Justice Anthony Kennedy's Free Speech Legacy

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Justice Kennedy has been hailed by free speech advocates as a leading free speech champion. In contrast, other experts have not only criticized particular opinions and votes by Justice Kennedy that rejected free speech claims, but they also have maintained that Justice Kennedy specifically declined to protect speech that was at odds with his conservative political and religious views. It is certainly true that Justice Kennedy did not uphold freedom of speech in some important contexts, including when the Government asserted countervailing national security or "War on Drugs" concerns. However, in other important cases, Justice Kennedy showed courage in defending freedom for expression that was not only inconsistent with his own views and values, but also reviled by the public, thus earning him enormous criticism. Moreover, in enforcing the First Amendment's non-Establishment Clause, Justice Kennedy displayed similar courage in re-examining and revising his own views in a major case, thus protecting individual religious liberty from government and popular pressure in the sensitive public school context. Overall, we can draw inspiration from Justice Kennedy's consistent vision that we must be free to make our own choices in the realm of ideas and beliefs, even if we may disagree with particular choices Justice Kennedy made in implementing that vision.

[†] Professor Strossen gratefully acknowledges the contributions of her Research Assistants, N.Y.L.S. students Jennifer Henriquez and Marc Walkow. Marc greatly assisted in the editing and proofreading of this Essay; he also prepared the footnotes, so all credit and responsibility for them are due to him and to the *Hastings Law Journal* editors.

I am happy to participate in this important symposium, and I want to thank and congratulate everyone who has done such great work to organize it, including my major contact, the *Hastings Law Journal* Executive Symposium Editor, Nina Gliozzo.

I also welcome the chance to reconnect with longstanding colleagues and friends, including Hastings Law Professor Matt Coles, the *Hastings Law Journal*'s Faculty Advisor who kindly invited me to participate in this program. Matt is justly celebrated for his pioneering leadership on issues concerning sexual orientation and gender identity, but he also has been an essential leader on the whole broad civil liberties agenda: defending all fundamental freedoms for all people. Matt deeply understands, and has powerfully explained, a point that is not as widely appreciated as it should be: that all rights, for all people, are indivisible.

This ties directly to the specific aspect of Justice Kennedy's free speech rulings that Nina asked me to discuss: his support of freedom even for "hate speech,"[1] or speech that disparages people who traditionally have been subject to discrimination. Nina invited me to focus on this issue because it is the topic of my recent book: *HATE: Why We Should Resist It with Free Speech, Not Censorship*.[2] So let me give you a thumbnail sketch of my book's conclusions and of Justice Kennedy's pertinent opinions.

A major reason I oppose censoring "hate speech" flows from the actual track record of such censorship, and the actual track record of non-censorial measures for combating hatred and discrimination. The evidence shows that censorship is at best ineffective in countering discrimination, and at worst counterproductive, too often targeting speech by the very minority groups it is intended to protect.[3] Conversely, while we of course have much ongoing work to advance equality and diversity, the progress we have made has depended on a robust freedom of speech; sufficiently robust that it extends to ideas that officials and powerful interest groups consider hateful and dangerous.

Justice Kennedy stressed this very point in his last pertinent Supreme Court opinion, in the Court's most recent "hate speech" case, *Matal v. Tam*, in 2017.[4] The Court unanimously struck down a provision in the federal trademark law that denied trademark protection to terms that the enforcing officials deemed to

1. Along with other commentators, I put this term in quotation marks to underscore the fact that it is not a constitutional law term of art; the Supreme Court never has identified a category of speech that receives no First Amendment protection, or less protection, based on its hateful content. To the contrary, as the text explains, the Court consistently and by consensus has refused to recognize any such categorical exception to general First Amendment precepts.

2. NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP (2018).

3. *See id.* at 86–88; Randall Kennedy, *Is the Cure of Censorship Better than the Disease of Hate Speech?*, KNIGHT FIRST AMENDMENT INST. (Apr. 9, 2018), https://knightcolumbia.org/news/cure-censorship-better-disease-hate-speech.

