

JUSTICE ANTHONY KENNEDY

Biography

- Born July 23, 1936, in Sacramento, California
- Supreme Court Justice February 18, 1988–present (appointed by President Reagan)

Current Role on the Court

- Kennedy has been touted by many as the so-called “swing” vote on the issue of a woman’s right to choose, especially in light of Justice Sandra Day O’Connor’s retirement in 2006. Despite the fact that Kennedy refused to overturn *Roe v. Wade* in the *Casey* plurality opinion, his other reproductive rights decisions show that his support for the constitutional protection for the right to choose has grown increasingly tenuous. This is particularly apparent considering his 2000 dissent in *Stenberg*, and especially in his 2007 majority opinion in *Gonzales v. Carhart*, upholding the Federal Abortion Ban.

A History of Hostility to Reproductive Freedom

- Kennedy began his career by voting with the plurality in *Webster v. Reproductive Health Services*, supporting the constitutionality of a statute that prohibited the use of public facilities and public personnel to provide abortions.¹ Justice Kennedy joined Justice Rehnquist’s plurality, which included an attack on *Roe*: “We have not refrained from reconsideration of a prior construction of the Constitution that has proved unsound in principle and unworkable in practice. We think the *Roe* trimester framework falls into that category.”²
- He dissented in part from the majority opinion in *Hodgson v. Minnesota*, arguing that a statute requiring notification of both parents of a minor’s decision to have an abortion should be upheld as constitutional with or without a judicial bypass.³
- Kennedy reiterated his support for limits on minors’ access to abortion in *Ohio v. Akron Center for Reproductive Health*. In this case, Kennedy wrote the majority opinion upholding a parental notice statute against a facial challenge that the burdensome judicial bypass procedure did not meet constitutional requirements.⁴

- Voting with the majority in a 5-4 decision, Kennedy upheld a federal regulation that prohibited Title X health care facilities from informing pregnant women that abortion was an option, and prevented personnel from offering counseling or referrals to women seeking abortions (the notorious “gag rule”).⁵
- In 1992, in the case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Kennedy, along with Justices Souter and O’Connor, authored the controlling plurality opinion that rolled back protection for the right to choose but preserved the “essential holding” of *Roe*.⁶
- In 2000 in the case of *Stenberg v. Carhart*, the Court considered a Nebraska abortion ban, a law that criminalized safe abortion procedures and lacked an exception to protect women’s health. The Court declared the ban unconstitutional, by a vote of just 5-4.⁷ Justice Kennedy, along with anti-choice members of the Court, Justices Scalia and Thomas and then-Chief Justice Rehnquist, dissented.⁸
- However, in 2003, Justice Kennedy relied heavily on *Casey* in his majority opinion striking down a law that criminalized homosexual sodomy in *Lawrence v. Texas*.⁹ He stated, “The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”¹⁰
- In 2007, Kennedy authored the majority opinion that upheld the Federal Abortion Ban, a federal law that outlaws certain second-trimester abortions and does not include any exception for when a woman’s health is threatened. The opinion was deeply troubling, as it ignored three decades of precedent requiring protections for women’s health, and retreated from *Roe*’s requirement that politicians not endanger women’s health when regulating abortion.¹¹
- Kennedy has voted against the constitutionality of measures designed to protect people outside clinics.¹² His votes in key clinic protection measures cases even conflict with those of staunchly anti-choice Chief Justice Rehnquist, who voted with the majority to uphold such protections outside clinics in *Hill v. Colorado* and *Madsen v. Women’s Health Center*.¹³

Notable Quotations

“[I]t is a constitutional liberty of the woman to have some freedom to terminate her pregnancy.”¹⁴

“Nebraska[] [had a] right to declare a moral difference between the procedures”¹⁵

“When the Court reaffirmed the essential holding of *Roe*, a central premise was that the States retain a critical and legitimate role in legislating on the subject of abortion, as limited by the woman’s right

the Court restated and again guaranteed.”¹⁶

“I am in full agreement with Justice Thomas that the appropriate Casey inquiry is not, as the Court would have it, whether the State is preventing an abortionist from doing something that, in his medical judgment, he believes to be the most appropriate course of treatment.”¹⁷

“Roe recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.”¹⁸

“The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. ‘It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.’”¹⁹

“Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”²⁰

“While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.”²¹

“Casey reaffirmed [that t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman. A central premise of the opinion was that the Court’s precedents after Roe had ‘undervalued the State’s interest in potential life.’”²²

“We note that the statute here applies to all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications. It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop.”²³

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Notes:

- ¹ *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).
- ² *Webster*, 492 U.S. at 518 (citations and internal quotation marks omitted).
- ³ *Hodgson v. Minnesota*, 497 U.S. 417, 480 (1990) (Kennedy, J., concurring in the judgment in part, dissenting in part). The majority in *Hodgson* upheld the provision of the two-parent notice requirement that included a judicial bypass, but struck the provision that lacked it.
- ⁴ *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990).
- ⁵ *Rust v. Sullivan*, 500 U.S. 173 (1991).
- ⁶ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 837 (1992).
- ⁷ *Stenberg v. Carhart*, 530 U.S. 914 (2000).
- ⁸ *Stenberg*, 530 U.S. at 952 (Rehnquist, C.J., dissenting); 530 U.S. at 953 (Scalia, J., dissenting); 530 U.S. at 956 (Kennedy, J., dissenting); 530 U.S. at 980 (Thomas, J., dissenting).
- ⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003).
- ¹⁰ *Lawrence*, 539 U.S. at 573–74.
- ¹¹ *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood Federation of America*, 127 S. Ct. 1610, 1618 (2007).
- ¹² See *Hill v. Colorado*, 530 U.S. 703, 765 (2000) (Kennedy, J., dissenting); *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 784 (1994) (Scalia, J., concurring in the judgment in part, dissenting in part).
- ¹³ *Hill*, 530 U.S. 703; *Madsen*, 512 U.S. at 757.
- ¹⁴ *Casey*, 505 U.S. at 869.
- ¹⁵ *Stenberg*, 530 U.S. at 962 (Kennedy, J., dissenting).
- ¹⁶ *Stenberg*, 530 U.S. at 956–57 (Kennedy, J., dissenting).
- ¹⁷ *Stenberg*, 530 U.S. at 965 (Kennedy, J., dissenting).
- ¹⁸ *Lawrence*, 530 U.S. at 565.
- ¹⁹ *Lawrence*, 530 U.S. at 578 (quoting *Casey*, 505 U.S. at 847).
- ²⁰ *Lawrence*, 530 U.S. at 578–79.
- ²¹ *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood Federation of America*, 127 S. Ct. at 1634 (citation omitted).
- ²² *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood Federation of America*, 127 S. Ct. at 1633 (alteration omitted) (quoting *Casey*, 505 U.S. at 873).
- ²³ *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood Federation of America*, 127 S. Ct. at 1639.