2015 ANTHONY M. KENNEDY LECTURE

LIBERTY OR EQUALITY?

by
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Thank you to Dean Johnson and the community of Lewis & Clark Law School for inviting me to present the 2015 Anthony M. Kennedy Lecture. It is a great honor to be invited to present this Lecture, especially in light of my extraordinarily accomplished predecessors. If I cannot match their erudition, I hope at least to provide some entertainment value (intended or otherwise).

A word on my topic. I am primarily a scholar of the First Amendment, and when Dean Johnson first invited me to present this Lecture, I assumed that would be my topic. On reflection, however, I realized that this year, to present a lecture named after Justice Kennedy without addressing at least in some way *Obergefell v. Hodges*[1]—the same-sex marriage case—would be odd to put it mildly, since I am confident that in an extraordinarily influential career, this case will nonetheless stand out as Justice Kennedy's most important contribution to constitutional jurisprudence. However, my purpose is not to describe in detail the holding in *Obergefell*, but to try and place the decision in the broader context of Justice Kennedy's jurisprudence—and you can be sure that I'll touch upon First Amendment issues along the way, fixated as I tend to be. I will begin by sharing my thoughts on Justice Kennedy's place on the Court, and

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[1] 135 S. Ct. 2584 (2015).

how it relates to his jurisprudential vision. I will then argue that, seen in this light, *Obergefell*—both the result and especially the reasoning—flows directly from this broader vision. Finally, and perhaps perversely, I want to suggest that in this instance Justice Kennedy's commitments may have lead him a bit astray, not in the final result, but in how he got there.

Let us start with Justice Kennedy's position on the Supreme Court. He is of course famously the "swing" Justice, the man in the middle,[2] and has been so since Justice Sandra Day O'Connor's resignation in 2005 (though in truth, he sometimes played that role even before 2005).[3] Furthermore, given the sharp partisan divisions on the Roberts Court (on which more later), Justice Kennedy's influence is unprecedented. In essence, on important, divisive issues, he almost always *is* the Court. That is a lot of power, and while I must confess I am a bit uneasy with any single individual holding that much influence, my gut tells me that better AMK than anyone else I know. He may not be perfect, but he is thoughtful and unbiased, and his heart is in the right place.

But Justice Kennedy's widely recognized position as the swing Justice, I think, obscures another and unusual reality about his role on the Court. Historically, swing Justices have tended to share certain characteristics: they have been pragmatists, lacking a strong jurisprudential philosophy, but instead valuing effective problem solving. They have also tended to work hard to place the Court in the mainstream of American public opinion, willing to move a little ahead of public opinion, but not too much. This was certainly quintessentially Justice O'Connor's approach to the work of the Court, and also that of her predecessor as the swing Justice, Lewis F. Powell, Jr. It is no surprise, therefore, that in the extremely controversial flag-burning cases of 1989 and 1990, Justice O'Connor joined dissents from the Court's decisions to recognize a First Amendment right to burn the American flag.[4] Justice Kennedy did not—to the contrary, he provided the decisive fifth vote for the majority.[5]

Justice Kennedy is just not a centrist pragmatist, lacking a strong judicial philosophy (if anyone plays that role on the current Court, it is Justice Stephen Breyer). That raises two questions. The first is, why then *is* Justice Kennedy the swing Justice? The answer, I think, is simple but

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[2] This speech was written and delivered prior to Justice Scalia's death. Depending on who replaces him, Justice Kennedy's tenure as the swing justice may come to an end.

[3] For a discussion of Justice Kennedy's emergence as the swing Justice after 2005, see JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 327–29 (2007). For a description of the circumstances of Justice O'Connor's resignation, see *id.* at 251–53.

[4] Texas v. Johnson, 491 U.S. 397, 421 (1989) (Rehnquist, C.J., dissenting); United States v. Eichman, 496 U.S. 310, 319, (1990) (Stevens, J., dissenting).

[5] *Johnson*, 491 U.S. at 420 (Kennedy, J., concurring); *Eichman*, 496 U.S. at 311.

troubling (not for Justice Kennedy, but for the Court): he is the Justice least bound by partisan preferences, and in particular, the partisan preferences of the President who appointed him. The conservative Justices are, of course, often accused of partisanship (unsurprisingly given *Bush v. Gore*);[6] but I believe that the same is largely true of the four liberal Justices. There is some variation among the other Justices—Chief Justice Roberts is undoubtedly less partisan than the other three conservatives, and the same is true with Justice Breyer on the left. But in the overwhelming majority of controversial cases, their votes (and the votes of the other conservative and liberal Justices) can largely be predicted based on the political platforms of their respective parties. The same cannot be said of Justice Kennedy. I find it noteworthy in this respect that according to recent reporting, of the five Justices in the majority in the *Bush v. Gore* decision, Justice Kennedy was the only one to hesitate about his vote, and the only one who seemed open to being convinced to change his mind.[7] Ultimately, of course, he did not, but who knows what would have happened if the case had not been decided on such a tight deadline.

