,[359] the Court in 2008, in another 5 to 4 decision,[360] with Justice Kennedy once again in the majority, accepted the conservative legal advocates' contention that the earlier precedent had not definitively resolved the matter.[361] The Court, in *District of Columbia v. Heller*, recognized the claimed

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354. Several conservative groups filed amicus briefs with the Supreme Court on behalf of the constitutional challengers in *Printz*. *See, e.g.*, Brief Amicus Curiae of the National Rifle Ass'n of America in Support of Petitioners, Printz v. United States, 521 U.S. 898 (1997) (Nos. 95–1478, 95–1503)*;* Brief Amicus Curiae of the Pacific Legal Foundation Supporting the Petitioners, Printz v. United States, 521 U.S. 898 (1997) (Nos. 95–1478, 95–1503).

355. *Printz*, 521 U.S. at 905.

356. *Id.* at 935.

357. *See, e.g.*, Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 99–100 (2013) (noting that most gun laws in the U.S. are enacted by municipalities and focus on specific risks of gun ownership in densely populated areas).

358. U.S. CONST. amend. II.

359. United States v. Miller, 307 U.S. 174, 178 (1939).

360. District of Columbia v. Heller, 554 U.S. 570, 621–22 (2008).

361. On conservative advocacy on behalf of Second Amendment rights, see generally ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA (2013). For an account of how conservative activists supported gun rights litigation, see, for example, KECK, *supra* note 335, at 70–77, 86–92. *See also* HOLLIS-BRUSKY, *supra* note 333, at 31–42 (exploring the Federalist Society's role in promoting the view that the Constitution recognizes a right of individuals to bear arms).

constitutional right to possess firearms before proceeding to strike down as unconstitutional a Washington, D.C. law that banned the possession of such weapons in the home.[362]

Given that the defendant in *Heller* was the District of Columbia, the Second Amendment applied directly to its gun control law.[363] But it was not clear, at the time of *Heller*, whether the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment, making it applicable to states and localities.[364] Gun rights advocates argued that this was the case because the right to bear arms was a fundamental liberty under the Due Process Clause.[365] Two years later, the Court in yet another 5 to 4 decision, with Justice Kennedy once again in the majority, accepted the gun rights advocates' constitutional claim in *McDonald v. City of Chicago*.[366] Although *McDonald* was not a judicial review case, its holding was immensely important because the Court, in one fell swoop, made it possible for conservative advocates to constitutionally challenge the hundreds of state and local laws that regulate the possession of guns.[367] In fact, it was *McDonald* that made it possible for the Court, four years after Justice Kennedy retired, to render unconstitutional a New York law that regulated the possession of concealed weapons in public.[368]

In short, on questions raised by the constitutionality of gun control laws, Justice Kennedy repeatedly accepted gun rights advocates' demands that the Court scrutinize and ultimately void the policy judgments of legislators regarding how best to prevent gun violence. Justice Kennedy's understanding of what the Constitution requires, and how it limits the government's policy choices, largely aligned with that of gun rights advocates.

Of course, Justice Kennedy was not alone on the Court in holding these views. In all the relevant cases, there were four other justices who joined Justice Kennedy in striking down the laws at issue. What

362. 554 U.S. at 636.

363. *See id.* at 573.

364. *See* McDonald v. City of Chicago, 561 U.S. 742, 750 (2010) (holding "that the Second Amendment right is fully applicable to the States").

365. *See, e.g.*, Brief and Required Short Appendix for Plaintiffs-Appellants National Rifle Association et. al. at 41–42, Nat'l Rifle Ass'n of America, Inc. v. City of Chicago, 567 F. 3d 856 (7th Cir. 2009) (No. 08–4241).

366. 561 U.S. 742, 750 (2010).

367. *See id.*

368. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022).

distinguished Justice Kennedy from most of those other justices was that at around the same time he was endorsing many of the constitutional claims put forward by gun control advocates, he also endorsed many constitutional claims advocated by progressive litigants, including those challenging abortion regulations.[369]

2. Abortion laws

While Justice Kennedy consistently sided with gun rights advocates in their constitutional challenges to gun control laws, his record on abortion laws was more mixed—sometimes he voted to strike down abortion measures, but he more often sided with government efforts to defend them.[370]

In the first abortion case that he participated in, *Webster v. Reproductive Health Services*,[371] Justice Kennedy joined four other justices in 1989 upholding a prohibition on the use of public employees and facilities to perform abortions not needed to save a pregnant woman's life.[372] The *Webster* Court also upheld a provision requiring that, for pregnancies of more than twenty weeks, a physician had to perform tests to determine whether the fetus could survive outside the womb.[373] Four of the five-justice-majority in *Webster*, including Justice Kennedy, also questioned the very foundations of *Roe v. Wade*[374] by challenging its trimester framework and viability standard.[375] The following year, Justice Kennedy voted in two different cases to uphold statutes that

369. Like Justice Kennedy, Justice O'Connor voted to strike down laws in the gun rights cases of *Lopez* and *Printz* and in the crucial abortion case, discussed in the next section, of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

370. *See infra* notes 328–344 and accompanying text.

371. 492 U.S. 490 (1989).

372. *Id.* at 509–11.

373. *Id.* at 519–20.

374. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

375. *Webster*, 492 U.S. at 518–19. Justices Kennedy and White joined Chief Justice's Rehnquist's plurality opinion for the Court. *Id.* at 496. Justice Scalia would have overturned *Roe* in *Webster*. *Id.* at 532 (Scalia, J., concurring in part and concurring in judgment). Although Justice O'Connor provided the fifth vote to uphold the abortion regulations at issue, she did not join in questioning *Roe*'s continued viability. *Id.* at 522 (O'Connor, J., concurring in part and concurring in the judgment).

required parental notification of abortions performed on minors that allowed for a judicial bypass.[376]

Although Justice Kennedy in these three cases sided with government efforts to defend the constitutionality of abortion regulations, his most important judicial ruling on abortion, by far, was his co-written 1992 plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, reaffirming *Roe*'s central holding.[377] At the time, it was widely expected that the *Casey* Court would overrule or significantly limit *Roe*.[378] Instead, Justice Kennedy, along with Justices O'Connor and Souter, surprised many people by retaining in *Casey* the core of *Roe*'s abortion protections.[379] In doing so, the three justices endorsed the basic claims of abortion rights proponents that the decision of whether to have an abortion implicated a constitutionally protected liberty, with significant implications for issues of autonomy, self-determination, bodily integrity, and women's equality.[380]

At the same time, the *Casey* Court made a crucial modification to *Roe*: while *Roe* had essentially prohibited the enforcement of all abortion regulations before the first trimester of pregnancy,[381] *Casey* held that the state's interests in protecting fetal life and the health of pregnant women were constitutionally relevant from the moment of conception and that, as a result, the government could enforce pre-viability

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376. A majority of the Court in the first case, *Hodgson v. Minnesota*, sided with the law's challengers in concluding that while a requirement that minors notify one parent before getting an abortion passed constitutional muster, no legitimate state interest was served by requiring notification of *both* parents. 497 U.S. 417, 423, 448–49, 450–54 (1990). Justice Kennedy dissented from this part of the ruling. *Id.* at 480–81 (Kennedy, J., concurring in the judgment in part and dissenting in part). But he wrote for the Court, represented by a different majority (Justice O'Connor switched sides), agreeing with the state that its judicial bypass provision was constitutional under *Roe* and its progeny. *Id.* at 482–85. On the same day it decided *Hodgson*, the Court in *Ohio v. Akron Center for Reproductive Health*, in a 6–3 ruling written by Justice Kennedy, upheld a criminal statute requiring parental notice with a judicial bypass option available to minors who could show by clear and convincing evidence that they were sufficiently mature to make the abortion decision or that the abortion was in their best interest. 497 U.S. 502, 519–20 (1990).