4. 137 S. Ct. 1744 (2017).

be disparaging to certain people, including ethnic minorities.[5] The Court's opinion, by Justice Alito, stressed time-honored First Amendment principles that shield freedom even for "the thought that we hate," quoting this famous phrase that had been coined by Justice Oliver Wendell Holmes.[6]

Justice Kennedy wrote a separate partial concurrence that, notably, was joined by three of the Court's most liberal Justices (Ginsburg, Kagan, and Sotomayor).[7] While "hate speech" laws aim to protect members of minority groups, Justice Kennedy stressed that those groups actually have the most to lose from such censorship and the most to gain from free speech protection for "hate speech." As he explained:

> A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.[8]

Indeed, the facts in the *Matal* case itself illustrate Justice Kennedy's insight. The speakers that the government sought to censor were not hate-mongers slinging slurs against members of a minority group. To the contrary, the censored speakers were themselves members of a minority group, who were using a traditional slur in order to assert their ethnic pride, by reclaiming that term.[9] Specifically, Asian American rock musician Simon Tam and his fellow Asian American band members proclaimed their pro-human rights activism through their chosen band name: "The Slants." When the Supreme Court barred the government from blocking that choice, it simultaneously upheld not only the band members' free speech rights, but also their equality and dignity.

Likewise, advocates of LGBT rights have explained that these rights in particular have been especially dependent on robust free speech principles, given the reinforcing nature of declaring one's identity and demanding one's equality.[10] Therefore, it is fitting that Justice Kennedy has been celebrated both

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5. *Id.* at 1747 (striking down 15 U.S.C. § 1052(a) (2012)).

6. *Matal*, 137 S. Ct. at 1764 (internal quotation marks omitted) (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

7. *Id.* at 1765 (Kennedy, J., concurring).

8. *Id.* at 1769.

9. *Id.* at 1766 ("[R]espondent endeavors to use The Slants to supplant a racial epithet, using new insights, musical talents, and wry humor to make it a badge of pride.").

10. *See* William B. Rubenstein, *Since When Is the Fourteenth Amendment Our Route to Equality? Some Reflections on the Construction of the 'Hate-Speech' Debate from a Lesbian/Gay Perspective*, *in* SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES 280 (1994).

as the Court's foremost free speech champion,[11] and as the Court's leading champion of LGBT rights.[12]

Justice Kennedy's concurring opinion in *Matal* made another point in support of the conclusion that "hate speech" laws, no matter how well intended, might well do more harm than good in countering discrimination: that the process of listening to speech considered hateful, and analyzing and discussing that speech, could plausibly increase the audience's support for equality, dignity, diversity, and inclusivity. As he wrote:

> The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. That danger is all the greater if the ideas or perspectives are ones a particular audience might think offensive, at least at first hearing. An initial reaction may prompt further reflection, leading to a more reasoned, more tolerant position.[13]

Even beyond the two key issues of hate speech and LGBT rights, the overarching theme of government neutrality also links other specific areas of Justice Kennedy's jurisprudence: the notion that government must remain neutral toward all ideas *and* toward all people. This theme pervaded one of his last major majority opinions for the Court in the *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[14] case last June. Consistent with Justice Kennedy's prior opinions upholding rights of LGBT individuals, he insisted that businesses open to the general public must neutrally serve all people, regardless of their sexual orientation, as mandated by public accommodation laws, including the Colorado law at issue in that case.[15] Likewise, consistent with Justice Kennedy's prior opinions on First Amendment issues concerning both speech and religion, he insisted that government must neutrally evaluate claims for exemption from public accommodation laws based on religious or conscientious beliefs.[16] In the *Masterpiece Cakeshop* case, he concluded that the

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11. *See, e.g.*, Floyd Abrams, *The First Amendment's Undisputed Champion*, WALL ST. J. (June 29, 2018, 6:37 PM), https://www.wsj.com/articles/the-first-amendments-undisputed-champion-1530311830; Michael Barone, *Justice Kennedy's First Priority: The First Amendment*, INVS.' BUS. DAILY (June 29, 2018), https://www.investors.com/politics/columnists/justice-kennedy-retires-legacy-first-amendment-supreme-court; James Burling, *Justice Kennedy Left His Mark on American Liberty*, PAC. LEGAL FOUND.: BLOG (June 27, 2018), https://pacificlegal.org/justice-kennedy-and-pacific-legal-foundation-at-the-supreme-court. *But see* Erwin Chemerinsky, *Anthony Kennedy and Free Speech*, SCOTUSBLOG (July 2, 2018, 2:38 PM), https://www.scotusblog.com/2018/07/anthony-kennedy-and-free-speech ("Justice Anthony Kennedy will be remembered as a staunch advocate of freedom of speech, but his actual record is more complicated than that.").