Second, what then is the content of Justice Kennedy's underlying philosophy? The answer there is I think quite clear: a driving dedication to individual liberty, in *all* of its manifestations. Other Justices will support their own preferred liberties, whether it be privacy and the rights of dissidents on the left, or property and the rights of religious individuals on the right. But no other Justice is *consistently* on the side of freedom and against government regulation of basic liberties. Moreover, this commitment to liberty has pervaded Justice Kennedy's entire tenure on the Court. Early on, he joined liberals (and Justice Scalia, to be fair) to strike down flag burning laws,[8] and also (most definitely without Scalia) to reaffirm both the Court's controversial school prayer decisions in *Lee v. Weisman*,[9] and *Roe v. Wade* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[10] But in the same period, he joined the conservatives to reinvigorate the Takings Clause in *Lucas v. South Carolina Coastal Council*,[11] and in any number of cases to reinvigorate the commercial speech doctrine.[12] Subsequently, his almost unswerving commitment to liberty has, if anything, strengthened.

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[6] 531 U.S. 98 (2000) (per curiam).

[7] *See* TOOBIN, *supra* note 3, at 168–70.

[8] *Johnson*, 491 U.S. at 398–99; *Eichman*, 496 U.S. at 311–12.

[9] 505 U.S. 577 (1992).

[10] 505 U.S. 833 (1992).

[11] 505 U.S. 1003, 1032 (1992) (Kennedy, J., concurring).

[12] *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 571 (2001) (Kennedy, J., concurring); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

The other noteworthy aspect of Justice Kennedy's commitment to liberty is that it is not abstract, it is instead tied to a very specific value: human dignity.[13] Commentators often note (sometimes scoffingly) Justice Kennedy's love of dignity,[14] but I think they do not understand. Dignity and liberty are not separate values to Justice Kennedy, they are one and the same. For Justice Kennedy, the reason we protect liberty is because without it, the State fails to treat individuals with the dignity that they deserve.

Justice Kennedy's commitment to liberty and dignity in all of their aspects is most apparent in his free speech jurisprudence (see, I told you we'd get there at some point). He is without doubt the foremost defender of the free speech principle on the Supreme Court since Hugo Black—one of my research assistants and I in fact co-authored a paper a couple of years ago designed to prove that point (I think we did, though you can of course judge for yourself).[15] Justice Kennedy believes that it is almost always just wrong for the government to tell individuals what they can say and what they can hear. It is, in his view, not the government's place to treat its citizens paternalistically, either to force them to be "moral," or to not trust them to handle the information provided them. Liberty, in this respect, is closely tied to dignity, because it requires one to trust the individual—something which both liberals and conservatives have a hard time doing. For conservatives, individuals need to be protected from pornography,[16] lest it erode their morals, and (historically at least) from dissident speech,[17] lest it erode their loyalty. For liberals, individuals need to be protected from even truthful commercial advertising,[18] lest they be convinced to act against their better interests, and from corporate political speech,[19] lest they then ignore other perspectives. The hallmark of Justice Kennedy's free speech jurisprudence is a hatred of paternalism.

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[13] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015) (linking marriage to dignity).

[14] *See, e.g.*, Jeffrey Rosen, *Supreme Leader: The Arrogance of Justice Anthony Kennedy*, NEW REPUBLIC (June 15, 2007), https://newrepublic.com/article/60925/supreme-leader-the-arrogance-anthony-kennedy.

[15] Ashutosh Bhagwat & Matthew Struhar, *Justice Kennedy's Free Speech Jurisprudence: A Quantitative and Qualitative Analysis*, 44 MCGEORGE L. REV. 167, 188–89 (2013).

[16] *See, e.g.*, Ashcroft v. ACLU, 542 U.S. 656, 676 (2004) (Scalia, J., dissenting).

[17] *See, e.g.*, Dennis v. United States, 341 U.S. 494, 508–11 (1951); Abrams v. United States, 250 U.S. 616, 623–24 (1919).

[18] *See, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 386–87 (2002) (Breyer, J., dissenting).

[19] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 423 (2010) (Stevens, J., concurring in part and dissenting in part).

