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Anthony M. Kennedy: A Study of His Judicial Opinions

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ANTHONY M. KENNEDY: A STUDY OF HIS JUDICIAL OPINIONS

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TABLE OF CONTENTS

TABLE OF CASES..... 1

I. INTRODUCTION..... 2

II. STATUTORY INTERPRETATION..... 4-11

INTRODUCTION..... 4

DECISIONS..... 6

SUMMARY..... 10

III. CONSTITUTIONAL INTERPRETATION..... 12-25

INTRODUCTION..... 12

HIS OWNS VIEWS..... 14

DECISIONS..... 16

SUMMARY..... 24

IV. CONCLUSIONS..... 26-28

BIBLIOGRAPHY..... 29-30

TABLE OF CASES

AFSCME v. State of Washington, 770 F2d. 1401 (9th Cir. 1985), 22.

Arizona v. Roberson, 108 S.Ct. 2093 (1988), 19,21.

Bank of Nova Scotia v. United States, 108 S.Ct. 2369 (1988), 18.

Beller v. Middendorf, 632 F2d. 788 (9th Cir. 1980), 20.

Bethesda Hosp. Ass'n v. Bowen, 108 S.Ct. 1255 (1988), 8.

Bowen v. Georgetown Univ. Hosp., 109 S.Ct. 468 (1989), 9.

Chadha v. Immigration and Naturlization Service, 634 F2d. 408 (9th Cir. 1980), 23,28.

Jones v. Thomas, 109 S.Ct. 2522 (1989), 18.

K-Mart v. Cartier, 108 S.Ct. 1811 (1988), 6,7.

National Treasury Employees Union v. Von Raab, 109 S.Ct. 1354 (1989), 16,17.

Patterson v. McLean, 109 S.Ct. 2363 (1989), 6,7.

Public Employees Retirement System of Ohio v. Butts, 109 S. Ct. 2854 (1989), 9.

Runyon v. McCrary, 96 S.Ct. 2586 (1976), 7.

Skinner v. Railway Labor Executives Ass'n, 109 S.Ct. 1402 (1989), 16.

Texas v. Johnson, 109 S.Ct. 2533 (1989), 16,23.

Topic v. Circle Reality, 532 F2d. 1273 (9th Cir. 1976), 9,10,28.

United States v. Broce, 109 S.Ct. 757 (1989), 18.

INTRODUCTION

The last Reagan appointee to the United States Supreme Court was Anthony M. Kennedy. Formerly a judge of the Court of Appeals for the Ninth Circuit, Kennedy was appointed by President Ford. He was also a member of a special California commission appointed by Governor Reagan to draft Proposition 1 to reduce state spending. Justice Kennedy has strong ties with the Republican party, but conservatives as well as liberals had questions as to what Kennedy would actually do once on the Supreme Court. Charles F. Williams writing for the ABA Journal suggested that the Senate was pleased with Kennedy because he was not the ideologue that Bork was. [1] Kennedy's lack of identifiable ideology was one of the main factors that got him appointed to the Court. First, it allowed the Senate Judiciary Committee to come to a compromise. [2] Second, it would allow the Senators to explain why they had voted for him in the event that he might decide cases unfavorably. The senators could say, "'Hey, I didn't know that he was going to vote that way.'" [3] They wanted a justice who appeared middle-of-the-road, and numerous articles were written prior to his confirmation discussing Kennedy's middle of the road attitudes. Now that Kennedy has

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1 Williams, The Opinions of Anthony Kennedy No Time for Ideology, 74 A.B.A. J. 56 (1988).
2 Ibid.
3 Ibid.

been on the Court for more than one term, it is possible to asses wether he is a middle-of-the-road Justice. Kennedy is not a middle-of-the-road judge. Kennedy is very much a conservative Justice who sees the Constitution as a document of principles to be strictly adhered to, and who sees the role of a judge as a non-activist. These conclusions were drawn after reading his majority opinions, his concurring opinions, and his dissenting opinions for the 1988 and 1989 Court Terms. Some of his more important appellate decisions were mentioned by authorities in articles written after his nomination to the Court. Those decisions will also be analyzed in this paper. . There are over 400 opinions authored by Kennedy since his appointment to the Court of Appeals for the Ninth Circuit and the Supreme Court; therefore, only a small number of them will be analyzed for this paper.