377. 505 U.S. 833, 843–46 (1992) (plurality opinion), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

378. CHEMERINSKY, *supra* note 343, at 970.

379. *Casey*, 505 U.S. at 845–46.

380. *See id.* at 852–53.

381. Roe v. Wade, 410 U.S. 113, 163–66 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.

regulations that had neither the intent nor effect of imposing an undue burden on the right to choose an abortion.[382]

Justice Kennedy joined a majority of justices in upholding several of the Pennsylvania abortion provisions at issue in *Casey*—including one mandating a twenty-four-hour waiting period and another requiring minors seeking an abortion to get the consent of at least one parent (or a judge)—on the ground that they did not constitute undue burdens on the right to choose.[383] But Justice Kennedy was also in the majority in striking down a separate statutory provision that required married women to notify their husbands before they could get an abortion.[384]

During Justice Kennedy's remaining tenure as a justice, the Court heard three additional important cases challenging the constitutionality of abortion restrictions. Two of those cases—one challenging a state law[385] and the other a federal statute[386]—involved prohibitions on what regulation proponents called "partial-birth" abortions. In both cases, Justice Kennedy voted with more conservative justices to uphold the laws, demonstrating that, in applying the Constitution, he sometimes deferred to legislative policy judgments (in these cases, regarding whether it was ever medically necessary to abort a fetus using the banned procedure).[387] But two years before he retired, Justice Kennedy voted with four more liberal justices, in *Whole Woman's Health v. Hellerstedt*,[388] to strike down two Texas laws that made getting an abortion more difficult—one by requiring doctors who performed the procedure to have admission privileges at nearby hospitals and the other by requiring clinics performing abortions to meet the medical standards of ambulatory surgical centers.[389]

For understandable reasons, the abortion disputes that received the most attention from commentators and the public were those—discussed so far—challenging laws restricting or regulating the

382. *Casey*, 505 U.S. at 877.
383. *Id.* at 881–87.
384. *Id.* at 893–95.
385. Stenberg v. Carhart, 530 U.S. 914 (2000).
386. Gonzales v. Carhart, 550 U.S. 124 (2007).
387. *Stenberg*, 530 U.S. at 956–57 (Kennedy, J., dissenting); *Gonzales*, 550 U.S. at 167–68 (2007).
388. 579 U.S. 582 (2016), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
389. *Id.* at 588–90.

procedure. But there were other cases involving abortion that reached the Supreme Court during Justice Kennedy's tenure.

While conservative advocates in many states, after *Casey*, succeeded in persuading legislatures to further regulate abortions, progressive activists in other jurisdictions convinced legislatures to enact laws protecting the ability of individuals to access abortion facilities.[390] And while pro-choice advocates constitutionally challenged laws that restricted abortions, abortion rights opponents constitutionally challenged laws that sought to protect access to abortion clinics.[391] Two of those cases reached the Court during Justice Kennedy's tenure: *Hill v. Colorado*[392] and *McCullen v. Coakley*.[393] Both disputes involved different versions of state laws that created buffer zones around abortion clinics, prohibiting individuals from stationing themselves near the facilities' entrances and thus from potentially discouraging individuals from entering the facilities to seek abortions.[394] The constitutional claim was that the buffer zone laws violated the free speech rights of abortion opponents who protested near clinics.[395] The Court rejected the claim in *Hill* by a 6 to 3 vote (with Justice Kennedy writing a dissent that forcefully sided with the challengers),[396] but accepted it unanimously in *McCullen*.[397]

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390. *See generally* William Alex Pridemore & Joshua D. Freilich, *The Impact of State Laws Protecting Abortion Clinics and Reproductive Rights on Crimes Against Abortion Providers: Deterrence, Backlash, or Neither?*, 31 L. & HUM. BEHAV. 611 (2007) (explaining that after *Roe v. Wade*, most states passed laws either restricting or further protecting reproductive rights).

391. For an account of how conservative activists used constitutional litigation to challenge abortion rights legislation, see, for example, KECK, *supra* note 335, at 81–85.

392. 530 U.S. 703 (2000).

393. 573 U.S. 464 (2014).

394. *Hill*, 530 U.S. at 707; *McCullen*, 573 U.S. at 471–72.

395. *Hill*, 530 U.S. at 708–09; *McCullen*, 573 U.S. at 474–75.

396. *Hill*, 530 U.S. at 730–32. In his dissent in *Hill*, Justice Kennedy complained that "[i]f from this time forward the Court repeats its grave errors of analysis, we shall have no longer the proud tradition of free and open discourse in a public forum." *Id.* at 765 (Kennedy, J., dissenting).

397. *McCullen*, 573 U.S. at 496–97. In *Madsen v. Women's Health Center, Inc.*, the Court upheld an injunction prohibiting demonstrators, who had earlier blocked an abortion clinic entrance, from standing within thirty-six feet of that entrance while striking down another part of the injunction creating a floating buffer zone around people entering the clinic. 512 U.S. 753, 757 (1994). Justice Kennedy was in the minority in *Madsen*, siding with the anti-abortion demonstrators who challenged the injunction in

In the same way that Justice Kennedy (at least some of the time) interpreted the Due Process Clause in ways that led to the voiding of abortion laws (as in *Casey* and *Whole Women's Health*), he interpreted the Free Speech Clause in ways that prohibited the government from creating abortion clinic buffer zones (as in *Hill* and *McCullen*). In other words, Justice Kennedy's understandings of the Constitution and the judicial function repeatedly gave advocates *on both sides* of the abortion issue opportunities to challenge the policy preferences of legislators.

3. Affirmative action laws

Justice Kennedy also largely embraced the arguments of conservative advocates who claimed that government-sponsored affirmative action programs violated the Constitution's equal protection guarantees.[398] At the crux of these constitutional disputes was the question of whether courts should be more deferential to the government when it adopted race-conscious policies to address and remedy past discrimination rather than to advance invidiously discriminatory objectives. For most of the 1980s, the Court found itself deeply divided over that question, resulting in fractured rulings that failed to provide a clear answer.[399]

In 1989, only a year after Justice Kennedy joined the Court, he and four other justices, in *City of Richmond v. J.A. Croson Co.*,[400] sided with those challenging the constitutionality of affirmative action policies.[401] In doing so, the Court held for the first time that, from a judicial review perspective, there was no constitutional difference between affirmative action regulations and measures that purposefully sought to burden

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its entirety under the Free Speech Clause. *Id.* at 784 (Scalia, J., concurring in part and dissenting in part). Three years later, the Court in *Schenck v. Pro-Choice Network of Western New York* upheld part of a preliminary injunction that created a fixed buffer zone in front of an abortion clinic while striking down another part mandating a floating buffer zone. 519 U.S. 357, 361 (1997). Once again, Justice Kennedy joined a minority of justices who would have struck down the preliminary injunction in its entirety on First Amendment grounds. *Id.* at 385 (Scalia, J., concurring in part and dissenting in part).

398. For an account of how conservative activists used constitutional litigation to challenge affirmative action programs, see, for example, KECK, *supra* note 335, at 92–112.

399. *See, e.g.*, United States v. Paradise, 480 U.S. 149, 149–50 (1987) (plurality opinion); Fullilove v. Klutznick, 448 U.S. 448, 449–52 (1980) (plurality opinion), *overruled in part by* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

400. 488 U.S. 469 (1989).

401. *Id.* at 476–77, 511.

minority racial groups; both types of laws, the majority concluded, merited the same rigorous (and least deferential) form of judicial review.[402]

At issue in *Croson* was a Richmond, Virginia ordinance requiring prime contractors in the construction business that signed contracts with the city "to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises."[403] The city had enacted the law in the face of profound racial disparities in the awarding of city contracts.[404] As the majority explained, "[p]roponents of the set-aside provision relied on a study which indicated that, while the general population of Richmond was 50% black, only 0.67% of the city's prime construction contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983."[405]

In applying strict scrutiny, the *Croson* Court concluded that addressing and remedying societal discrimination against racial minorities did not constitute a sufficiently compelling government interest to justify the use of race in allocating government contracts.[406] Six years after striking down the Richmond affirmative action law, Justice Kennedy again joined four other justices, in *Adarand Constructors, Inc. v. Peña*,[407] in holding that strict scrutiny applied to a similar federal program intended to increase the number of highway contracts awarded to businesses owned by racial minorities.[408]

Croson and *Adarand* opened the floodgates of affirmative action litigation, as conservative advocates repeatedly challenged laws and policies at the federal, state, and local levels aimed at ameliorating the social and economic inequalities that decades of discriminatory laws and policies had created for racial minorities.[409] When several of those cases reached the Supreme Court, the conservative activists could almost always count on Justice Kennedy to side with their constitutional claims against government efforts to defend affirmative action programs.

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402. *See id.* at 493–97.
403. *Id.* at 477.
404. *Id.* at 478.
405. *Id.* at 479–80.
406. *Id.* at 505.
407. 515 U.S. 200 (1995).
408. *Id.* at 204–05.
409. *See, e.g.*, KECK, *supra* note 335, at 92–111 (describing how conservative activists used constitutional litigation to challenge affirmative action programs).

For example, when a deeply divided Court, in the 2003 case of *Grutter v. Bollinger*,[410] upheld the University of Michigan Law School's use of race as one admissions criterion among many to increase the diversity of its entering classes, Justice Kennedy strongly dissented.[411] The majority in *Grutter* found the school's admissions policy to be a constitutionally permissible means of promoting the compelling government interest of having a diverse student body in order to expand and enhance learning opportunities for all students.[412] But Justice Kennedy, in his dissent, claimed that the majority had dispensed with the type of strict judicial scrutiny of state action that he believed the Constitution required in all affirmative action cases.[413] In doing so, he strongly objected to what he viewed as the majority's misguided willingness to defer to university administrators in determining which means were necessary to achieve the diversity objective. As Justice Kennedy put it, "[p]referment by race, when resorted to by the [s]tate, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality."[414] He added that

> [i]f the Court abdicates its constitutional duty to give strict scrutiny to the use of race in university admissions, it negates my authority to approve the use of race in pursuit of student diversity. The Constitution cannot confer the right to classify on the basis of race even in this special context absent searching judicial review.[415]

Justice Kennedy was in the majority in *Gratz v. Bollinger*,[416] a companion case to *Grutter*, holding that a University of Michigan undergraduate admissions policy that awarded points to underrepresented racial minorities violated the Equal Protection Clause.[417] And in 2007, in *Parents Involved in Community Schools v. Seattle School District No. 1*,[418] Justice Kennedy voted with the majority to render unconstitutional policies that took race into account in assigning students to public schools with the objective of having the racial

410. 539 U.S. 306 (2003).
411. *Id.* at 387 (Kennedy, J., dissenting).
412. *Id.* at 337–38 (majority opinion).
413. *Id.* at 388 (Kennedy, J., dissenting).
414. *Id.*
415. *Id.* at 395.
416. 539 U.S. 244 (2003).
417. *Id.* at 251, 253–54.
418. 551 U.S. 701 (2007).

composition of individual schools reflect the composition of school districts as a whole.[419]

It bears noting that cases such as *Gratz* and *Parents Involved* were not judicial review cases as I have defined them in this Article because they did not require the Court to assess the constitutionality of statutes.[420] Yet, it was judicial review cases like *Croson* that laid the constitutional foundations for many of the later legal victories won by affirmative action opponents, including in *Gratz* and *Parents Involved*.[421] In affirmative action cases, Justice Kennedy repeatedly joined other conservative justices in accepting the claim of right-wing policy advocates that, under the Constitution, courts should be no more deferential to government actors in cases involving affirmative action than in cases challenging racist policies intended to advantage white people at the expense of racial minorities.[422]

Two years before he retired, Justice Kennedy wrote an opinion, on behalf of a 4 to 3 Court, upholding a university admissions policy that contained an affirmative action component.[423] At issue in *Fisher v. University of Texas at Austin*[424] was the constitutionality of the university's undergraduate admissions policy that filled about three-quarters of incoming classes with applicants who graduated in the top 10% of their Texas high school classes.[425] Admissions officials filled the remainder of the classes through a holistic evaluative process that considered, among other factors, grades, SAT scores, and race.[426] In *Fisher*, Justice

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419. *Id.* at 782 (Kennedy, J., concurring).

420. *See supra* note 49 and accompanying text.

421. *Gratz*, 539 U.S. at 270 (citing Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224 (1995)); *Parents Involved*, 551 U.S. at 730, 741 (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989)).

422. *See supra* notes 398–415415 and accompanying text. As this Article goes to press, the Supreme Court is evaluating the legality of affirmative action programs in *Students for Fair Admissions, Inc. v. University of North Carolina*, 142 S. Ct. 896 (2022) and *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 142 S. Ct. 895 (2022).

423. Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 376 (2016). Justice Kennedy also wrote for the Court rejecting a constitutional challenge brought by affirmative action supporters to a state constitutional amendment that prohibited state agencies and universities from implementing affirmative action programs. Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 315 (2014) (plurality opinion).

424. 579 U.S. 365 (2016).

425. *Id.* at 371–73.

426. *Id.* at 371.