Now to raise some hackles. I would argue that even Justice Kennedy's most controversial free speech decision, *Citizens United v. Federal Election Commission*,[20] can be explained in these terms. In *Citizens United*, as we all know, the Court, by a 5–4 vote (with Kennedy writing) held that corporations have a right to spend unlimited amounts of money on political advertising, so long as the spending is not coordinated with a candidate or political party.[21] This decision has been widely denounced as treating corporations like individuals—the running joke for a while was whether corporations would get the vote.[22] But that is not what *Citizens United* said (Mitt Romney's comment, "corporations are people, my friend" notwithstanding).[23] In part, *Citizens United* suggested that corporate rights are a means to protect the rights of the individuals who make up the corporation—the shareholders, management, and employees.[24] To be honest, I find this argument less than convincing—certainly, these individuals have free speech rights, but it is unclear why they are entitled to exercise their rights in the for-profit corporate form (non-profits are different, because they very arguably fall within separate First Amendment protections for association and assembly). But the main argument for *Citizens United*, clearly articulated by Justice Kennedy, is that individuals—voters—should be trusted to assess the value, or lack thereof, of corporate speech.[25] It is noteworthy in this regard that Kennedy did *not* strike down disclosure requirements, because those requirements help voters to assess the value of the information and arguments provided by corporations.[26] Echoing Holmes and (especially) Brandeis, Kennedy read the First Amendment to presume that more speech is better than less, because individuals can then sort out what is valuable and what is not.[27] If that argument applied to the speech of Communists (as Brandeis argued),[28] then why not to corporations?

Of course, Justice Kennedy's commitment to liberty and dignity is hardly limited to the First Amendment sphere. Indeed, its most famous

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[20] *Id.* at 310 (majority opinion).

[21] *Id.* at 365.

[22] Umair Haque, *A Modest Proposal: Let Corporations Vote*, HARV. BUS. REV. (Jan. 21, 2010), https://hbr.org/2010/01/a-modest-proposal-let-corporat.

[23] Philip Rucker, *Mitt Romney Says "Corporations Are People,"* WASH. POST (Aug. 11, 2011), http://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html.

[24] *Citizens United*, 558 U.S. at 349 (describing corporations as speakers who are "an association that has taken on the corporate form").

[25] *Id.* at 355–56.

[26] *Id.* at 366–71.

[27] *Id.* at 368–69.

[28] Whitney v. California, 274 U.S. 357, 376–77 (1927) (Brandeis, J., concurring).

appearance was in the area of privacy, and in particular in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[29] The joint opinion in *Casey* focused clearly and directly on the liberty and dignity of the mother in upholding the abortion right[30] (in stark contrast to Justice Blackmun's majority opinion in *Roe*, which sometimes read as if the right belonged to physicians instead of mothers).[31] In the Court's words: "The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."[32]

Eleven years later, in *Lawrence v. Texas*,[33] the same themes reemerged. In this case, Justice Kennedy wrote a majority opinion for five justices striking down a Texas statute banning same-sex sodomy[34] (Justice O'Connor concurred, but on narrower equal protection grounds).[35] Again, the theme is clear: the State may not interfere in the private, consensual sexual relationships of adult individuals, because to do so deprives them of their liberty and dignity. The Court's opinion is replete with quotes making this point. "[A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. . . . The liberty protected by the Constitution allows homosexual persons the right to make this choice," it said.[36] And it closed with the comment that "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."[37] *Lawrence* was also notable for recognizing that liberty and dignity did not just inure in individuals, they could also be as an aspect of relationships[38]—a thought that was developed to its logical conclusion in *Obergefell*.

Indeed, even Justice Kennedy's Establishment Clause jurisprudence shows signs of his commitment to liberty and dignity, even though this is an area where he generally has sided with the government (and the conservative Justices). Most notably, in *Lee v. Weisman* (which he wrote)[39] and

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[29] 505 U.S. 833, 847–48 (1992).

[30] *Id.* at 851–52.

[31] Roe v. Wade, 410 U.S. 113, 164 (1973) (stating that during the first trimester of pregnancy "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician").

[32] *Casey*, 505 U.S. at 852.

[33] 539 U.S. 558 (2003).

[34] *Id.*

[35] *Id.* at 579 (O'Connor, J., concurring).

[36] *Id.* at 567 (majority opinion).

[37] *Id.* at 578.

[38] *Id.*

[39] 505 U.S. 577, 586–87 (1992).

Santa Fe Independent School District v. Doe (which he joined),[40] Kennedy concluded that the Establishment Clause did not permit the reading of prayers by a minister at a middle school graduation (in *Lee*),[41] or a "student-led" prayer sponsored by the school, at a high school football game (in *Santa Fe*).[42] His concern in these cases was that placing students in a position where they must choose between being strongly coerced (if not compelled) to participate in a prayer they did not agree with, or to forego attendance at important school events, was unfair and interfered with the liberty and dignity of students belonging to religious minorities.[43] Of course, no one is perfect, and in this area Justice Kennedy has (in my opinion) sometimes slipped, most notably in a recent case called *Town of Greece v. Galloway* where he wrote a majority opinion upholding a city council's custom of opening its meetings with explicitly sectarian Christian prayers, even when attendees were sometimes seeking specific relief from the city council.[44] As I said, no one is perfect.