The paper is divided into two parts. The first part is devoted to statutory interpretation. In this section, I will analyze cases questioning the validity or application of statutes or regulations. The second section centers on constitutional interpretation. Within this section, I will explain how Kennedy sees the role of the judge. In addition, I will analyze some cases involving issues of constitutional interpretation. Finally, I will analyze some of the pre-confirmation articles that speculated about his behavior on the Court.

STATUTORY INTERPRETATION

INTRODUCTION

There are maxims of self restraint governing constitutional as well as statutory interpretation. Five such maxims will be discussed and applied to Kennedy's interpretation of statutory questions.

First, many of the cases or controversies that reach the Supreme Court are decided on statutory grounds rather than constitutional grounds. This is a maxim of self restraint. [4] " (I)f a case or controversy can be decided on any other (grounds) than constitutional grounds-- such as statutory construction, which constitutes the greatest single area of the Court's work,...--the Court will be eager to do so. " [5]

Another maxim was articulated in an article written by Louis Fisher. [6] "A more reliable safeguard against judicial activism is the Court's ability to sidestep sensitive issues or decide in such a way as to allow the other branches and state governments to re-enter the field and make the necessary adjustments and revisions to the court doctrine." [7]

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4 Henry J. Abraham, ed., The Judicial Process (New York, NY: Oxford University Press, 1986), p. 386.
5 Ibid.
6 Fisher. Methods of Constitutional Interpretation: The Limits of Original Intent. 18 CUMB. L. REV. 67 (1987/1988).
7 Ibid.

In addition to these maxims there are others that also deal with statutory interpretation. "If the court does find that it must hold a law unconstitutional, it will usually try hard to confine the holding to that particular section of the statute which was successfully challenged." [8] "In any event, the Court will not normally formulate a rule of constitutional law broader than is required by the precise facts to which it is applied." [9]

Another maxim is, "In the event of a validity challenged statute, the presumption of its constitutionality is always in its favor." [10] In other words, the piece of legislation will always be considered constitutional unless the challenging party can prove otherwise.

Finally, Justices who read the exact wording of a statute are exhibiting another form of judicial self restraint. They use a rule called the "plain meaning". The answer to the case or controversy can most often be found in the plain meaning of the statute without necessarily looking at legislative intent.

> `Where its words are plain, clear and determinate, they require no interpretation.... Where the words admit of two senses, each of which is conformable to general usage, that sense is to adopted, which without departing from the literal import of the words, best harmonizes with the nature and objectives, the scope and design of the instrument.' [11]

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8 Abraham, The Judicial Process, p. 389.
9 Ibid., p. 386.
10 Ibid., p. 385.
11 Sheldon Goldman, and Austin Sarat, eds., American Court Systems: Readings in Judicial Procedure and Behavior (White Plains, New York: Longman Inc.,

Justice Kennedy most definitely uses the plain meaning rule along with other maxims of self-restraint. Two opinions, though, clearly exemplify the plain meaning reasoning. They are K-Mart v. Cartier, 108 S.Ct. 1811 (1988), and Patterson v. McLean, 109 S.Ct. 2363 (1989).

Decisions

In K-Mart v. Cartier the Court had to determine the validity of Customs Service Regulation 19 CFR sections 133.21(c)(1)-(3). This section of a 1987 regulation outlined instances when section 526 of the 1930 Tariff Act were not applicable. Kennedy reasoned that sections (c) (1),(2) did not violate section 536 of the Tariff Act because it resolved statutory ambiguity in such words as "owned by" and "merchandise of foreign manufacture". [12] It is apparent from the opinion that if a subsection of a later or different act clarifies the original act, and it does not directly change the plain meaning of the act, it is not overruled. In this case, however, a section of the Customs Service Regulation was found contradictory to the original section of the Tariff Act. 19 CFR section 133.21 (c)(3) directly contradicted "gray market strategies" prohibited by the Tariff Act and it was held violative of the Tariff Act. Here, the holding of only a particular section of a statute

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1989), p. 587.
12 108 S.Ct. at 1811.

in violation of the original act regulating that area of commerce represents a maxim of self-restraint.