12. *See, e.g.*, Robert Barnes, *Kennedy Emerges as Judicial Champion of Gay Rights*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/politics/courts_law/kennedy-emerges-as-judicial-champion-of-gay-rights/2015/06/26/b295eb60-1c22-11e5-ab92-c75ae6ab94b5_story.html; Kent Greenfield & Adam Winkler, Opinion, *Without Kennedy, the Future of Gay Rights Is Fragile*, N.Y. TIMES (June 28, 2018), https://www.nytimes.com/2018/06/28/opinion/kennedy-gay-rights-same-sex-marriage.html.

13. *Matal*, 137 S. Ct. at 1767 (Kennedy, J., concurring).

14. 138 S. Ct. 1719 (2018).

15. *Id.* at 1727–28.

16. *Id.* at 1728.

exemption claim at issue had not received a "neutral . . . consideration,"[17] because some government officials had shown "a clear . . . hostility toward" the pertinent religious beliefs.[18]

In my remaining time, I will comment further about the two facets of Justice Kennedy's First Amendment views on which Nina encouraged me to focus: his extremely strong support for the concept of neutrality in the free speech context; and his evolving views about how to honor the concept of neutrality in the Establishment Clause context, as manifested in his seemingly dramatic shift between the *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*[19] case in 1989 and *Lee v. Weisman*[20] in 1992.

So, let's start with free speech. As I already noted, in *Matal v. Tam,* Justice Kennedy stressed that minority groups in particular have the most to gain from strict enforcement of the content or viewpoint neutrality principle: that government may not suppress constitutionally protected speech solely because its message is considered hateful or otherwise evil; but rather, government may generally suppress such speech only when, in its overall context, it directly causes certain serious, specific, imminent harm, such as when it constitutes a genuine threat,[21] or intentional incitement of imminent violence,[22] or targeted harassment.[23]

To be sure, all Justices in recent history have supported the general content neutrality principle, which the Court has hailed as the "bedrock"[24] free speech precept. That said, the Justices are often closely split on specific implementing details—about how strictly that principle should actually be enforced in particular cases.

In my limited time, I will discuss just one notable aspect of Justice Kennedy's views about such details, which I think is particularly striking. In a couple of cases relatively early in his Supreme Court tenure, he opined that content-based speech regulations should be absolutely unconstitutional.[25] Under the Court's established doctrine, in contrast, content-based regulations are only presumptively unconstitutional. They are subject to strict judicial scrutiny, and

17. *Id.* at 1729.

18. *Id.*

19. 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (concluding that display of crèche in county courthouse and display of menorah outside city building did not violate Establishment Clause), *abrogated by* Town of Greece v. Galloway, 572 U.S. 565 (2014).

20. 505 U.S. 577 (1992) (holding that clergy's offering of prayers as part of official public school graduation ceremony was prohibited by the Establishment Clause).

21. Virginia v. Black, 538 U.S. 343 (2003).

22. Brandenburg v. Ohio, 395 U.S. 444 (1969).

23. Davis *ex rel.* Lashonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (1999).

24. Texas v. Johnson, 491 U.S. 397, 414 (1989).

25. *See* Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) ("[C]ontent-based speech restrictions that do not fall with any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests."); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring).

they will be upheld if the government can show that they are narrowly tailored to promote a goal of compelling importance. That burden is appropriately heavy, so government can rarely satisfy it. However, the burden is not insurmountable, and in some cases government has satisfied it.[26] In Justice Kennedy's view, strict scrutiny thus did not provide a sufficiently strong barrier to content-based censorship: "[R]esort to the test might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so."[27] He maintained that the strict scrutiny standard

> derives from our equal protection jurisprudence, and has no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome restriction of speech based on content only, apart from any considerations of time, place, and manner or the use of public forums.[28]

Ironically, Justice Kennedy himself joined the Court's majority in upholding content-based censorship in *Holder v. Humanitarian Law Project*[29] under a strict scrutiny standard, to the consternation of the dissenters, who maintained that the majority was unduly deferential to the government.[30]

Justice Kennedy wrote some important opinions conveying his strong opposition to regulations he deemed content-based, including his majority opinion in *Citizens United v. Federal Election Commission*[31] (about campaign finance regulations) and his dissenting opinion in *Hill v. Colorado*[32] (about anti-abortion protests). In *Citizens United*, Justice Kennedy's opinion stressed that an essential aspect of content neutrality is speaker neutrality: that government may neither disfavor nor favor particular speakers or groups of speakers, including those that are organized in the form of unions or corporations. He explained:

> Speech restrictions based on the identity of the speaker are all too often simply a means to control content.
>
> . . . The Government may not by these means deprive the public of the right . . . to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.[33]