In many ways, what is most significant about Justice Kennedy's defense of liberty over the years is that he has regularly protected those with whom he does not agree, and even probably despises. He began this trend early in his career in the flag burning case *Texas v. Johnson*, in which he even felt compelled to write a concurring opinion expressing his personal dismay at the result he believed the Constitution required.[45] He has since then defended the rights of pornographers in cases such as *United States v. Playboy Enterprises*[46] and *Ashcroft v. Free Speech Coalition*,[47] and the Ku Klux Klan in *Virginia v. Black*.[48] It is hard to imagine that Justice Kennedy feels a great deal of affinity for Hugh Hefner and Playboy, or the creators of "virtual child pornography" in *Ashcroft*, to say nothing of the KKK, but to him that is, quite rightly, irrelevant. To quote Holmes, "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[49]

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[40] 530 U.S. 290, 292 (2000).

[41] *Lee*, 505 U.S. at 587.

[42] *Santa Fe*, 530 U.S. at 301.

[43] *Id.* at 301, 313; *Lee*, 505 U.S. at 587.

[44] 134 S. Ct. 1811, 1815–17 (2014).

[45] 491 U.S. 397, 420–21 (1989) (Kennedy, J., concurring).

[46] United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 806–07 (2000).

[47] 535 U.S. 234, 248–49 (2002).

[48] 538 U.S. 343, 380–87 (2003) (Souter, J., joined by Kennedy and Ginsburg, JJ., concurring in part and dissenting in part).

[49] United States v. Schwimmer, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting).

Justice Kennedy clearly understands this point, but unfortunately, not all of his colleagues appear to do so. One case last Term, *Walker v. Texas Division, Sons of Confederate Veterans*,[50] caused me particular dismay. The case involved a Texas program permitting private groups to commission "specialty license plates" for their vehicles. Groups could propose custom license plate designs for their vehicles, subject to approval by the Texas Department of Motor Vehicles.[51] The Sons of Confederate Veterans proposed a specialty plate that included images of the Confederate battle flag.[52] Their proposal was denied pursuant to a rule permitting the DMV to reject designs that "might be offensive to any member of the public."[53] The Supreme Court upheld the DMV's decision by a 5–4 vote, the majority consisting of the four liberal Justices and Justice Thomas.[54] Their reasoning was that the specialty plates constituted "government speech"—speech by the State of Texas itself—and therefore the First Amendment did not constrain the State's right to choose its message.[55] This is utterly unconvincing. As the dissent points out, in the past the State had approved an incredibly wide variety of specialty plates, including plates touting among other things commercial enterprises and out-of-state universities, including football powerhouses such as Florida State, Alabama, and (most tellingly) the University of Oklahoma.[56] It seems most unlikely that the State of Texas meant to express its own support for all those messages (especially for UT's arch rival Oklahoma). Moreover, Texas charged for the specialty plates.[57] Why would private groups pay the State to distribute the State's own message? It seems evident that the Justices in the majority were driven by their understandable distaste for the idea of seeing the Confederate battle flag on a state license plate. But that is disappointing and frankly dangerous.

Back to Justice Kennedy. I have thus far argued that the defining aspect of his constitutional jurisprudence has been a commitment to all forms of liberty, which he sees as a means to protect human dignity. He has, I have argued, hewed to that position across time, and across many different areas of law. It is also clear to me that he holds those views firmly, and with great confidence. One of Justice Kennedy's notable personal characteristics is that he seems incapable of vitriol or unkindness, in any setting. I have truly never heard him speak an unkind word about another human being, even when such words might have been deserved. One

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[50] 135 S. Ct. 2239 (2015).

[51] *Id.* at 2243.

[52] *Id.* at 2243–44.

[53] *Id.* at 2244–45.

[54] *Id.* at 2244.

[55] *Id.* at 2246.

[56] *Walker*, 135 S. Ct. at 2255, 2257 (Alito, J., dissenting).

[57] *Id.* at 2261–62).

story illustrates this in a small way. When I was clerking for him back in the dark ages (Oct. Term 1991), I was working on a divisive case involving the Establishment Clause. Justice Kennedy had sided with the liberals in that case, and written the majority opinion. After it was circulated, we received an unusually harsh and vitriolic dissent. The question was what we should do. Justice Kennedy's response, after reading it, was to look at me calmly and say, "I don't think this requires a response. Do you?" I agreed it did not (maybe because I didn't want more work at that point?), and that was that. That refusal to engage might be considered by some to be weakness but it was not—it was confidence in his convictions, and simple gentlemanliness.

These characteristics of Justice Kennedy—confidence and faith in his fellow human beings—admittedly may occasionally lead him astray. For example, his conviction, expressed in *Citizens United*, that unlimited independent corporate spending would not corrupt public officials, and that if it did, voters would hold those officials accountable,[58] may have been a bit naïve. Certainly the subsequent rise of 527 organizations and billionaire sponsors (to use a nice word) of political candidates might suggest otherwise. But if one has to err, I would argue better in the direction of optimism than cynicism.