An article in the Los Angeles Daily Journal examined Kennedy's opinion in K-Mart v. Cartier. The author correctly pointed out that Kennedy used a doctrine, "... that the plain meaning of a statute or regulation governs, virtually regardless of legislative purpose and practical impact." [13]

In Patterson v. McLean Kennedy avoided a potential constitutional question involving racial discrimination in the dismissing of employees by looking only to the very specific section brought to the attention of the court by the parties. The parties to the case raised the question pursuant to 42 U.S.C. section 1981. The petitioner, a black woman, claimed that she was not promoted to accountant clerk solely because of her race. She brought suit under 42 U.S.C. section 1981. The Court in Runyon v. McCrary, 96 S.Ct. 2586 (1976), previously held that in the making of contracts race could not be a factor under 42 U.S.C. section 1981. Justice Kennedy, writing for the Court's majority, reasoned that in Patterson v. McLean the continuing of contracts should have been brought up under Title VII of the 1964 Civil Rights Act and not section 1981 because the code deals only with the making of contracts, not the continuing or breaking of contracts. This opinion is an example of the plain meaning

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13 Louis B. Schwartz, "Kennedy: The Newest Justice Stakes Out His Position: The `Gray Market' Case `Plain Meaning' And Other Potents," Los Angeles Daily Journal, 30 Sept 1988, p. 3.

rule and of the maxim confining statutory questions to the precise issues presented.

In other cases Kennedy also reached questions of statutory interpretation. Bethesda Hosp. Ass'n v. Bowen, 108 S.Ct. 1255 (1988), was the first opinion written by Kennedy for the Court. This case dealt with the authority of a review board to hear a case concerning a 1979 Medicare regulation disallowing certain claims for malpractice insurance premium costs. Kennedy held that the plain language of the statute states that the review board had the authority to hear claims against regulations. [14] Kennedy in this case preferred to let the review board decide the issue in keeping with the second maxim of self-restraint, which is to allow other branches of the government to decide the issue or to make necessary changes.

In the same article in the Los Angeles Daily Journal the author questioned the validity of answering questions solely on the plain language of the statute or regulation because in Bethesda no substantive or practical significance of the controversy was discussed. [15] The issue was far too technical an issue according to the author. This path taken by Kennedy was extremely self-restraintist in nature. Because he does not see himself or the role of judge in general as appropriately being activist, a narrow statutory issue was decided.

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14 108 S.Ct. at 1257.
15 Fisher, "Methods of Constitutional Interpretation," p. 4.

Occasionally Kennedy will look to legislative history to help resolve any question not readily resolvable by the language of the statute alone. There are two such cases. In the first, Public Employee Retirement System of Ohio v. Butts, 109 S.Ct. 2854 (1989), the respondent claimed that a requirement that anyone receiving disability benefits be under the age of 60 violated the Age Discrimination in Employment Act. Kennedy writing for the majority, looked to the legislative intent of the act. Its purpose was to prohibit age as a factor for hiring, firing, and wages and salaries. As long as the Ohio retirement plan did not deceive the Age Discrimination in Employment Act on its face, reasoned Kennedy, the insurance, retirement, and disability plans were exempt from the prohibitions of the A.D.E.A.

In another case Bowen v. Georgetown Univ. Hosp., 109 S.Ct. 468 (1988), Kennedy used legislative intent to determine that the Secretary of Health and Human Services did not have the power to impose retroactive cost limitations on reimbursements for Medicare. The plain language of the statute giving power to the Secretary of Health and Human Services was looked at first, and then as a last resort the legislative intent.

The best example of Kennedy's willingness to sidestep a major constitutional issue in favor of a narrow statutory issue is Topic v. Circle Reality, 532 F2d. 1273 (9th Cir. 1976). Kennedy wrote for the majority in this case from the

Court of Appeals for the Ninth Circuit. A citizens action group brought suit against the reality company for steering whites and blacks into separate neighborhoods on the basis of race. The citizens group brought suit under 42 U.S.C. section 3612. Kennedy held that these people were third party complainants because they were not directly effected themselves and because they were not home buyers, but rather, homeowners. Kennedy admitted that racial steering is illegal, but section 3612 is not the proper section to "vindicate the rights of third parties". [16] Kennedy explained that section 3610 "permits suit by any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur." [17] The fact that Kennedy distinguished between section 3612 and section 3610 after conceding that racial steering is illegal best exemplifies his judicial self-restraint posture.