Kennedy concluded that the university had met strict scrutiny by showing, among other things, that meaningful racial diversity in its undergraduate population was not achievable through entirely colorblind admission policies.[427]

Fisher was an exception to Justice Kennedy's otherwise consistent record in rejecting the claims of legislators and other government officials that the affirmative action programs in question passed constitutional muster.[428] In this manner, Justice Kennedy approached affirmative action cases in the same way he approached cases involving gun control and abortion regulations: with a repeated willingness to interpret the Constitution in ways that granted policy advocates judicial veto points, significantly restricting the ability of legislators to pursue their preferred objectives in crucial areas of social policy.[429]

4. LGBTQ laws

It seems reasonable to surmise that, decades from now, Justice Kennedy's long tenure on the Court will best be remembered for his majority rulings accepting the constitutional claims of LGBTQ rights advocates. Prior to his joining the Court, the judiciary had generally rejected the notion that the Constitution protected the equality and privacy interests of non-heterosexuals.[430] Indeed, only two years before Justice Kennedy was appointed to the Court, it issued its infamous ruling in *Bowers v. Hardwick*,[431] rejecting the claim that the Constitution protected the ability of individuals to engage in consensual same-sex sexual conduct in private, contending that the claim was, "at best, facetious."[432]

In many ways, it was Justice Kennedy's 1996 opinion for the Court in *Romer v. Evans* that rendered LGBTQ people constitutional citizens of this country.[433] As already noted, at issue in that case was a Colorado

427. *Id.* at 381–84.

428. *See supra* notes 398–415 and accompanying text.

429. *See supra* Sections III.A.1. & A.2.

430. CARLOS A. BALL, THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY 79 (2017) (noting that by the end of the 1970s, "[n]o appellate court, whether state or federal, had held that gay people had a constitutional right to privacy, and no court had held that discrimination on the basis of sexual orientation violated constitutional equality mandates").

431. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

432. *Id.* at 194.

433. Romer v. Evans, 517 U.S 620, 623 (1996).

constitutional amendment prohibiting state and local governments from enacting any legal measures or adopting any policies protecting lesbians, gay men, and bisexuals from discrimination.[434] After supporters of the initiative gathered enough signatures to put the measure on the ballot, LGBTQ activists mobilized to try to defeat it at the polls.[435] Despite their best efforts, however, they failed.[436] As policy advocates on both the right and left have repeatedly done for decades,[437] LGBTQ rights proponents, after losing in the political arena, quickly turned to the courts to try to prevent the approved measure from being implemented.[438]

Justice Kennedy in *Romer* accepted the challengers' claim that the constitutional amendment endorsed by Colorado voters violated the Equal Protection Clause because it targeted members of an unpopular minority by burdening them with significant legal disabilities that the law did not impose on any other group.[439] Before *Romer*, the Supreme Court had never recognized the equality rights of lesbians, gay men, and bisexuals.[440] After *Romer*, government officials across the country were on notice that discriminatory treatment of sexual minorities would be subject to constitutional scrutiny by courts.[441]

Seven years later, Justice Kennedy wrote for the Court in *Lawrence v. Texas*, overruling *Bowers v. Hardwick* and holding that adults who engage in consensual same-sex sexual conduct, like those who engage in consensual different-sex conduct, have a constitutional right to do so in the privacy of their homes.[442] In his ruling, Justice Kennedy emphasized the government's constitutional obligation to respect the dignity- and autonomy-based interests that inhere in the freedom of individuals, regardless of their sexual orientation, to choose with whom to be sexually intimate.[443]

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434. *Id.* at 623–24.
435. BALL, *supra* note 245, at 103–05.
436. *Id.* at 105.
437. *See generally* KECK, *supra* note 335, 123–24 (noting how both liberal and conservative activists often resort to constitutional litigation to pursue policy aims).
438. For an account of the litigation in *Romer*, see BALL, *supra* note 245, at 111–38.
439. *Romer*, 517 U.S. at 631–33.
440. BALL, *supra* note 245, at 142, 148.
441. For the impact of *Romer*, see *id.* at 138–49.
442. Lawrence v. Texas, 539 U.S. 558, 567, 577–78 (2003).
443. *Id.* at 567.

In defending its sodomy law, which applied only to same-sex sexual partners, Texas argued that it permissibly reflected the moral judgments of a majority of Texas residents.[444] But Justice Kennedy in *Lawrence* accepted the longstanding claim of LGBTQ rights advocates that majoritarian moral disapprobation of lesbians, gay men, and bisexuals was an unacceptable constitutional basis for imposing legal burdens or disabilities on them.[445]

At the time that LGBTQ rights advocates were litigating cases like *Romer* and *Lawrence*, they were also using state constitutional provisions in some jurisdictions to challenge same-sex marriage bans.[446] While advocates won some of those cases[447] and lost others,[448] the litigation efforts, combined with political organization and agitation, pushed the country as a whole to repeatedly confront the question of whether gender was essential to marriage.[449] In the process, marriage equality advocates vigorously challenged the notion that same-sex relationships were problematic or harmful.[450]

When DOMA's constitutionality reached the Supreme Court in 2013, Justice Kennedy, in writing for the 5 to 4 majority in *United States v. Windsor*, accepted several of the LGBTQ rights advocates' claims, including that the statute impermissibly targeted and harmed same-sex couples and their children.[451] And, two years later, when Justice Kennedy wrote for the 5 to 4 Court in *Obergefell v. Hodges* striking down same-sex marriage bans, he emphasized the advocates' claims that

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444. BALL, *supra* note 245, at 226 ("The only justification that [Texas] was proffering for its sodomy law's differential treatment of LGBT people was that the majority of citizens had a right to have the law reflect their moral views.").

445. *Lawrence*, 539 U.S. at 577–78.

446. *See generally* WILLIAM N. ESKRIDGE JR. & CHRISTOPHER R. RIANO, MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS (2020) (detailing inter alia state constitutional challenges to same-sex marriage bans).

447. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

448. Conaway v. Deane, 932 A.2d 571 (Md. 2007), *abrogated by* Obergefell v. Hodges, 576 U.S. 644 (2015); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006), *abrogated by Obergefell*, 576 U.S. 644; Andersen v. King County, 138 P.3d 963 (Wash. 2006) (en banc), *abrogated by Obergefell*, 576 U.S. 644.

449. BALL, supra note 430, at 142–47.

450. *See generally* CARLOS A. BALL, THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY (2003) (exploring normative components of push for LGBTQ equality and defending the morality of same-sex relationships and intimacy).

451. 570 U.S. 744, 770, 772–73 (2013).

recognizing the constitutional right of same-sex couples to marry did not entail either a threat to the institution of marriage[452] or the adoption of a new right.[453] Instead, Justice Kennedy explained, echoing the arguments of marriage equality proponents, both the institution of marriage and the fundamental right to marry were best understood as including same-sex couples, many raising children, willing to commit to marital relationships.[454] Before the turn of the twenty-first century, few Americans had given any thought to the notion that marriage could be anything other than the union of a man and a woman.[455] But Justice Kennedy, in *Obergefell*, embraced the position forcefully advanced by marriage equality advocates that such a circumscribed understanding of marriage, no matter how long and widely held, had to give way to the Constitution's protections of liberty and equality for all.[456]

The four Supreme Court LGBTQ rights opinions discussed so far, all written by Justice Kennedy, reflect a robust understanding of the power of judicial review and the appropriateness of striking down laws, no matter their historical pedigrees, when they are understood by judges to be inconsistent with constitutional principles, such as ones protecting the liberty and equality rights of individuals. The four LGBTQ rights cases are some of Justice Kennedy's most prominent rulings on behalf of the Court and will undoubtedly be among the best remembered decisions authored by him.

But what is not so widely recognized is how Justice Kennedy, being an equal opportunity judicial activist, was also receptive to the claims made by social and religious conservatives that the Constitution (and more specifically, the First Amendment) called for judicial veto points that hindered rather than advanced LGBTQ equality. Thus, Justice Kennedy in 1995 joined a unanimous Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,[457] holding that a

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452. 576 U.S. 644, 658 (2015).

453. *Id.* at 665 (asserting that the right marry is "inherent in the concept of individual autonomy").

454. *Id.* at 665–75.

455. BALL, *supra* note 430, at 142 (noting that before the Hawaii same-sex marriage litigation of "the early 1990s, most Americans had never thought of, much less grappled with, the question of whether same-sex couples should be permitted to marry").

456. *Obergefell*, 576 U.S. at 665–75.

457. 515 U.S. 557 (1995).

Massachusetts law prohibiting sexual orientation discrimination by places of public accommodation could not be constitutionally enforced against the organizers of the Boston St. Patrick's Day Parade in ways that required them to allow an Irish LGBTQ group to march in the parade over their objections.[458]

Five years later, Justice Kennedy joined a 5 to 4 majority in *Boy Scouts of America v. Dale*[459] holding that the Free Speech Clause's right of expressive association allowed the Boy Scouts to dismiss an openly gay assistant scoutmaster even though the dismissal violated a New Jersey antidiscrimination statute.[460] In choosing between the attainment of the statute's equality objectives and protecting the ability of an organization, such as the Boy Scouts, to exclude an openly gay man because it claimed that his presence was inconsistent with its values, Justice Kennedy sided with the four conservative justices who chose the latter option.[461] The *Dale* Court embraced an expansive understanding of the Constitution's protection of the right of expressive association in ways that restricted the antidiscrimination policy preferences of legislators.[462]

One of the last opinions that Justice Kennedy wrote, released a few weeks before he retired in 2018, was the majority ruling in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[463] That case arose after a bakery owner refused a same-sex couple's request to make their wedding cake on the ground that their union was inconsistent with his Christian values.[464] The Colorado Civil Rights Commission found that the baker had violated a Colorado law prohibiting places of public accommodation from discriminating on the basis of sexual orientation, a determination that was upheld by the Colorado Court of

458. *Id.* at 572–75
459. 530 U.S. 640 (2000).
460. *Id.* at 654–56.
461. *Id.*
462. For critical assessments of the *Dale* Court's reasoning, see, for example, BALL, *supra* note 441, at 205–13 (explaining why *Dale* improperly interpreted the right of association to grant the Boy Scouts a right to discriminate); ANDREW KOPPELMAN & TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE? HOW THE CASE OF *BOY SCOUTS OF AMERICA V. JAMES DALE* WARPED THE LAW OF FREE ASSOCIATION (2009) (critiquing *Dale* and arguing broadly that *Dale* confused and disrupted the law of freedom of association).
463. 138 S. Ct. 1719 (2018).
464. *Id.* at 1724.

Appeals.[465] The baker appealed to the Supreme Court, contending that the application of the antidiscrimination law to him violated his First Amendment rights to free speech and the free exercise of religion.[466]

In writing for the Court, Justice Kennedy deemed it unnecessary to reach the ultimate question of whether the Constitution provided a private business, which sold goods to the general public, with a constitutional right to refuse to serve patrons because of their sexual orientation (and presumably any other trait, characteristic, or conduct that was in tension with the owner's religious values).[467] Instead, the Court, through Justice Kennedy's opinion, ruled more narrowly by concluding that some members of the Colorado Civil Rights Commission had violated the baker's rights to free exercise by expressing anti-religious animus during their consideration of his case.[468] Although, given the litigation's outcome, *Masterpiece Cakeshop* was not ultimately a judicial review case because the Court did not have to assess the constitutionality of the application of the antidiscrimination law to the baker, the ruling showed that Justice Kennedy, as he had done in *Hurley* and in *Dale*, embraced the notion, forcefully promoted by conservative advocates, that the First Amendment places meaningful limits in the government's ability to pursue LGBTQ equality objectives through legislation.[469]

The only time that Kennedy rejected a First Amendment claim brought by opponents of LGBTQ equality in a case involving the differential treatment of LGBTQ individuals was in *Christian Legal Society v. Martinez*.[470] Interestingly, that dispute was the only one in this category of cases that did not involve the application of a state antidiscrimination statute (as occurred in *Hurley*, *Dale*, and *Masterpiece Cakeshop*). In *Christian Legal Society*, Kennedy concurred in the Court's conclusion that a public law school's policy requiring all student groups receiving school subsidies to admit any student interested in

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465. *Id.* at 1726–27; Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (2015), *rev'd sub nom.*, Masterpiece Cakeshop Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).

466. *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

467. *See id.* at 1728–29, 1732. As this Article goes to press, the Court is considering another case raising the question of whether owners of places of public accommodation have a free-speech right to decline to provide services to LGBTQ customers. 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022).

468. *Masterpiece Cakeshop*, 138 S. Ct. at 1729–31.

469. *See id.* at 1723, 1731–32; BALL, *supra* note 430, at 224–26.

470. 561 U.S. 661 (2010).

joining did not violate the First Amendment rights of a conservative religious group that wanted to exclude lesbian and gay law students while still receiving the subsidies.[471]

By noting that Justice Kennedy almost always accepted the constitutional claims of LGBTQ rights opponents in First Amendment cases, I do not mean to suggest that those disputes were as significant as *Romer*, *Lawrence*, *Windsor*, and *Obergefell*. The latter cases were more important because they made it possible to do away with much of the legally mandated discrimination, in areas such as criminal law and family law, faced by LGBTQ people.[472] My point instead is that in cases implicating LGBTQ rights, Justice Kennedy sometimes sided with LGBTQ rights advocates and sometimes with their opponents. The one consistent thread in Justice Kennedy's resolutions of the disputes was *that he took the judicial activist position in all of the judicial review cases implicating LGBTQ rights* that came before the Court during his tenure, regardless of whether the constitutional challenges were supported by proponents or opponents of LGBTQ equality.

When it came to LGBTQ issues, Justice Kennedy was an equal opportunity judicial activist, choosing to deploy judicial power to block the implementation of laws regardless of whether they helped or hindered the policy objectives of LGBTQ rights advocates. As was the case in the context of abortion,[473] Justice Kennedy's understandings of the Constitution and of the judicial function helped to grant advocates on *both* sides of LGBTQ rights disputes constitutional rulings nullifying the policy preferences of legislators.

There were other substantive areas of law and policy in which Justice Kennedy embraced the constitutional claims of advocates on the right to void the policy preferences of elected officials, including by voting in multiple cases to limit Congress's legislative authority through interpretations of the Commerce Clause, the Tenth Amendment, and the Eleventh Amendment.[474] And there were other substantive areas of law and policy in which Justice Kennedy accepted the constitutional claims of advocates on the left to void the policy preferences of elected officials, including by voting in multiple cases to limit the use of the

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471. *Id.* at 703 (Kennedy, J., concurring).

472. *See generally* BALL, *supra* note 245 (outlining the important legal and social changes that followed from *Romer* and *Lawrence*).

473. *See supra* Section III.A.2.

474. *See supra* notes 254**Error! Bookmark not defined.**–257 and accompanying text.

death penalty and of mandatory life sentences through interpretations of the Eighth Amendment.[475] Justice Kennedy also embraced First Amendment claims that allowed progressives to challenge laws supported by their political opponents[476] and distinct First Amendment claims that permitted conservatives to challenge laws supported by progressives.[477]

For most of the other justices, there were entire swaths of policy areas that were largely beyond the reach of judicial intervention through constitutional interpretation. For conservative jurists like Justices Scalia and Thomas, the Constitution, for example, was silent on issues related to abortion and sexual orientation.[478] For liberal judges like Justices Ginsburg and Breyer, the Constitution, for example, gave great leeway to Congress to use its Commerce Clause authority to legislate and to government entities to implement affirmative action policies.[479] In contrast, for Justice Kennedy, there were few "areas of law or policy that [were] immune from judicial

475. *See supra* notes 285–288 and accompanying text.

476. *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 549 (2001) (invalidating under the First Amendment a funding restriction preventing legal service organizations from challenging welfare laws); Reno v. ACLU, 521 U.S. 844, 857–59, 885 (1997) (holding that "indecent transmission" and "patently offensive display" prohibitions in the Communications Decency Act violated the First Amendment).

477. *See, e.g.*, Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2486 (2018) (holding that statute authorizing unions to charge agency fees to non-members violated the First Amendment); Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2378 (2018) (holding that statute requiring crisis pregnancy centers to post notices informing visitors about the availability of publicly-funded family-planning services, including contraception and abortion, violated the First Amendment).

478. Justices Scalia and Thomas dissented in the pivotal abortion case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022), as well as in the leading LGBTQ equality rights cases such as *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting), and *Obergefell v. Hodges*, 576 U.S. 644, 713 (2015) (Scalia, J., dissenting).

479. Justices Ginsburg and Breyer did not find constitutional problems with federal legislation in crucial cases such as *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 589 (2012) (Ginsburg, J., concurring in part, concurring in the judgment, and dissenting in part), and *United States v. Morrison*, 529 U.S. 598, 628 (2000) (Souter, J., dissenting). The two justices also supported the constitutionality of affirmative action programs in pivotal cases such as *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 264 (1995) (Souter, J., dissenting), and *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

resolution."[480] This made Justice Kennedy both a committed and an equal opportunity judicial activist, one who was repeatedly open to the constitutional claims of advocates from across the political spectrum seeking judicial veto points to block legislation.

I want to make it clear that by arguing that Justice Kennedy was an equal opportunity judicial activist, I am not claiming that he was ideologically in perfect equipoise between the right and left. Although I have not here explored the question of whether Justice Kennedy voted more often with conservative than with liberal colleagues in judicial review cases, some commentators have concluded that Justice Kennedy was more conservative than liberal in his overall voting record.[481] Those conclusions do not undermine my point that Justice Kennedy, in judicial review cases, was repeatedly willing to accept constitutional claims raised by advocates from across the political spectrum, to the detriment of both conservative and progressive policy preferences as reflected in statutes.

B. The Non-Future of Equal Opportunity Judicial Activism

Justice Kennedy's equal opportunity judicial activism worked to incentivize the increased use of constitutional litigation, by conservatives and progressives alike, to attain political and policy objectives and to thwart those of their opponents. Success in litigation, of course, breeds additional litigation. When Justice Kennedy, almost always in the majority, voted to grant advocates veto points by voiding legislative policy preferences in matters related, for example, to gun

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480. KECK, *supra* note 30, at 294.

481. Devins and Baum, for example, found that Justice Kennedy, during his first twenty-two years on the Court, voted more often with the conservative Justice Scalia than with the liberal Justice Stevens "sometimes by a small margin [and] sometimes by a substantial one." DEVINS & BAUM, *supra* note 20, at 98. Their analysis applied to all cases, not just judicial review ones. *Id.* at 94. For their part, Lee Epstein, William Landes, and Richard Posner found that Justice Kennedy voted in favor of the conservative position in 65% of non-unanimous cases through the 2009 term. LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 108 (2013); *see also* JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 122 (2020) (arguing that "[Justice] Kennedy is a conservative libertarian, voting with conservatives on most issues, and with liberals on a few") (citation omitted); Benjamin Pomerance, *Center of Order: Chief Justice John Roberts and the Coming Struggle for a Respected Supreme Court*, 82 ALB. L. REV. 449, 451 (2018) ("For the bulk of his career . . . [Justice] Kennedy remained a political conservative voter on an increasingly politically conservative Court . . . .").

control, abortion, affirmative action, and LGBTQ rights, the advocates kept coming back for more.[482] In addition, the dozens of precedents vigorously exercising the power of judicial review supported—and in many instances crafted—by Justice Kennedy will remain on the books for decades to come, tempting future advocates to use them as bases for additional veto points going forward. What we are unlikely to see on the Supreme Court in the foreseeable future are additional equal opportunity judicial activists in the Justice Kennedy mold.

We can expect advocates from across the ideological spectrum to continue to rely on constitutional litigation to advance their interests and to thwart those of their political opponents. As Professor Keck notes,

> no matter how much political denunciation or scholarly skepticism they face, political advocates are unlikely to withdraw from judicial politics. In a world of constant litigation by friend and foe, any decision not to litigate would amount to an act of unilateral disarmament, leaving the field entirely to their ideological opponents.[483]

The fact that legal and policy advocates from across the political spectrum are likely to continue to demand from courts judicial vetoes of laws that are inconsistent with their policy preferences makes it unlikely that a jurist committed to judicial restraint will receive the necessary political support, from either the left or right, to be appointed to the Court in the foreseeable future.

While all ideological factions in our contemporary political and legal environment will be tempted to support judicially active judges who will help them achieve their policy objectives, there will be little interest in supporting an *equal opportunity* judicial activist like Justice Kennedy. The increased manifestations of partisan polarization,[484] coupled with the growing politicization of the Supreme Court nomination process,[485] make it unlikely that a jurist who is willing to

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482. *See supra* Section III.A.

483. KECK, *supra* note 335, at 14.

484. *See, e.g.*, Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 303–04 (discussing the impact of increasing partisanship on Court nominations and decision-making).

485. *See, e.g.*, Lee Epstein, Jeffrey A. Segal & Chad Westerland, *The Increasing Importance of Ideology in the Nomination and Confirmation of Supreme Court Justices,* 56 DRAKE L. REV. 609 (2008) (presenting qualitative and quantitative analyses showing increasing politicization in the Court nomination process).

exercise the power of judicial review to strike down laws in response to claims made by advocates from across the political spectrum will receive the necessary support to be appointed to the Court any time soon.[486]

Justice Kennedy's position as the median justice, when combined with his equal opportunity judicial activism, repeatedly showed policy advocates, elected officials, and legal academics on both the right and left that it is possible to gain significant policy victories though the courts.[487] Although conservative activists benefited from Justice Kennedy's robust understanding of the power of judicial review in persuading the Court to strike down, for example a gun control law,[488] a crucial provision of the Voting Rights Act of 1965,[489] affirmative action statutes,[490] and Obamacare's expansion of Medicaid,[491] they will have little incentive, going forward, to support the appointment of an equal opportunity judicial activist who, like Justice Kennedy, is willing to recognize many of their ideological opponent's constitutional claims. Similarly, although progressive activists benefited from Justice

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486. *See* BALKIN, *supra* note 481, at 127 ("[A]s politics polarizes and gridlock becomes the norm, the courts become ever more important to achieving a party's policy goals. . . . [W]hen politics is gridlocked, politicians will take what they can get."); *id.* at 139–40 ("[T]oday, in a period of legislative gridlock, advanced rot, and high party polarization, courts become especially important in furthering the parties' agendas . . . .").

487. It is not just policy advocates who have pushed for robust forms of judicial review in recent decades. As Mark Graber notes, "prominent elected officials consciously invite the judiciary to resolve those political controversies that they cannot or would rather not address." GRABER, *supra* note 44, at 36–37. In his book *Political Foundations of Judicial Supremacy*, Keith Whittington explores in detail "why politicians have been so eager to anoint the judges as the 'ultimate interpreters' of the Constitution, a mantle that judges have been only too happy to accept." KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENT, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY xii (2007); *see also* BALKIN, *supra* note 481, at 108–09 ("American politicians and legal intellectuals depend so heavily on the federal judiciary for so many things that it is almost unthinkable that they would willingly renounce judicial review as a tool of policy advancement."); KECK, *supra* note 30, at 285 ("The current Court's continued willingness to exercise its power on behalf of liberal as well as conservative ends has tended to reinforce support for judicial power among political elites.").

488. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

489. Shelby County v. Holder, 570 U.S. 529, 556–57 (2013).

490. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 474 (1989).

491. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 574 (2012).

Kennedy's vigorous embrace of the power of judicial review in persuading the Court to strike down, for example, sodomy laws,[492] same-sex marriage bans,[493] some abortion restrictions,[494] and some death penalty statutes,[495] they will have much to lose from the appointment of a justice who evinces a willingness to also embrace constitutional challenges from the other side of the ideological spectrum.

Justice Kennedy's repeated willingness to strike down statutes that took sides in deeply contested issues of social policy pleased advocates from across the political spectrum during his three decades as a justice. Although Justice Kennedy's judicial activism was highly responsive to the demands made on the Court by both conservative and progressive activists, there is little chance that another equal opportunity judicial activist will be appointed to the Court any time soon.

CONCLUSION

It is important to emphasize that, while this Article has focused on Justice Kennedy's judicial activism, he was by no means the only justice during his tenure who had a robust understanding of the Court's power of judicial review. What made Justice Kennedy's judicial activism unique was, first, that he voted to strike down statutes at a rate higher than that of most of the justices with whom he served for extended periods of time;[496] second, that he exercised the power of judicial review while rarely expressing concerns about judicial overreach or its implications for the people's ability to self-govern;[497] and, third, that he voted to strike down laws in response to constitutional claims raised by advocates from across the political spectrum.[498]

This Article has sought to provide an in-depth examination of the extent and impact of Justice Kennedy's robust judicial activism. As we have seen, from both quantitative and qualitative perspectives, Justice

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492. Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

493. Obergefell v. Hodges, 576 U.S. 644 (2015).

494. *See, e.g.*, Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

495. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002).

496. *See supra* Part I.

497. *See supra* Part II.

498. *See supra* Part III.

Kennedy evinced a deep and abiding trust in the power of judicial review. Although he was by no means the only justice of his era to do so, the frequency and enthusiasm with which he did, in response to conservative and progressive constitutional claims, distinguished him from the other justices with whom he served for extended periods of time.

Time will tell whether history will be kind to Justice Kennedy's vigorous—one could even say relentless—embrace of judicial activism. That judgment will likely track assessments of the appropriateness of robust exercises of judicial review. For defenders of the constitutional practice, Justice Kennedy will be remembered as the courageous judge who, time and again, defended constitutional principles against legislative overreach. But for critics, Justice Kennedy's record on the Court will be seen as symptomatic of judges who care a great deal about limiting the power of federal, state, and local legislatures while showing little concern about restraining their own. The debates over how best to exercise the Court's power of judicial review are unlikely to ever cease or be settled conclusively. But my hope is that the detailed exploration of Justice Kennedy's robust judicial activism provided in this Article will help inform those discussions.

APPENDIX: PIVOTAL JUDICIAL REVIEW CASES (1988–2018)

The Table below lists fifty cases that, in my estimation, were among the most important and impactful judicial review rulings decided during Justice Anthony Kennedy's tenure on the Supreme Court. All the disputes were ones that divided the Court by three votes or fewer. For each case, the Table indicates the main issue raised by the litigation, whether the Court upheld (UH) or struck down (SD) the law in question, the Court's voting tally, how Justice Kennedy and four comparator justices voted, as well as whether any of the five justices wrote a majority (MJ) or plurality opinion (PL) in any given case.*

Case	Citation	Issue	Court Vote	Kennedy	Scalia	Thomas	Ginsburg	Breyer
City of Richmond v. J.A. Croson Co.	488 U.S. 469 (1989)	affirmative action	SD/ 6-3	SD	SD	N/A	N/A	N/A
Michael H. v. Gerald D.	491 U.S. 110 (1989)	parental rights	UH/ 5-4	UH	UH (MJ)	N/A	N/A	N/A
Texas v. Johnson	491 U.S. 397 (1989)	flag burning	SD/ 5-4	SD	SD	N/A	N/A	N/A
Employment Div. v. Smith	494 U.S. 872 (1990)	religious exemptions	UH/ 6-3	UH	UH (MJ)	N/A	N/A	N/A
Cruzan v. Dir., Missouri Dept. of Health	497 U.S. 261 (1990)	right to refuse medical treatment	UH/ 5-4	UH	UH	N/A	N/A	N/A
New York v. United States	505 U.S 144 (1992)	congressional power	SD/ 6-3	SD	SD	SD	N/A	N/A
Planned Parenthood of Se. Pa. v. Casey	505 U.S. 833 (1992)	abortion	SD/ 5-4	SD (PL)	UH	UH	N/A	N/A
United States v. Lopez	514 U.S. 549 (1995)	congressional power	SD/ 5-4	SD	SD	SD	UH	UH
U.S. Term Limits, Inc. v. Thornton	514 U.S. 779 (1995)	term limits	SD/ 5-4	SD	UH	UH	SD	SD
Adarand Constructors, Inc. v. Peña	515 U.S. 200 (1995)	affirmative action	SD/ 5-4	SD	SD	SD	UH	UH
Seminole Tribe of Florida v. Florida	517 U.S. 44 (1996)	congressional power	SD/ 5-4	SD	SD	SD	UH	UH
Romer v. Evans	517 U.S. 620 (1996)	LGBTQ rights	SD/ 6-3	SD (MJ)	UH	UH	SD	SD
Shaw v. Hunt	517 U.S. 899 (1996)	legislative districting	SD/ 5-4	SD	SD	SD	UH	UH

* The Court sometimes strikes down one or more statutory provisions while upholding others in the same case. As I did in organizing the data set as a whole, the Table designates such cases as ones in which the Court struck down a law. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); Arizona v. United States, 567 U.S. 387 (2012); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)..

Case	Citation	Issue	Court Vote	Kennedy	Scalia	Thomas	Ginsburg	Breyer
Printz v. United States	521 U.S. 898 (1997)	congressional power	SD/ 5-4	SD	SD (MJ)	SD	UH	UH
Clinton v. City of New York	524 U.S. 417 (1998)	congressional power	SD/ 6-3	SD	UH	SD	SD	UH
Alden v. Maine	527 U.S. 706 (1999)	congressional power	SD/ 5-4	SD (MJ)	SD	SD	UH	UH
Kimel v. Fla. Bd. of Regents	528 U.S. 62 (2000)	congressional power	SD/ 5-4	SD	SD	SD	UH	UH
U.S. v. Morrison	529 U.S. 598 (2000)	congressional power	SD/ 5-4	SD	SD	SD	UH	UH
Apprendi v. New Jersey	530 U.S. 466 (2000)	jury trial rights	SD/ 5-4	UH	SD	SD	SD	UH
Boy Scouts of Am. v. Dale	530 U.S. 640 (2000)	LGBTQ rights	SD/ 5-4	SD	SD	SD	UH	UH
Bd. of Trustees of the Univ. of Ala. v. Garrett	531 U.S. 356 (2001)	congressional power	SD/ 5-4	SD	SD	SD	UH	UH
Legal Servs. Corp. v. Velazquez	531 U.S. 533 (2001)	free speech	SD/ 5-4	SD (MJ)	UH	UH	SD	SD
Nguyen v. INS	533 U.S. 53 (2001)	gender equality	UH/ 5-4	UH (MJ)	UH	UH	SD	SD
Atkins v. Virginia	536 U.S. 304 (2002)	death penalty	SD/ 6-3	SD	UH	UH	SD	SD
Nev. Dep. of Hum. Res. v. Hibbs	538 U.S. 721 (2003)	congressional power	UH/ 6-3	SD	SD	SD	UH	UH
Lawrence v. Texas	539 U.S. 558 (2003)	LGBTQ rights	SD /6-3	SD (MJ)	UH	UH	SD	SD
Ashcroft v. ACLU	542 U.S. 656 (2004)	free speech	SD/ 5-4	SD (MJ)	UH	SD	SD	UH
Roper v. Simmons	543 U.S. 551 (2005)	death penalty	SD/ 5-4	SD (MJ)	UH	UH	SD	SD
Gonzales v. Raich	545 U.S. 1 (2005)	congressional power	UH/ 6-3	UH	UH	SD	UH	UH
Gonzales v. Carhart	550 U.S. 124 (2007)	abortion	UH/ 5-4	UH (MJ)	UH	UH	SD	SD
Crawford v. Marion Cnty. Election Bd.	553 U.S. 181 (2008)	voting rights	UH/ 6-3	UH	UH	UH	SD	SD
Boumediene v. Bush	553 U.S. 723 (2008)	congressional power	SD/ 5-4	SD (MJ)	UH	UH	SD	SD
Kennedy v. Louisiana	554 U.S. 407 (2008)	death penalty	SD/ 5-4	SD (MJ)	UH	UH	SD	SD
District of Columbia v. Heller	554 U.S. 570 (2008)	gun control	SD/ 5-4	SD	SD (MJ)	SD	UH	UH
Citizens United v. FEC	558 U.S. 310 (2010)	free speech	SD/ 5-4	SD (MJ)	SD	SD	UH	UH
Graham v. Florida	560 U.S. 48 (2010)	juvenile life sentence	SD/ 6-3	SD (MJ)	UH	UH	SD	SD

Case	Citation	Issue	Court Vote	Kennedy	Scalia	Thomas	Ginsburg	Breyer
Sorrell v. IMS Health Inc.	564 U.S 552 (2011)	free speech	SD/ 6-3	SD (MJ)	SD	SD	UH	UH
Arizona v. United States	567 U.S. 387 (2012)	states' rights	SD/ 5-3	SD (MJ)	UH	UH	SD	SD
Miller v. Alabama	567 U.S. 460 (2012)	juvenile life sentence	SD/ 5-4	SD	UH	UH	SD	SD
Nat'l Fed'n of Indep. Bus. v. Sebelius	567 U.S. 519 (2012)	congressional power	SD/ 5-4	SD	SD	SD	UH	UH
Maryland v. King	569 U.S. 435 (2013)	search and seizure	UH/ 5-4	UH (MJ)	SD	UH	SD	UH
Shelby County v. Holder	570 U.S. 529 (2013)	voting rights	SD/ 5-4	SD	SD	SD	UH	UH
United States v. Windsor	570 U.S. 744 (2013)	LGBTQ rights	SD/ 5-4	SD (MJ)	UH	UH	SD	SD
McCutcheon v. FEC	572 U.S. 185 (2014)	free speech	SD/ 5-4	SD	SD	SD	UH	UH
Zivotofsky v. Kerry	576 U.S. 1 (2015)	presidential power	SD/ 5-4	SD (MJ)	UH	UH	SD	SD
Obergefell v. Hodges	576 U.S. 644 (2015)	LGBTQ rights	SD/ 5-4	SD (MJ)	UH	UH	SD	SD
Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n	576 U.S. 787 (2015)	legislative districting	UH/ 5-4	UH	SD	SD	UH (MJ)	UH
Whole Woman's Health v. Hellerstedt	579 U.S. 582 (2016)	abortion	SD/ 5-3	SD	N/A	UH	SD	SD
Janus v. AFSCME, Council 31	138 S.Ct. 2448 (2018)	free speech	SD/ 5-4	SD	N/A	SD	UH	UH
Nat'l Inst. of Fam. & Life Advocs. v. Becerra	585 U.S. __, 138 S.Ct. 2361 (2018)	free speech	SD/ 5-4	SD	N/A	SD (MJ)	UH	UH