Finally, we come to *Obergefell*. The primary issue in *Obergefell* was, of course, "whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex."[59] The case also posed a secondary issue, whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in another State which does grant that right;[60] but it was essentially mooted by the Court's resolution of the first issue.[61] At this point, it is worth our time to note an ambiguity: the issues presented refer to the Fourteenth Amendment, but they do not specify what part of the Fourteenth Amendment was at stake. The petitioners in the case had in fact explicitly invoked both of the key provisions of the Fourteenth Amendment, the Due Process Clause (which protects liberty and privacy) and the Equal Protection Clause (which of course protects equality),[62] and the Court left both arguments on the table when it reframed the Questions Presented.

Justice Kennedy's opinion, however, is not equivocal. It is almost all liberty (i.e., due process) with just a few passing nods to equality (i.e.,

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[58] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 360–61 (2010).

[59] Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

[60] *Id.*

[61] *Id.* at 2607–08.

[62] *See* Brief for Petitioners at 12, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556).

equal protection). Indeed, it is not just about liberty, it is about one specific form of liberty, the right of individuals in a relationship to marry. The entire opinion (as has been oft noted) is an extended ode to marriage, describing marriage as the ultimate, and essential, source of human dignity, and so liberty. Here are some representative quotations:

- "From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage."[63]
- "Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations."[64]
- "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality."[65]
- "The right to marry thus dignifies couples who 'wish to define themselves by their commitment to each other.'"[66]
- "Marriage remains a building block of our national community."[67]
- "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family."[68]

It is true, equal protection does get an acknowledgement as an alternate source of the marriage right, but Kennedy's discussion here has nothing like the resonance and eloquence of his liberty discussion. Equality, rather, is presented as a handmaiden of liberty arguments, strengthening the liberty right rather than standing on its own.[69]

That Justice Kennedy wrote the opinion in this way should not have come as a surprise, for any number of reasons. Most obviously, for reasons that I have discussed perhaps ad nauseam, this focus on liberty and its twin dignity is entirely consistent with his past jurisprudence. For Justice Kennedy, denial of the right to marry the partner of one's choice is the ultimate denial by the State of human liberty and dignity, precisely because of the central role of marriage in the lives of individuals. And for him, being no bigot in any sense, it is simply incomprehensible why the State would, or should be permitted to, deny such a basic liberty, and

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[63] *Obergefell*, 135 S. Ct. at 2593–94 (2015).
[64] *Id.* at 2594.
[65] *Id.* at 2599.
[66] *Id.* at 2600 (quoting United States v. Windsor, 133 S. Ct. 2675, 2689 (2013)).
[67] *Id.* at 2601.
[68] *Id.* at 2608.
[69] *Id.* at 2602–05.

such a basic source of dignity, to any individual or couple. This is the sense in which *Obergefell* is the logical culmination of over two and a half decades of Justice Kennedy's jurisprudence exalting liberty and human dignity. More to the point, *Obergefell* is the end point of the path Kennedy first laid down in *Lawrence* twelve years before, recognizing that liberty and dignity attach not just to individuals, but also to relationships between individuals.

Justice Kennedy's faith in marriage as the ultimate source of human happiness and identity should also come as no surprise to anyone who knows him at all personally (and I do not claim to know him well). More especially, it comes as no surprise to anyone who has met his wife, Mary Davis Kennedy. Mrs. Kennedy is an utterly charming person, who is neither publicly vocal, nor outspoken. But anyone who has seen she and the Justice interact understand very quickly how important she is to him, and how deeply influential. I saw them working a crowd together at a reception in Sacramento just last spring, and they are clearly still a well-oiled machine. Here is one personal story about Mrs. Kennedy, which I think tells you a lot about her. My wife and I became engaged the spring of the year I was clerking for Justice Kennedy, and we had a dilemma—whether to invite the Kennedys to our wedding which was scheduled for the next fall, a couple of months after my clerkship ended. We of course wanted them to attend, but it seemed to us presumptuous to ask. In late spring, the Kennedys took the clerks and significant others to a baseball game (the Orioles in what was then a brand new Camden Yards—the Nationals didn't exist yet). Shannon and Mrs. Kennedy happened to sit together, and Mrs. Kennedy asked about our wedding plans. At some point, Mrs. Kennedy took both her hands and said, "And of course you'll be inviting us." Problem solved—because Mrs. Kennedy knew exactly what our dilemma was. What that story exemplifies to me is just how much the Kennedys rely on each other and the human dimension that Mrs. Kennedy brings to Justice Kennedy's life. All of which is to say, given Justice Kennedy's jurisprudence, values, and personal experience, *Obergefell* makes perfect sense.