I advisedly referred above to regulations that Justice Kennedy "deemed" content-based. On occasion, he concluded that the challenged regulations were not content-based, thus taking a less speech-protective stance than other Justices, who did deem these regulations to be content-based. In the *Turner Broadcasting System, Inc. v. FCC* case, Justice Kennedy's majority opinion upheld the so-

26. *See* Burson v. Freeman, 504 U.S. 191 (1992).
27. *Simon & Schuster*, 502 U.S. at 124–25 (Kennedy, J., concurring).
28. *Id.* at 124 (citations omitted).
29. 561 U.S. 1 (2010).
30. *Id.* at 54–55 (Breyer, J., dissenting).
31. 558 U.S. 310 (2010).
32. 530 U.S. 703, 765–92 (2000) (Kennedy, J., dissenting).
33. *Citizens United*, 558 U.S. at 340–41.

called "must carry rule" for cable TV channels, requiring them to carry local broadcast channels.[34] Four Justices joined a partial dissent, which turned completely on their treatment of the rule as content-based, thus triggering strict scrutiny,[35] whereas Justice Kennedy treated the rule as content-neutral, thus subject only to intermediate scrutiny.[36]

On the anti-free speech side of the ledger, in cases of particular concern to me, Justice Kennedy also sometimes rejected free speech positions in ACLU cases. One prominent example was *Morse v. Frederick*,[37] a case in which we defended high school student Joseph Frederick's right to display a banner proclaiming "Bong Hits for Jesus." That said, from the standpoint of free speech advocates, no Justice has had a perfect record—not even Hugo Black, who is often touted as a free speech absolutist.[38] Among his other anti-free speech rulings, Justice Black wrote a strong dissent in another ACLU case in which we successfully defended student speech rights: *Tinker v. Des Moines Independent Community School District*.[39]

In sum, notwithstanding the significant cases in which Justice Kennedy took a less speech-protective position than other Justices,[40] considering his overall record, he was fairly regarded as "the First Amendment's Undisputed Champion," to quote the prominent First Amendment lawyer Floyd Abrams.[41] In the wake of Justice Kennedy's resignation from the Court, Abrams wrote: "He was the Supreme Court's most dedicated, consistent and eloquent defender of the First Amendment. He played that role [both] when other conservatives rejected First Amendment arguments, and when liberals did."[42]

Now let me turn to the two Establishment Clause opinions by Justice Kennedy that I agreed to discuss: his 1989 partial dissent in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter* and his 1992 majority opinion in *Lee v.*

34. 512 U.S. 622, 661–62 (1994).

35. *See id.* at 676 (O'Connor, J., concurring in part and dissenting in part).

36. *Id.* at 661–62 (majority opinion).

37. 551 U.S. 393 (2007).

38. *See, e.g.*, Note, *Reflections on Justice Black and Freedom of Speech*, 6 VAL. U. L. REV. 316, 317 (1972); Sonja R. West, *The Problem with Free Press Absolutism*, 50 NEW ENG. L. REV. 191, 197 (2016).

39. 393 U.S. 503, 515 (1969) (Black, J., dissenting).

40. *E.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (joining majority opinion holding that "material support and resources" provision of the pertinent federal statute was not unconstitutionally vague when used to designate a group as a foreign terrorist organization); *Morse*, 551 U.S. 393 (joining majority opinion holding that public schools may prohibit students from displaying messages that promote drug use); Beard v. Banks, 548 U.S. 521 (2006) (joining plurality opinion holding that a prison policy denying "incorrigible" prisoners access to newspapers and magazines was not unconstitutional); Garcetti v. Ceballos, 547 U.S. 410 (2006) (authoring majority opinion holding that speech by public officials is not protected if engaged in as part of their official public duties); *Turner*, 512 U.S. 622 (authoring majority opinion holding that a law requiring that cable television operators "must carry" local broadcast channels was not an unconstitutional form of government-compelled speech).

41. Abrams, *supra* note 11.

42. *Id.*

Weisman.[43] Both of these cases are of great general interest, but my personal interest is heightened by the key role the ACLU played in both cases, as both counsel and plaintiff, challenging government-sponsored religious displays or exercises as violating the Establishment Clause. We won a partial victory in *Allegheny* and a complete victory in *Lee*.

Before I say more about these cases and Justice Kennedy's key opinions in them, I want to quote a distinguished lawyer, professor, and media commentator, Harry Litman, who was clerking for Justice Kennedy during the term when the Court ruled on the *Allegheny* case, and who is here today. The outstanding lawyer and ACLU leader who argued the *Allegheny* case in the High Court was my longtime friend and colleague Roz Litman—none other than Harry Litman's mother! Harry and I recently exchanged emails about this historic argument, and he kindly gave me permission to share with you the following excerpt from one of his emails:

> I had the ultra-strange experience of being like a parent watching his child in the school play but in reverse. You know probably where the clerks sit to the right of the advocates and I had to sit there keeping my cool while hanging on every word and metaphorically biting my nails.[44]

Harry's nail biting and his mother Roz's advocacy were evidently effective. In *Allegheny*, the Court did strike down one of two challenged government-sponsored displays of religious symbols during the winter holiday season, although it upheld a second such display.[45] In *Lee*, the Court struck down a school-sponsored graduation prayer.[46] In both cases, the Justices were deeply split and wrote impassioned opinions.

In *Allegheny*, Justice Kennedy concluded that both of the challenged displays should have been upheld, and he condemned the Court's striking down of one display in unusually harsh language. He accused the Court of harboring either a "latent hostility" or a "callous indifference"[47] toward religion. This prompted the following strong retort from Justice Blackmun, who had authored the Court's opinion:

> [Justice Kennedy's] accusations . . . [are] as offensive as they are absurd. Justice Kennedy apparently has misperceived a respect for religious pluralism, a respect commanded by the Constitution, as hostility or indifference to religion. No misperception could be more antithetical to the values embodied in the Establishment Clause.[48]

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43. 492 U.S. 573, 655–79 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part), *abrogated by* Town of Greece v. Galloway, 572 U.S. 565 (2014); 505 U.S. 577 (1992).

44. Email from Harry Litman to Nadine Strossen (Dec. 25, 2018, 5:46 PM) (on file with author).

45. 492 U.S. at 574–75 (majority opinion).

46. 505 U.S. at 599.

47. *Allegheny*, 492 U.S. at 657, 664 (Kennedy, J., concurring in the judgment in part and dissenting in part).

48. *Id.* at 610 (majority opinion).

Given this opinion, it was not surprising how Justice Kennedy voted three years later, after the oral argument in *Lee v. Weisman*, to reject the ACLU's challenge to government-sponsored graduation prayers.[49] In fact, Chief Justice Rehnquist assigned Justice Kennedy to write the majority opinion upholding such prayers. However, to the surprise of everyone—including, apparently, Justice Kennedy himself—he concluded that his draft of this opinion "looked quite wrong," as he wrote in a note to Justice Blackmun, explaining that he was reaching out in light of the "barbs . . . between the two of us" in their prior opinions.[50] Therefore, Justice Kennedy's assigned majority opinion rejecting the Establishment Clause challenge instead morphed into a majority opinion upholding that challenge, which was joined by Justice Blackmun and the Court's three other most liberal members.

Substantively, Justice Kennedy's opinion striking down the school-sponsored prayer stressed his consistent theme of government neutrality in the realm of individual conscience and expression. Just as government may neither favor nor disfavor any idea in the free speech context, it likewise may neither favor nor disfavor any belief in the religion context. As Justice Kennedy memorably put it in *Lee*:

> [R]eligious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. . . . [T]ransmission of religious beliefs and worship is . . . a choice committed to the private sphere, which itself is promised freedom to pursue that mission.[51]

Even in the earlier *Allegheny* case, Justice Kennedy had also championed the same overarching value of neutrality; his support for a different outcome in *Lee* reflects his recalibration of how best to promote neutrality. Recall, in *Allegheny*, Justice Kennedy had viewed the Court's striking down of government-sponsored religion as reflecting its hostility toward religion, not the required neutrality.

In contrast, in *Lee* Justice Kennedy rejected such a conclusion, given the facts of that case, stressing that Establishment Clause rulings are very fact-specific.[52] Specifically, Justice Kennedy disavowed any "hostility to" religious beliefs.[53] Echoing Justice Blackmun's opinion in *Allegheny*, Justice Kennedy's *Lee* opinion cited the Court's duty to enforce Establishment Clause limits on government endorsement of religion as an essential aspect of its "duty to guard . . . that sphere of inviolable conscience . . . which is the mark of a free

49. 505 U.S. at 599.

50. *See, e.g.*, Mark Walsh, *Justice's Papers Reveal Surprises on Key Education Cases*, EDUC. WK. (Mar. 17, 2004), https://www.edweek.org/ew/articles/2004/03/17/27blackmun.h23.html (internal quotation marks omitted).

51. *Lee*, 505 U.S. at 589.

52. *Id.* at 597.

53. *Id.* at 598.

people."[54] This perspective reflects Justice Kennedy's overarching vision of neutrality, including in other First Amendment contexts.

To be sure, just as I indicated above that I believe Justice Kennedy did not correctly enforce free speech precepts of content neutrality in important specific cases, I also believe that he did not correctly enforce principles of government neutrality toward religion in important specific cases.[55] Nonetheless, it would be unfair to conclude that he consistently departed from neutral First Amendment principles in favor of his conservative political and/or religious views.[56]

To the contrary, there are noteworthy instances in which Justice Kennedy staunchly upheld First Amendment principles even when the results were clearly at odds with conservative values. In addition to *Lee v. Weisman*, other striking examples include his votes upholding the right to burn or otherwise "desecrate" the U.S. flag[57] and his majority opinion striking down certain contested provisions of the federal Child Pornography Prevention Act (CPPA)[58] in *Ashcroft v. Free Speech Coalition*.[59] All of these decisions were closely split,[60] indicating that there was a plausible First Amendment rationale for reaching the opposite result. Justice Kennedy's separate concurring opinion in the first flag burning case underscores how personally difficult he found it to vote in accordance with his understanding of First Amendment principles, rather than his policy preferences; that opinion also indicates that he anticipated how deeply unpopular his vote would be.[61]

Indeed, all of these rulings unleashed a torrent of public and political criticism, from across the political spectrum.[62] The opposition to the Court's flag burning decisions was so intense and extensive that the first such ruling

54. *Id.* at 592.

55. *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565 (2014); Van Orden v. Perry, 545 U.S. 677 (2005).

56. *See* Erwin Chemerinsky, Opinion, *Kennedy's Supreme Court Legacy*, HERALD & REV. (Aug. 2, 2018), https://herald-review.com/opinion/columnists/erwin-chemerinsky-kennedy-s-supreme-court-legacy/article_601c0966-6d56-5d51-9cb3-b75f4d9512c3.html; Andrew Cohen, *Anthony Kennedy Was No Moderate*, NEW REPUBLIC (June 27, 2018), https://newrepublic.com/article/149449/anthony-kennedy-no-moderate; Amelia Thomson-DeVeaux, *Justice Kennedy Wasn't a Moderate*, FIVETHIRTYEIGHT (July 3, 2018, 5:58 AM), https://fivethirtyeight.com/features/justice-kennedy-wasnt-a-moderate.

57. *See* United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989) (Kennedy, J., concurring).

58. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 100 Stat. 3009, 3009–27 (codified at 18 U.S.C. § 2251 (Supp. II 1996)).

59. 535 U.S. 234 (2002) (striking down 18 U.S.C. § 2256(8)(B), (D) (2000)).

60. The decisions in *Eichman* and *Johnson* were split 5-4. *Free Speech Coalition* was split 6-3.

61. *See Johnson*, 491 U.S. at 420–21 (Kennedy, J., concurring) (noting that his joining the majority opinion "exacts its personal toll").

62. *See, e.g.*, *Court Sets Off Furor on Flag Burning*, *in* 45 CONG. Q. ALMANAC 1989, at 307, 307–14 (1990); Linda Greenhouse, *Supreme Court Voids Flag Law; Stage Set for Amendment Battle*, N.Y. TIMES (June 12, 1990), https://www.nytimes.com/1990/06/12/us/supreme-court-voids-flag-law-stage-set-for-amendment-battle.html; Linda Greenhouse, *Justices, 5-4, Back Protesters' Right to Burn the Flag*, N.Y. TIMES (June 22, 1989), https://www.nytimes.com/1989/06/22/us/justices-5-4-back-protesters-right-to-burn-the-flag.html; Warren Richey, *High Court Allows Virtual-Child Pornography*, CHRISTIAN SCI. MONITOR (Apr. 17, 2002), https://www.csmonitor.com/2002/0417/p01s06-usju.html.

immediately galvanized a mass, bipartisan movement to overcome it by amending the First Amendment. That proposed amendment has garnered the required support of three-quarters of state legislatures; it has gotten the required support of two-thirds of the U.S. House of Representatives; and it has come within one vote of the required two-thirds super-majority in the U.S. Senate.[63] Given Justice Kennedy's key role as the "swing vote" in all of these cases, and the fact that many conservative pundits and politicians viewed him as defecting from their camp, his votes triggered especially vitriolic attacks upon him.[64] Hence, it took no small measure of principle and courage to vote and write in these cases as he did.

Particularly striking in this regard is Justice Kennedy's opinion in the *Free Speech Coalition* case. Child pornography—sexually explicit depictions of minors—is understandably deeply reviled, and at the time of this case, our country was experiencing an especially strong wave of revulsion, which some commentators labeled a "moral panic."[65] Indeed, the CPPA itself was one manifestation of such a panic, criminalizing expression that in fact did not entail any abuse—or even any use—of any minor. Instead, the CPPA outlawed "virtual child pornography," images that "appeared to be" or were marketed as being, depictions of minors, but in fact were not.[66] In contrast to anti-obscenity laws, the CPPA included no exemption for works with "serious literary, artistic, political, or scientific value."[67] Examples of expression with such serious value, which could incur criminal penalties under the CPPA, included Academy Award-winning movies that Justice Kennedy cited in his opinion, such as *American Beauty* and *Traffic*, since they employed adult actors to play the roles of minor teenagers engaged in sexual conduct.[68]

Despite the CPPA's clear constitutional flaws, and its endangerment of a vast array of artistically acclaimed and mainstream expression, it is not surprising that the constitutional challenges to it were almost all repudiated in the lower courts. Given its use of the demonizing label "child pornography," especially in the climate of the times, this outcome was probably predictable. Out of the approximately forty federal court judges who considered

63. *See Background on the Flag Desecration Amendment*, ACLU, https://www.aclu.org/other/background-flag-desecration-amendment (last visited May 13, 2019); Carl Hulse & John Holusha, *Amendment on Flag Burning Fails by One Vote in Senate*, N.Y. TIMES (June 27, 2006), https://www.nytimes.com/2006/06/27/washington/27cnd-flag.html.

64. *See, e.g.*, Jason DeParle, *In Battle to Pick Next Justice, Right Says, Avoid a Kennedy*, N.Y. TIMES (June 27, 2005), https://www.nytimes.com/2005/06/27/politics/in-battle-to-pick-next-justice-right-says-avoid-a-kennedy.html; *Supreme Court Rules First Amendment Protects "Virtual" Child Porn*, CONCERNED WOMEN FOR AM. (Aug. 23, 2002), https://concernedwomen.org/supreme-court-rules-first-amendment-protects-virtual-child-porn.

65. *See, e.g.*, Suzanne Ost, *Children at Risk: Legal and Societal Perceptions of the Potential Threat that the Possession of Child Pornography Poses to Society*, 29 J.L. & SOC'Y 436 (2002).

66. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 100 Stat. 3009, 3009–27.

67. Miller v. California, 413 U.S. 15, 23 (1973).

68. Ashcroft v. Free Speech Coal., 535 U.S. 234, 247–48 (2002).

constitutional challenges to the CPPA between 1996 and 2002 (when *Ashcroft v. Free Speech Coalition* was decided), a striking thirty-seven of them found some rationale for rejecting those challenges.[69] The judges who rejected the challenges included at least nine who had been appointed by Democratic Presidents and several who had records and reputations that were in general supportive of free speech values. That even such judges could not bring themselves to neutrally enforce free speech principles in the context of expression that Congress sought to outlaw as "child pornography" underscores the courage and principled consistency in Justice Kennedy's opinion.

As for the occasional disparity between Justice Kennedy's forceful invocations of neutral First Amendment principles in the abstract and his enforcement of such principles in actual cases, I would like to inject two cautionary notes. First, no matter how self-confidently each of us likely believes that we are consistently adhering to neutral principles, at least some observers would criticize what they view as deviations from the same. Given my ACLU leadership experience, I can attest that critics regularly chastise the ACLU on that ground. To cite one recent example, in the wake of our defense of the free speech rights of white nationalist demonstrators in Charlottesville in 2017, we have been assailed both for insufficiently adhering to our principles concerning