SUMMARY

Justice Kennedy clearly maintains a posture of judicial self restraint in statutory interpretation. If the code or statute is clearly written, or if a subsequent code or statute to a previous code or statute clarifies, the plain meaning of the exact words will be used to resolve the issue. Only in rare instances does he look to legislative

16 532 F2d. 1275 (9th Cir. 1976).
17 532 F2d. at 1275.

intent. This is in keeping with his overall view of the role of judge. The judge should apply the rules or principles and not use much judicial discretion. The problem with this mode of interpretation is that,"[e]ven the most carefully drafted legislation has gaps." [18]

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18 Richard A. Posner, "What Am I? A Potted Plant? The Case Against Strict Constructionism", The New Republic, Sept 28 1987, p. 24.

CONSTITUTIONAL INTERPRETATION

INTRODUCTION

Since Marbury v. Madison, the doctrine of judicial review has been used to judge the constitutionality of legislation or actions. Each justice has a view about the use of judicial review. Generally there are three approaches to constitutional interpretation. [19] They are absolutism, balancing of interests, and preferred freedoms.

Absolutists believe only the words of the Constitution or an amendment can be used to determine constitutionality. Other scholars have referred to them as literalists or textualists. [20] These people also use the original intent of the framers to help guide their opinions. They can be either activist or restraintist in nature. Justice Black was an avid absolutist and an activist on the Warren Court. [21]

Then there are those who when faced with a constitutional question balance the interests of the government against the interests of the individual. These jurists are said to be interest balancers. [22] Interest balancers feel that, "although they have accepted the premise that the courts are political institutions, they

19 Craig Ducat, and Harold W. Chase, Constitutional Interpretation (St. Paul, Minn: West Pub Co., 1988), p. 57.
20 Cole. Constitutional Interpretation: A Bicentennial Reflection. 18 CUMB. L. REV. 13 (1987/1988).
21 Ducat, Constitutional Interpretation, p. 57.
22 Ibid., p. 61.

feel bound by the fundamental assumption that public policy ought to be expressed through the actions of elected officials." [23] These judges, therefore, take a self-restraintist position. [24]

Preferred freedoms is a third approach to constitutional interpretation. Jurists following this approach believe that some rights are fundamental to a democratic system of government. These people take into account that there are permanent and unprotected minorities, that the Constitution needs to be flexible to deal with an ever changing world, and that the interests of the individual always come before the government unless the government can prove otherwise. [25] This position is clearly activist. "Precisely because the Court is not a majoritarian institution, it has a constitutional responsibility to carefully scrutinize majority passed legislation that directly impinges upon the exercise of those rights by minorities through which their political demands can be expressed." [26]

If a justice of the Supreme Court has an ideology that he/she is comfortable with it may run contrary to an existing doctrine or precedent. For example, a justice who is an absolutist, and who sees the establishment clause of the first amendment merely as a prohibition against

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23 Ibid.
24 Ibid.
25 Ibid., p. 67.
26 Ibid.

governmentally established state religion will run head on into opinions that see the establishment clause as a barrier to any governmental contact with any religion. Justices with differing views of jurisprudence have effected many judicial doctrines and legal concepts by expressing these views in their opinions. Justices are, however, bound by stare decisis. This to some extent, determines how a case should be decided.

Although Justice Kennedy sees himself as a literalist and the role of judge as a self-restraintist, his opinions are those of a judge who balances interests. At first it may seem odd, but one has to look at the precedent with which he has to work. The Warren court was more activist in nature than the court on which he now sits appears to be. Kennedy has to work within the existing legal norms, but he can distinguish cases from one another, or he can, for example, find compelling government interests to regulate activity not previously regulated. This clearly explains the difference between the speeches he has given about his judicial philosophy and some of his actual opinions.

HIS OWN VIEWS

"The first critical assumption (of judicial absolutists) is that the Constitution is a collection of rules." [27] In 1987 a legal newspaper ran two articles which were essentially speeches that Kennedy had given about his

27 Ibid., p. 57.

view of jurisprudence sometime before his appointment to the Supreme Court. In the first article entitled "Wise Restraints Make Us Free", Justice Kennedy explained, "(t)he whole idea of a written Constitution is that there must be some fixed principles, some immutable laws, some constraints that apply from one generation to the next.... And therefore it's necessary to develop a theory of constitutional interpretation that respects that intention and that confines the judiciary." [28] In another article published about a month later Kennedy said, "To recognize the necessity of continued interpretation does not give us a license to interpret the document for utilitarian ends....The Constitution cannot be divorced from its logic and its language, the intention of its framers, the precedents of the law, and the historic values of our people." [29] Kennedy feels that, "...(T)he actual text can settle more cases than its given credit for." [30] He goes on to say that if the answer is not within the actual text then the original intent of the Framers needs to be used. [31] In addition to being a literalist, Kennedy is a conservative.

Kennedy is a judicial conservative who respects precedent and the dangers of pursuing abstract philosophical agendas. [32] Kennedy himself stated, "It's a fundamental

28 "Judge Kennedy: 'Wise Restraints Make Us Free," Legal Times, 16 Nov., 1987, p. 14.
29 "Change But Not For The Sake of Change," Legal Times, 7 Dec., 1987, p. 21.
30 Ibid.
31 Ibid.
32 Peter Schrang, "'Webster' Could Answer Many Questions

misconception, though, to say that conservatives oppose change. To the contrary, conservatives have an acute awareness of the necessity for change. They simply do not embrace it for its own sake." [33] The absolutist approach can be either activist or restraintist in nature; therefore it is important to note Kennedy's conservative political position. It is the reason Kennedy articulates in his speeches that he chooses the restraintist absolutist position.

A review of his opinions, however, seem not to be literalist at all. In fact, they seem to be balancing the interests of the government versus the interests of the individual. The exception appears to be his concurring opinion in Texas V. Johnson, 109 S.Ct. 2533 (1989). Because the balancing of interests approach is a self-restraintist position, he is comfortable with this approach when the absolutist position cannot be used.

Decisions

Kennedy's most striking examples of this balancing approach is in Skinner v. Railway Labor Executives Ass'n, 109 S.Ct. 1402 (1989) and National Treasury Employees Union v. Von Raab, 109 S.Ct. 1354 (1989). The Skinner v. Railway Labor Executives Ass'n opinion authorizes the Federal Railroad Administration to mandatorally test employees for

About Kennedy," Los Angeles Daily Journal, 28 Ap., 1989, p. 4.

33 "Change", p. 21.

drug use under specified serious accidents or safety violations. Justice Kennedy explains that although drug testing through blood samples and urine tests is a "search" under the fourth amendment, the government agents conducting the testing do not need probable cause, nor do they need a search warrant. Kennedy reasoned, "For the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable." [34] Rule "G" that had allowed workers to identify possible drug use and abuse did very little to eradicate the problems created by drug use in the railroad industry; therefore, the government had enough of a compelling interest in regulating the railroads for the safety of all those involved, according to the Court. The government in these circumstances can use the threat of drug testing as a deterrent to future drug use in the industry. This case was decided along with another mandatory drug testing case.

In National Treasury Employees Union v. Von Raab, D.E.A. agents are automatically tested for drug use when they are promoted to positions that deal directly with interdiction of illegal drug trafficking, or that require agents to carry firearms within the Drug Enforcement Agency. The compelling interest of the government to fight the drug war far out weighed the interests of the individuals.

> ... (w)hen a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance

34 109 S.Ct. at 1414.

> the individual's privacy expectations against the government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context. [35]

There is no need for a showing that there be a history of drug use by the agents; it is enough that they work in sensitive areas of drug enforcement.