Now, as law professors are wont to do, I think I'll stir the pot a little. First, some well-known background. Justice Kennedy, of course, is the author of all four of the key gay-rights cases of the Supreme Court: *Romer v. Evans* (striking down a Colorado proposition banning laws protecting LGBT individuals from discrimination),[70] *Lawrence v. Texas* (striking down sodomy laws),[71] *United States v. Windsor* (striking down part of

[70] 517 U.S. 620 (1996).

[71] 539 U.S. 558 (2003).

DOMA, the federal Defense Against Marriage Act),[72] and of course *Obergefell*. These cases are a logical progression from protection against gross discrimination, eventually to full citizenship; and these cases are going to be as much Justice Kennedy's legacy as *Brown v. Board* and its progeny[73] were Chief Justice Warren's (though like Warren, not the only legacy—let us not forget the First Amendment). Jurisprudentially, however, the cases are not a straight line (as anyone trying to teach this line of cases knows all too well). *Romer* and *Windsor* are equal protection cases, while *Lawrence* and *Obergefell* invoke due process. So why, in the two critical cases—for *Lawrence* and *Obergefell* are the critical ones—did Justice Kennedy choose liberty over equality, especially since in *Lawrence* Justice O'Connor wrote an equality-based concurrence?[74]

It is, I think, because Justice Kennedy's relationship to liberty is far more straightforward than to equality. While his liberty opinions have consistently expanded rights and championed the underdog, in the equality arena he has equivocated. Consider two notable examples. First, in *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court struck down plans in which two school districts assigned students to schools in part based on their race, in order to maintain racial balance.[75] Kennedy provided the crucial fifth vote, but distanced himself from Chief Justice Roberts's rather radical embrace of color-blindness.[76] Instead, he tried to steer a middle path, accepting the need for greater racial integration, but placing high barriers in front of policies that classify individuals on the basis of race.[77] Second, in *Nguyen v. INS*, Justice Kennedy authored a majority opinion upholding a federal law creating an explicit gender-based classification that made it easier for U.S. citizen mothers than U.S. citizen fathers to pass on their citizenship to children born abroad out of wedlock.[78] In both cases, Justice Kennedy's equivocation is partially based on his views on human dignity. One of the more offensive aspects of the Seattle system, as the majority pointed out, was that each student had to choose a single race.[79] If he or she picked two races, "the enrollment service person taking the application will indicate

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[72] 133 S. Ct. 2675 (2013).

[73] Brown v. Bd. of Educ., 347 U.S. 483 (1954); Watson v. City of Memphis, 373 U.S. 526 (1963); Gayle v. Browder, 352 U.S. 903 (1956) (per curiam); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam).

[74] *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring).

[75] 551 U.S. 701, 709–11 (2007).

[76] *See id.* at 735–48 (plurality opinion) (reading *Brown v. Board* and other precedent to forbid any race-based preferences).

[77] *Id.* at 783–84 (Kennedy, J., concurring).

[78] 533 U.S. 53, 56–60 (2001).

[79] *Parents Involved*, 551 U.S. at 723 n.11.

one box."[80] In *Nguyen*, Justice Kennedy spoke passionately of the bond between mother and child created by childbirth[81]—precisely the same dignity-based argument that he invoked to uphold abortion rights in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[82] Be that as it may, I read these cases as indicating that while Justice Kennedy is of course firmly opposed to simple bigotry, he still struggles with circumstances in which otherwise problematic classifications may be used by the government in the face of real differences between individuals or to advance substantial social policies. The underlying driving force here, I think, is that Justice Kennedy finds the idea of individual liberty and dignity intuitively obvious and appealing. When dealing with groups, however, he is much more conflicted. On the one hand, he understands the need for social policies designed to advance equality and integration—hence his refusal to join Chief Justice Roberts's opinion in *Parents Involved* in full. On the other hand, Justice Kennedy firmly believes that type-casting individuals based on personal characteristics such as race or sexual orientation, as all broad classifications tend to do, is a severe impingement on individual dignity—hence his refusal to join the liberal dissenters in *Parents Involved*. This distrust of classifying and type-casting individuals also, I think, explains why Justice Kennedy has voted so consistently with the conservative Justices in affirmative action cases. It is not that he is hostile to the goals of such policies, it is that he does not like the means chosen.

It is this discomfort with group-based thinking that, I believe, led Justice Kennedy to embrace the liberty rather than the equality rationale in *Obergefell*. In particular, there is at least an argument (though in my opinion not a strong one) that even if discrimination based on sexual orientation is generally wrong (as Justice Kennedy surely believes, given his opinion in *Romer*), marriage raises more complicated questions because it implicates the "real differences" problem referred to above: the putative difference being that heterosexual couples are at least potentially fertile without technological assistance, while homosexual couples of course are not. Liberty must have seemed an easier path.