69. The following decisions all rejected constitutional challenges to the CPPA: United States v. Paul, 274 F.3d 155 (5th Cir. 2001); United States v. Peebles, 275 F.3d 46 (5th Cir. 2001) (per curiam), *vacated*, 535 U.S. 1014 (2002) (mem.); United States v. Fox, 248 F.3d 394 (5th Cir. 2001), *aff'g* 248 74 F. Supp. 2d 696 (E.D. Tex. 1999), *vacated*, 535 U.S. 1014 (2002) (mem.); United States v. White, 2 F. App'x 295 (4th Cir. 2001); United States v. Mento, 231 F.3d 912 (4th Cir. 2000), *vacated*, 535 U.S. 1014 (2002) (mem.); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999); United States v. Hilton, 167 F.3d 61 (1st Cir. 1999), *rev'g* 999 F. Supp. 131 (D. Me. 1998); United States v. Brown, No. 00-CR-112-C, 2001 WL 34373161, at *6 (W.D. Wis. Mar. 16, 2001) (noting that First Amendment questions were present but holding that CPPA was not unconstitutional); United States v. Berry, No. 00-CR-89-B-S, 2001 WL 243491 (D. Me. Mar. 12, 2001); United States v. Fiscus, 105 F. Supp. 2d 1219 (D. Utah 2000); United States v. Pearl, 89 F. Supp. 2d. 1237 (D. Utah 2000), *aff'd in part, vacated in part*, 324 F.3d 1210 (10th Cir. 2003); Free Speech Coal. v. Reno, No. C 97-0281VSC, 1997 WL 487758 (N.D. Cal. Aug. 12, 1997), *aff'd in part, rev'd in part*, 198 F.3d 1083 (9th Cir. 1999); United States v. James, 55 M.J. 297 (C.A.A.F. 2001), *aff'g* 53 M.J. 612 (N.M. Ct. Crim. App. 2000). In contrast, only the following decisions reached the opposite conclusion, striking down the CPPA as unconstitutionally vague and overbroad: *Free Speech Coal.*, 198 F.3d 1083 (two judges holding that CPPA was unconstitutional due to its not being content-neutral and being vague and overbroad, with one judge dissenting), *rev'g* No. C 97-0281VSC, 1997 WL 487758 (N.D. Cal. Aug. 12, 1997); United States v. Hilton, 999 F. Supp. 131 (D. Me. 1998) (holding that CPPA was unconstitutional due to one section being vague and overbroad, therefore finding its definition of "child pornography" constitutionally invalid), *rev'd*, 167 F.3d 61 (1st Cir. 1999).

equality rights[70] and for insufficiently adhering to our principles concerning free speech and association rights.[71]

The second cautionary note stresses what I consider to be the most important perspective when we assess the records of any of our fellow/sister human beings, with our inherent imperfections. It is a statement I recall having read from an unknown source, which refers to the justly celebrated architects of our admirable—but certainly imperfect—Constitution. That statement applies as well to Supreme Court Justices and others who strive to advance constitutional principles, including Justice Anthony Kennedy. Along with the rest of us, the Constitution's Framers were imperfect, inconsistently adhering to their professed principles. We should celebrate the remarkable ideals they embraced in the Declaration of Independence: that we are all "created equal," equally entitled to certain "unalienable rights." And we should all castigate their deep deviations from those ideals, including by perpetuating enslavement and subjugation of too many of their fellow/sister human beings. The statement I read urges us to be inspired and guided by their *vision*, despite their *blind spots.*

I will close with one of Justice Kennedy's statements that most eloquently captures his powerful vision of government respect for individual autonomy in the realm of ideas and beliefs. Despite what we might view as his occasional blind spots in implementing it, that vision should continue to inspire and guide us. As he wrote: "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal."[72]

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70. *See* Joseph Goldstein, *After Charlottesville, A.C.L.U. Braces for the Next Alt-Right Case*, N.Y. TIMES (Oct. 4, 2017), https://www.nytimes.com/2017/10/04/us/aclu-charlottesville-white-supremacists.html; Joseph Goldstein, *After Backing Alt-Right in Charlottesville, A.C.L.U. Wrestles with Its Role*, N.Y. TIMES (Aug. 17, 2017), https://www.nytimes.com/2017/08/17/nyregion/aclu-free-speech-rights-charlottesville-skokie-rally.html; Ned Oliver, *Board Member of Va. ACLU Resigns in Protest of Group's Stance on Charlottesville Rally*, RICHMOND TIMES-DISPATCH (Aug. 13, 2017), https://www.richmond.com/news/virginia/board-member-of-va-aclu-resigns-in-protest-of-group/article_2d030782-80bc-5f4b-b5ef-73d525a69a6b.html.

71. *See* Wendy Kaminer, *The ACLU Retreats from Free Expression*, WALL ST. J. (June 20, 2018, 6:17 PM), https://www.wsj.com/articles/the-aclu-retreats-from-free-expression-1529533065; Robby Soave, *Will the ACLU Defend Controversial Speech? Ira Glasser, Wendy Kaminer, Nadine Strossen React to the Memo*, REASON: HIT & RUN BLOG (June 26, 2018, 9:50 AM), https://reason.com/blog/2018/06/26/will-the-aclu-defend-controversial-speec.

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

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