Kennedy, in three cases that questioned criminal procedure, ruled in favor of the government. The petitioner in Bank of Nova Scotia v. U.S., 108 S.Ct. 2369 (1988), claimed the district court had erred when it threw out grand jury indictments on the grounds that the rules of federal procedure were violated causing the defendants a harmful and prejudiced effect in the grand jury proceedings. Kennedy agreed that the district court had erred because the rules that were violated were not substantial enough to harm or prejudice the grand jury. In another case, U.S. v. Broce, 109 S.Ct. 757 (1989), the respondents pleaded guilty to two counts of conspiracy, and subsequently were found guilty. They contended that the conviction should be set aside because in fact it was one incident of conspiracy; therefore, the double count violated guarantees against double jeopardy. Kennedy allowed the conviction to stand because they admitted their guilt to two crimes in a confession to police, and because they pleaded guilty to two counts of conspiracy. Kennedy wrote on another double jeopardy case from Missouri, Jones v. Thomas, 109 S.Ct. 2522

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35 109 S.Ct. at 1390.

(1989). The petitioner was sentenced for two felonies as a result of one crime; however, under Missouri law a defendant can only be sentenced for one. The governor commuted the lesser sentence and the time already served was subtracted from the existing sentence. The petitioner filed for a writ of habeas corpus. Kennedy held that because the error was realized, and because time was subtracted from the existing sentence, there was no showing of a double jeopardy violation.

In a dissenting opinion with Chief Justice Rehnquist, Kennedy distinguishes Arizona v. Roberson, 108 S. Ct. 2093 (1988) from the Miranda ruling. Kennedy reasoned that if a suspect is read his Miranda rights and refuses to talk to police until his lawyer is present and a second investigation from a different crime brings police to question the suspect while in police custody, he must again waive his right to talk until his lawyer is present. In other words, all questioning for any crime is not halted when a suspect invokes his Miranda rights, only the questioning for the crime for which his Miranda rights were read. "Allowing authorities who conduct a separate investigation to read the suspect his Miranda rights and ask him wether he wishes to invoke them strikes an appropriate balance, which protects the suspect's freedom from coercion without unnecessarily disrupting legitimate law enforcement efforts." [36] The author of a Los Angeles Daily Journal

36 108 S.Ct. at 2103.

article expressed, "Kennedy's Roberson dissent with Rehnquist manifests a disposition to overrule Miranda, and a readiness to abandon 'plain meaning' interpretation when such interpretation runs counter to strongly held policy references." [37] This opinion partly overstated Kennedy's dissent in this case. Kennedy refused to extend Miranda beyond its original scope by distinguishing it from other cases, rather than a disposition to overrule it all together. This was in keeping with Kennedy's self-restraintist position to refuse to extend the facts of one case beyond those of the original case. "The technique of restricting a precedent to a narrow range enables a judge to depart, in a sense, from prior rulings without defying or ... overturning them." [38] Kennedy was clearly interested in protecting the individuals interests which would not lead to a conclusion that he is willing to overrule Miranda all together.

Two opinions from the Court of Appeals for the Ninth Circuit also exhibit Kennedy's balancing of interest approach. In Beller v. Middendorf, 632 F2d. 788 (9th Cir. 1980), former sailors brought suit alleging that the Navy's regulation which allows the dismissing of persons who admit to homosexual activity violated the due process clause of

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37 Louis B Scwartz,"Kennedy: The Newest Justice stakes His Position: The 'Gray Market' Case,'Plain Meaning', and Other Portents," Los Angeles Daily Journal, 30 Sept., 1988, p. 5.

38 Martin P Golding, Legal Reasoning (New York NY: Alfred A Knopf, 1984), p. 101.

the Fifth Amendment. Kennedy wrote the majority opinion. He explained that the dismissals did not violate the fifth amendment protection:

> We are limited to determining whether or not the Constitution prohibits the Navy from adopting the rule before us. We cannot say that constitutional limitations have been exceeded here, and therefore, we do not find the regulation is invalid. [39]

Kennedy refused to come to a conclusion of whether homosexual activity is a fundamental right of privacy. "We decide at the outset that this case does not require us to address the question whether consensual private homosexual conduct is a fundamental right...." [40] Kennedy, like in the Arizona v. Roberson dissent, applied the principle of stare decisis. Kennedy explained,

> Recent decisions indicate that substantive due process scrutiny of a government regulation involves a case-by-case balancing of the nature of the individual interest allegedly infringed, the importance of the government interests furthered, the degree of infringement, and the sensitivity of the government entity responsible for the regulation to more carefully tailored alternative means of achieving its goals. [41]

Kennedy finally held:

> We conclude, in these cases, that the importance of the government interests furthered, and to some extent the relative impracticality at this time of achieving the Government's goals by regulations which turn more precisely on the facts of an individual case, outweigh whatever heightened solicitude is appropriate for consensual private homosexual conduct. [42]

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39 632 F2d. at 792.
40 632 F2d. at 807.
41 Ibid.
42 Ibid.

Kennedy felt that the fact that it was the Navy which was the employer in this case was crucial to his decision because he wrote, "...that some kinds of governmental regulation of private consensual homosexual behavior **may** (emphasis added) face substantial constitutional challenge."[43] .

Another example of the balancing of interests approach is apparent in a case from the court of appeals for the Ninth Circuit involving pay differences between jobs held by men and women within the Washington state government. In addition to the words of the law, Kennedy looked to legislative intent as well to help decide the case. The American Federation of State County and Municipal Employees brought suit against the state of Washington in AFSCME v. State of Washington, 770 F2d. 1401 (9th Cir. 1985). It alleged that Washington paid its women workers less for jobs of comparable worth to men in violation of Title VII of the 1964 Civil Rights Act. Kennedy held that

> While the Washington legislature may have the discretion to enact a comparable worth plan if it chooses to do so, Title VII does not obligate it to eliminate an economic inequality it did not create....We find nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental economic principles such as the laws of supply and demand or to prevent employers from competing in the labor market. [44]

While Kennedy was on the Court of Appeals for the Ninth Circuit, he wrote an insightful case demonstrating his

43 Ibid.
44 770 F2d. at 1407.

literalist approach to jurisprudence. In 1980, a case came before the Court of Appeals concerning a congressional veto over ruling an Immigration and Naturalization Service finding. In Chadha v. Immigration and Naturalization Service, 634 F2d. 408 (9th Cir. 1980), Kennedy held that statute unconstitutional. The statute gave Congress a one-house legislative veto over ruling an agency finding. The veto violated the doctrine of separation of powers established by the Constitution, because the INS is essentially an agency of the executive branch. Kennedy wrote, the veto is an " assumption of power...both disruptive and unnecessary to the attainment of a legitimate purpose." 45 Kennedy feels very strongly that each branch of government stay with in its constitutional mandate. This opinion falls with in his literalist approach toward constitutional interpretation. The concurring opinion written for the controversial flag burning case, Texas v. Johnson, 109 S.Ct. 2533 (1988), also exhibits this position.

> For we are presented with a clear and simple statute to be judged against a pure command of the Constitution....The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result....With all respect to those views, (of Chief Justice Rehnquist, Justices White and O'Connor dissenting) I do not believe the Constitution gives us the right to rule as the dissenting members of the Court urge, however this judgement is to announce....the fact remains that

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45 634 F2d. at 409.

> his acts were speech, in both the technical and the fundamental meaning of the Constitution.[46]

In a somewhat different but related vain, Thomas Grey in a 1975 law review article articulated the sentiments written by Kennedy in his concurring opinion.

> ...(W)hen the court strikes down a popular statute or practice as unconstitutional, it may always reply to the resulting public outcry: 'We didn't do it - you did.' The people have chosen the principles that the statute or practice violated, have designated it as fundamental, and have written it down in the text of the Constitution for the judges to interpret and apply.[47]

Justice Kennedy said just that to the other members of the Court, and to that part of the public that is offended by flag burning.

SUMMARY

Many Supreme Court watchers speculated that Kennedy would be a middle-of-the-road justice. This could not be more untrue. Today as well as his past years on the Court of Appeals for the Ninth Circuit, Justice Kennedy is not a middle-of-the-road justice. When he can, he is an absolutist. Often, though, the Court has in preceding decisions established a framework within which he must work. When those cases arise, Kennedy will balance the interests in a position of self-restraint most comfortable to him. One author wrote that although justices act in a self-restraintist manor their acts may actually be activist in

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46 109 S.Ct. at 2548.

47 Grey. Do We Have an Unwritten Constitution? 27 STAN. L. REV. 705 (1975).

nature. [48] This is precisely what Justice Kennedy's opinions during his initial tenure appear to do. He takes the restraintist position to achieve activist ends. Whether he actually wants to achieve activist ends with his restaintist position is another matter, and is best left for future research.

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48 Ely. Constitutional Interpretivism:Its Allure and Impossibility. 53 IND. L.J. 399 (1977/1978).

CONCLUSIONS

Some the works of Anthony M. Kennedy have been used to analyze his decisions, and the conclusions drawn here are not the same as those offered by some journalists and scholars. Many of these authorities thought they knew his behavior, but they did not. The first such article was published in December 1987. It explained that unlike Bork, Kennedy appeared to be a middle-of-the-road judge. "In less strident tones, he declared that he has no fixed views on abortion, the limitations on privacy rights, or the death penalty, and he described his growing sensitivity to race and gender discrimination." [49] Charles Williams stated,

> ... despite having written more than 430 opinions during his 12 years on the 9th Circuit, and despite having undergone questioning by the same Senate Judiciary Committee that meticulously dissected Bork, no one knows how a Justice Kennedy would treat the most sensitive issues of our day: civil rights, women's rights and the right to privacy. [50]

A year and a half later, however, journalists and scholars seem to backing away from their earlier position.

> A year later seasoned courtwatchers say Supreme Court Justice Anthony M. Kennedy is still far from a judicial certainty. But, he appears to have aligned himself firmly with the Courts more conservative justices, bringing the high court its first working conservative majority in decades.[51]

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49 Charles Roberts, "Kennedy Promises Law And Order As Hearings Begin: High Court Nominee Says No Fixed Views On Abortion, Privacy: Polite Give And Take," Los Angeles Daily Journal, 15 Dec., 1987, p. 1.

50 Williams, " The Opinions of Anthony Kennedy," p. 56.

51 Richard A Reuben, " After One Year Kennedy Still A Mystery Man: Seems To Side With Conservative Wing, But Still Very Early: Liberals Hopeful," Los Angeles Daily Journal, 7 Ap., 1989, p. 1.

Kennedy is clearly a conservative justice who will in most instances go the conservative route. There will be fewer sweeping cases like Brown v. Board or Miranda v. Arizona giving citizens rights they did not know they had, but in trying to restrict such decisions, the Court, thanks to Justice Kennedy, may be more activist than it has been in years.

Kennedy said he felt proud that his name will appear on the same water goblet as Justice Powell and Justice Black. [52] A scholar, in a soon to be published article, interpreted that statement. "He was impressed that his water goblet is the same used by a favorite former justice, Hugo Black.[53] One author wrote of Justice Black:

> Throughout his long and remarkable career on the bench, the most consistently reiterated theme of his constitutional jurisprudence was the need for fidelity to the constitutional text in judicial review, and the illegitimacy of constitutional doctrines based on sources other that the explicit commands of the written Constitution. [54]

This perception of jurisprudence is plainly articulated in Kennedy's own speeches outlining his jurisprudence. He stated that he prefers the "textual approach" in cases involving constitutional and statutory interpretation

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52 24 The Docet Sheet of The Supreme Court of the United States, Winter 1988, at 1, col. 1

53 Melone, "Revisiting the Freshman Effect Hypothesis: The First Two Terms of Justice Anthony Kennedy," (Paper submitted to American Judicature Society, Spring 1990).

54 Grey, Do We Have, p. 703.

cases. [55] The only real difference from what Kennedy has said and from what was written about Black is that Kennedy will use the absolutist approach in a restraintist rather than activist manor. As Kennedy feels more at home in the Supreme Court Chambers more decisions like TOPIC and Chadha, which demonstrate most clearly a literalist approach to jurisprudence may be handed down.

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55 "Wise Restraints," p. 4.

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24 The Docet Sheet of The Supreme Court of The United States, Winter 1988, at 1, col. 1.