The problem is, I am not sure that *was* an easier path. The truth is that the liberty argument for same-sex marriage, while entirely plausible, faces some obstacles. The biggest one is that the Court's doctrine has always emphasized the role of history and tradition in defining the scope of unenumerated rights such as the right of intimate privacy at issue in

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[80] *Id.*

[81] *Nguyen*, 533 U.S. at 64–65.

[82] 505 U.S. 833, 852–53 (1992).

Obergefell.[83] However, as Kennedy had to acknowledge, there is obviously no historical tradition of recognizing same-sex marriages.[84] There is of course a counterargument, which focuses on the level of generality at which one defines the relevant right. If, in *Loving v. Virginia*, the Court had defined the right as one of *interracial* marriage, it too would have run up against history, but of course the Court defined the right as simply marriage.[85] The historical counterarguments in *Obergefell*, however, were stronger than in *Loving*, because the bar on miscegenation was a product of America's particular, twisted history on race, while the limitation of marriage to opposite-sex couples was both far older and, until recently, far more universal.

There is also a broader, more policy-based objection to deciding this case on right-to-marriage grounds. By making marriage the centerpiece of the Court's gay rights jurisprudence, it arguably imposed a hetero-normal worldview onto LGBT individuals. This worldview assumes that everyone, including gays and lesbians, should aspire to the heterosexual ideal of marriage: a house in the suburbs, two SUVs emitting more greenhouse gases than a Dutch village, and 2.2 ungrateful children. The same objection has been posed to gender discrimination decisions such as *United States v. Virginia*,[86] the case requiring the Virginia Military Institute to admit women: the objection being that such decisions require the discriminated-against group to conform to the dominant group's norms if it is to achieve equality. Of course no one questions that gay and lesbian couples who want to conform to this vision are entitled to do so—but perhaps that is not the essence of what is going on here. Perhaps the goal should be equality on terms chosen by the individual, not the majority.

A related objection is that Kennedy's opinion in *Obergefell* assumes that marriage is necessary for happiness *and* dignity. Consider the following quotations:

- "Marriage responds to the universal fear that a lonely person might call out only to find no one there."[87]
- "Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions."[88]
- "The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life."[89]

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[83] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015); Washington v. Glucksberg, 521 U.S. 702, 710 (1997).

[84] *Obergefell*, 135 S. Ct. at 2598.

[85] 388 U.S. 1, 12 (1967).

[86] 518 U.S. 515, 555–56 (1996).

[87] *Obergefell*, 135 S. Ct. at 2600.

[88] *Id.* at 2608.

Each seems to assume that without marriage, homosexuals (and for that matter, heterosexuals) are "condemned to live in loneliness"[90] and without dignity. But surely some people—whatever their sexual preferences (or lack thereof)—disagree, and believe that they can be fully defined individuals, enjoying full dignity, while alone.

I should say that in some ways, I think these objections are a bit unfair to Justice Kennedy. The importance of, and desire for, marriage for LGBT couples were after all the grounds upon which the plaintiffs litigated the case, and so it is hardly surprising that he picked up on that theme (especially given his values). But for all that, the objections remain legitimate ones in my view, even if perhaps directed as much to the litigants and their lawyers as to the Court.

So, how do I think the Court should have resolved *Obergefell*? To start with, it surely should have reached the same result—I must be honest, I consider that a no-brainer. As my title and my remarks so far suggest, however, I think that an equality-based argument has a stronger jurisprudential basis, and would have been more robust, than liberty. The doctrine of substantive due process, with its protection of unenumerated liberties, has always been suspect, lacking as it does a clear textual basis since the Due Process Clause on its face speaks only of procedure, not substance. Equality, however, is expressly protected by the Fourteenth Amendment. Of course, some originalists wish to restrict the Equal Protection Clause to banning race discrimination (though oddly, they would also protect whites against race discrimination, which has *literally* no basis in the original understanding). The problem they face is that this is *not* what the Equal Protection Clause *says*—it never mentions race. And when the Reconstruction Congress wished to target race discrimination directly, they knew how to do so—as proven by the Civil Rights Act of 1866, and by the Fifteenth Amendment. Instead, the text of the Equal Protection Clause adopts a much more abstract principle of equality for all persons.

How then do we translate that abstract principle into practice? In modern parlance, this is a problem not of interpretation, but of construction. Obviously, not all discriminations are suspicious—if they were, I would be an NBA center. But some types of discrimination, the archetype being race discrimination, are highly suspect. How, then, to decide what is and is not permissible? Our solution to this dilemma has been to identify certain groups that we conclude are: a) defined by traits that are irrelevant, in that the trait provides no basis to deny full rights of citizenship; and b) subject to systematic, irrational discrimination. We then accord these groups or traits (that is a different struggle) heightened

[89] *Id.* at 2594.

[90] *Id.* at 2608.

protection against discrimination. The key step is the first, I think—the insight that this group deserves full citizenship, or alternatively, that the trait they share is morally and politically irrelevant. African-Americans were the first group to receive this protection, at least on paper (though obviously not in practice for many years). Later we added other racial minorities—though again, sometimes just on paper, as the *Korematsu* case demonstrates.[91] But after World War II we began to make these guarantees real, and extended them to other groups, notably women, aliens, and illegitimate children.[92]

In *Romer v. Evans*, in 1996 (i.e., almost twenty years ago), the Court in practice extended this same protection to the LGBT community.[93] It is true that the Court did not explicitly extend the doctrine of heightened scrutiny to sexual orientation (this avoidance of traditional doctrine is a general trend in Justice Kennedy's jurisprudence), but by holding that discrimination against LGBT individuals is irrational and impermissible, the Court recognized that sexual orientation is morally and politically irrelevant.[94] That conclusion is surely correct, as the vast majority of contemporary Americans acknowledge, even those who oppose same-sex marriage. But it dictates the result in *Obergefell*, since there is no plausible justification, unrelated to historical discrimination, for the State to deny the benefits of secular marriage to same-sex couples (religious institutions of course remain free to chart their own paths). Moreover, reliance on equal protection in *Obergefell* would not have implicated Justice Kennedy's concerns about classification and dignity, since in the LGBT rights cases the plaintiffs were not asking the government to classify individuals based on sexual orientation, they were seeking equal treatment and nothing more.

One clarification—I am not suggesting that the path from *Romer* to *Obergefell* was not in some ways fraught. After all, it took almost twenty years to get from *Romer* to *Obergefell*. But remember, it took thirteen years to get from *Brown v. Board* to *Loving v. Virginia*, when the Court finally struck down bans on interracial marriage. In both cases, the reasons for the delay were not legal, they were social and political.

What are the benefits of equality over liberty? There are several:

First, as a practical matter an equal protection holding, concluding that sexual orientation is a suspect classification, has a much broader

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[91] Korematsu v. United States, 323 U.S. 214, 219 (1944) (upholding constitutionality of the exclusion of all Americans of Japanese ancestry from the West Coast during World War II).

[92] United States v. Virginia, 518 U.S. 515, 532–34 (1996) (women); Clark v. Jeter, 486 U.S. 456, 461–62 (1988) (illegitimate children); Graham v. Richardson, 403 U.S. 365, 371–72 (1971) (aliens).

[93] 517 U.S. 620, 635–36 (1996).

[94] *Id.* at 631–32.

scope than a liberty holding. *Obergefell* protects same-sex marriage, but nothing else. An equality holding would protect LGBT individuals from *all* discrimination by state actors including in employment, adoption rights, benefits, and so forth.

Second, I would like to believe that an equality holding might have been more palatable to many opponents of same-sex marriage than a liberty holding (though I do not kid myself—die-hard opponents like Kim Davis were going to resist regardless). Redefining marriage, as *Obergefell* effectively does, might seem to some a frontal attack on a longstanding, and, for many, deeply religious institution. Equality, on the other hand, is a value written into the modern American DNA. Opposition to same-sex marriage is regularly portrayed as a conflict between two liberties: religious versus sexual. That argument, while unconvincing to me (since I do not think the two burdens are commensurate), appears to have some social valence. Precisely because of our deep, cultural commitment to equality, I think an argument that liberty should trump equality is much less socially compelling.

Third, an equality holding would not have been as easily susceptible to the "slippery slope" objection: that recognizing same-sex marriages will necessarily lead to recognition of polygamy. I personally find this argument rather far-fetched—though to be fair, the historical argument in favor of polygamy is hardly trivial—but it has in fact been widely deployed, notably in dissenting opinions on the Court.[95] It is very difficult to imagine, however, how an equality-based holding in favor of same-sex marriage could be extended to polygamy, since no one believes that a "polygamist orientation" is either immutable or fundamental to personal identity.

Fourth, and most fundamentally, I firmly believe that in a democracy, invocation of equality principles is a more elegant, and preferable mode of constitutional analysis than invocation of substantive rights, especially unenumerated ones. Justice Robert Jackson made the point this way in his brilliant concurring opinion in the *Railway Express* case:

> The burden should rest heavily upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance. . . . Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except

[95] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2621–22 (2015) (Roberts, C.J., dissenting); *Romer*, 517 U.S. at 648 (Scalia, J, dissenting).

> upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.[96]

As usual when I quote Justice Jackson, I have *literally* nothing I can add, so I will end here.

Thank you again Dean Johnson and the wonderful Lewis & Clark community for the invitation to speak to you. And thank you for your patience and generosity as an audience. I am more than happy to take questions on any topic that might be of interest. Perhaps even the First Amendment?

[96] Ry. Express Agency v. New York, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring).