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On Liberty: The Moral Concepts of Justice Kennedy's Jurisprudence

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Introduction

To the unsuspecting eye, Justice Anthony Kennedy's jurisprudential philosophy is a riddle, wrapped in a mystery, inside an enigma.¹ Indeed, even for many legal scholars, the only point about Justice Kennedy's jurisprudential philosophy upon which they can be maddeningly certain is that Justice Kennedy does not have a comprehensive jurisprudential philosophy. The general consensus on Kennedy is that he is a "legal pragmatist who goes case by case," without "a consistent judicial philosophy to guide his decision making."^{2 3} More bluntly, "the more closely one examines Kennedy's Supreme Court jurisprudence, the more confused one becomes."⁴ During his Confirmation hearings, Kennedy himself admitted:

"I do not have an over-arching theory, a unitary theory of interpretation. I am searching, as I think many judges are, for the correct balance in constitutional interpretation."⁵

Despite his own admissions that he lacks a "unitary theory," a careful study of Kennedy's jurisprudence reveals underlying interpretive themes. Kennedy's jurisprudential philosophy centers on defining the moral content of the Constitution's "spacious clauses."⁶ In particular, judges must define and enforce the full and necessary meaning of "liberty," "consistent with the Constitution as we understand it."⁷ Liberty's moral content may be illuminated by history,

¹ For quotation in its original context, see WINSTON CHURCHILL, *The Russian Enigma* (BBC radio address Oct. 1, 1939).

² THOMAS HENSLEY, CHRISTOPHER E. SMITH, AND JOYCE A. BAUGH, *THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES* (Minneapolis/St. Paul: Wadsworth, 1997), p. 75.

³ TINSLEY YARBOROUGH, *THE REHNQUIST COURT AND THE CONSTITUTION* (New York: Oxford University Press, 2000).

⁴ Patrick D. Schmidt and David A. Yalof, "'The Swing Voter' Revisited: Justice Anthony Kennedy and the First Amendment Right of Free Speech," *57 Political Research Quarterly* 209 (2004).

⁵ U.S. Senate, "Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States," 14-16 December 1987, p. 154.

⁶ FRANK J. COLUCCI, *JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY*, 11 (2006).

⁷ *Id.* at 9. See also U.S. Senate, *supra*, p. 86.

tradition, original intent, and precedent, but its full and necessary meaning may extend beyond these traditional sources.⁸

This paper will begin by discussing Justice Kennedy's background and basic jurisprudential philosophy. In Part III, I will discuss Kennedy's treatment of the Establishment Clause, particularly in his formulation of a "coercion principle" to protect individual's belief and exercise of religion from state interference. In Part IV, I will discuss Kennedy's views on substantive Due Process under the Fourteenth Amendment, wherein he protects private, consensual intimate conduct of adults through liberty. In Part V, I will discuss Kennedy's concept of cruel and unusual punishment, specifically in his prohibition on imposing capital punishment on offenders who were under the age of 18 at the time of their offense. In Part VI, I will discuss Kennedy's views on abortion, which shifted the constitutional foundations of the right to choose to abort from privacy to liberty and allowed for greater State regulation. In Part VII, I will discuss Kennedy's treatment of substantive Due Process under the Fifth Amendment, as it applies to the equal recognition of same-sex marriage. Lastly, in Part VIII, I discuss Kennedy's expansive conception of Free Speech, which he uses to protect political speech and the right to dissent, to expand the "public forum doctrine," and to protect corporate political expression.

Part I: Background

A. The epitome of a Sacramento man

Anthony McLeod Kennedy ("Kennedy") was born on July 23, 1936 in Sacramento, California to Anthony J. Kennedy and Gladys McLeod Kennedy.⁹ Kennedy's father, Anthony

⁸ *Id.* at 11 (citing *Lawrence v. Texas*, 539 U.S. 558, 571 (2003)).

⁹ THE SUPREME COURT HISTORICAL SOCIETY: ANTHONY KENNEDY, <http://www.supremecourthistory.org/history-of-the-court/the-current-court/justice-anthony-kennedy/> (last visited November 30, 2013).

“Bud” Kennedy (“Bud”), was a lawyer and lobbyist in the California legislature.¹⁰ Kennedy’s mother was a teacher.¹¹ The Sacramento that Kennedy was born into was “a very reasonable place” with “reasonable values.”¹² As several laws passed in California in the 1920s had weakened the established political parties, lobbyists “stepped into the vacuum to supply the network the parties could not.”¹³ As a successful lobbyist, Bud Kennedy was “one of the men ... who made Sacramento hum” and often conducted business with liquor industry, tobacco industry, and manufacturing industry representatives over poker games in his backyard.¹⁴

Young Kennedy was a parent’s dream. Kennedy was an avid reader and an excellent, albeit bored, student.¹⁵ Kennedy grew up “super Catholic.”¹⁶ He attended Mass every Sunday and was an altar boy at his local church.¹⁷ Additionally, Kennedy was a wholesome youth whose faultlessness bordered on the judgmental, as he was always quick to inform his comrades when he believed they sinned. In the fourth grade, Bud arranged for his son to work as a page in the California legislature, where he became acquainted with future Chief Justice Earl Warren.¹⁸ Under Warren’s wing, Kennedy learned intimate details of the legislative and democratic process.

Kennedy graduated from McClatchy High School in 1954.¹⁹ From there, Kennedy went to study at Stanford University, his father and mother’s alma mater.²⁰ Although he completed his undergraduate requirements in three years, at the advice of his father, Kennedy took “a year

¹⁰ Massimo Calabresi & David Von Drehle, *What Will Justice Kennedy Do?*, TIME MAGAZINE (Jun. 18, 2012), <http://content.time.com/time/subscriber/article/0,33009,2116699,00.html>.

¹¹ See SUPREME COURT HISTORICAL SOCIETY, *supra*.

¹² See Massimo Calabresi & David Von Drehle, *supra*.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ ANTHONY KENNEDY BIOGRAPHY, <http://www.biography.com/people/anthony-kennedy-9362868> (last visited November 30, 2013).

²⁰ See Massimo Calabresi & David Von Drehle, *supra*.

off,” in which he studied at the London School of Economics.²¹ Kennedy graduated from Stanford University in 1958 with a Bachelor's Degree in Political Science.²² From Stanford, Kennedy went straight to Harvard Law School, where he graduated *cum laude* in 1961.²³

After law school, Kennedy served for one year in the California National Guard before settling in San Francisco to practice law in 1962.²⁴ Following his father's untimely death in 1963, however, Kennedy moved back to Sacramento, where he took over his father's law practice, bought a house, and married Mary Davis, a teacher and fellow Stanford graduate. Kennedy and Mary Davis have three children: two sons and a daughter.²⁵ In addition to his work as a lawyer and a judge, Kennedy taught Constitutional Law at the University of Pacific's McGeorge School of Law from 1968 to 1988.²⁶ A practical and modest man, Kennedy enjoys his relative anonymity compared to the massive power he holds as the Supreme Court's regular “swing vote.”²⁷

B. The road to the Supreme Court is paved with Reagan's failures

In 1967, Kennedy did assorted legal work for the then-California governor Ronald Reagan and his staff.²⁸ Notably, Kennedy drafted “Proposition 1,” a proposed amendment to the California constitution to curtail the state government's power to tax and spend.²⁹ Although the legislation was ultimately unsuccessful, Proposition 1 was a “starred credential” on Reagan's resume during his later presidential run.³⁰ For his efforts, Kennedy was appointed to the Ninth

²¹ *Id.*

²² See ANTHONY KENNEDY BIOGRAPHY, *supra*.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* See also Massimo Calabresi & David Von Drehle, *supra*.

²⁶ See ANTHONY KENNEDY BIOGRAPHY, *supra*.

²⁷ See Massimo Calabresi & David Von Drehle, *supra*.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

Circuit Court of Appeals in 1975, at the recommendation of Reagan to then President Gerald Ford.³¹ At 38, Kennedy became the youngest Court of Appeals judge in the country.

In 1987, Ronald Reagan nominated Kennedy to fill the Supreme Court Associate Justice position vacated by Justice Louis Powell's retirement.³² Kennedy was Reagan's third choice for the position. Reagan's initial nominee, Robert Bork, was blocked by Senate democrats, and his second option, Douglas Ginsburg, withdrew his nomination due to controversy involving his past marijuana use.³³ The Senate unanimously confirmed the "squeaky-clean" Kennedy by a 97-0 vote on February 3, 1988.³⁴

C. The man, the myth, the decider

When he was first nominated, Kennedy's background and demeanor suggested he would not be much of a change from the retiring "center-right" Justice Powell.³⁵ Kennedy's time on the Ninth Circuit was marked by his cautious approach and his tendency to "hew closely to established doctrine."³⁶ As expected, in his first term, Kennedy voted along conservative lines, voting with Chief Justice Rehnquist and Scalia over 90% of the time.³⁷ Kennedy's voting allegiances would, however, change, most notably beginning with the *Planned Parenthood of Southeastern Pennsylvania v. Casey*³⁸ decision.

Now, Kennedy is arguably the least predictable Supreme Court justice in terms of voting. The deciding "swing" vote in many controversial cases, the Supreme Court under Kennedy's quarter of a century tenure has often been referred to as the "Kennedy Court."³⁹ And why not?

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ See ANTHONY KENNEDY BIOGRAPHY, *supra*.

³⁵ See Massimo Calabresi & David Von Drehle, *supra*.

³⁶ *Id.*

³⁷ See ANTHONY KENNEDY BIOGRAPHY, *supra*.

³⁸ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

³⁹ Adam Litpak, *The Fragile Kennedy Court*, N.Y. TIMES, July 7, 2006, at sec. A, p. 16.

Since his appointment in 1988, Kennedy has been a member of the majority more than any other Supreme Court justice.⁴⁰ In fact, during the 2006-2007 term, Kennedy was a member of the majority in all 24 cases decided by a 5-4 vote.⁴¹ His former clerks and supporters are careful to note that Kennedy's seemingly random jurisprudential decisions are a result of his open-mindedness rather than indecisiveness.⁴² Neal Katyal, President Barack Obama's former Solicitor General, states, "[Kennedy] agonizes about trying to make the right decision, instead of trying to fit the case into some formulaic box."⁴³ Alex Kozinski, his former law clerk and the current Chief Justice of the Ninth Circuit Court of Appeal, adds, "[Kennedy] tr[ies] out an idea for size, like trying on a hat," then sees if it looks good on him or not before making a decision.⁴⁴ In light of Kennedy's fluid jurisprudential philosophy, many lawyers have begun filing "Kennedy briefs" that are written by his former clerks and borrow heavily from his prior decisions.⁴⁵ Despite all attempts to stack the deck in their favor, the Kennedy briefs have not guaranteed the desired results and Kennedy's decisionmaking "remain[s] unknowable."

Part II: Jurisprudential philosophy

A. Give me liberty or give me liberty

Justice Kennedy's jurisprudential philosophy centers on ensuring that the word "liberty" is given "its full and necessary meaning, consistent with the purposes of the Constitution as we understand it."⁴⁶ For Kennedy, the Constitution contains "spacious phrases," phrases with general concepts that contain moral content.⁴⁷ A judicial duty exists to find the full and

⁴⁰ FRANK J. COLUCCI, *supra*, at p. 1.

⁴¹ See SCOTUS BLOG, *Final 5-4 decisions in OT06* (<http://www.scotusblog.com/movabletype/archives/Final5-4visual.pdf>).

⁴² See Massimo Calabresi & David Von Drehle, *supra*.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See U.S. Senate, *supra*, p. 154, 122.

⁴⁷ FRANK J. COLUCCI, *supra*, at p. 11.

necessary meaning of the Constitution's spacious phrases, and enforce the moral concepts within it. To perform this duty, judges must engage in case-by-case moral arguments "about the nature of liberty, human personality, and human dignity, as well as the judicial power to enforce them."⁴⁸ While the moral idea of liberty is "amorphous" and "wavering," uncertainty over the precise standards of interpretation does not excuse judges from their expansive duty of attempting to define and enforce liberty's moral content.⁴⁹

When questioned at his Confirmation hearing on what factors a judge should consider when determining what the Constitution protects under liberty, Kennedy answered:

"a very abbreviated [non-exclusive] list of the considerations are the essentials of the right to human dignity, the injury to the person, the harm to the person, the anguish to the person, the inability of the person to manifest his or her own personality, the inability of a person to obtain his or her own self-fulfillment, the inability of a person to reach his or her potential."⁵⁰

Kennedy rejects the Originalist's position that the only sources for Constitutional interpretation are the Constitution's text and original meaning at the time of its passage. While Kennedy finds some link to the Framers' ideas as necessary for the judge's ruling to seem legitimate, a historical study of the Constitution alone is insufficient to define and enforce the moral concepts of liberty within it.⁵¹ Kennedy notes, "Over time the intentions of the Framers are more remote from their particular political concerns and so they have ... a certain generality now that they did not have previously."⁵² The Constitution "cannot be divorced from its logic and language, the intention of its framers, the precedents of the law, and the shared traditions and historic values of our people."⁵³ Had the Framers intended for the Constitution's text and

⁴⁸ *Id.*

⁴⁹ See U.S. Senate, *supra*, p. 31.

⁵⁰ *Id.* at p. 180.

⁵¹ FRANK J. COLUCCI, *supra*, at p. 4.

⁵² US Senate, *supra*, p. 180.

⁵³ Anthony M. Kennedy, "Rotary Speech," Sacramento, Rotary Club, Oct. 15, 1987, p. 7.

original meaning to explicitly answer every Constitutional issue raised thereafter, the Framers would not have used general, spacious phrases like due process or cruel and unusual punishment.⁵⁴ Instead, judges must exercise their own independent judgment to define and enforce the moral content of liberty embodied in the Constitution's spacious clauses.

B. Stare decisis and non-traditional sources

To ensure that liberty is given its full and necessary meaning, the Constitution's moral concepts themselves, rather than their prior interpretations, must provide the basis for "determining the extent of the personal liberty that courts have a duty to enforce."⁵⁵ Kennedy criticizes judges "make a quick bow to the words and text and then go off into ... [a] mass of precedents."⁵⁶ As explained earlier, a judge's responsibility is to ensure that liberty is given its full and necessary meaning, consistent with the purposes of the document as we understand it.⁵⁷ It logically follows that a self-aware judge must then determine whether the Constitution's moral concepts "extend ... to situations not previously addressed by the courts, to protections not previously announced by the courts."⁵⁸ Thus, under Kennedy's jurisprudential philosophy, judges must act like "architects" to "preserve the best elements of our past and to create structures that meet the demands of a dynamic present and an uncertain future."⁵⁹

To develop their architectural plan, judges may rely upon traditional and non-traditional sources to provide "objective referents" to help define and enforce the moral content of liberty. The Constitution's text, tradition, and history are the starting point, but not necessarily the

⁵⁴ *Id.* at p. 6.

⁵⁵ FRANK J. COLUCCI, *supra*, at p. 13.

⁵⁶ US Senate, *supra*, p. 231.

⁵⁷ *Id.* at 154, 122 (emphasis added).

⁵⁸ Anthony M. Kennedy, "Comments at Ninth Circuit Judicial Conference," Hawaii, Aug. 21, 1987, pp. 6-7, 87.

⁵⁹ "Pasadena Dedication," Pasadena, California, Special Session of the Judges of the Ninth Circuit, Feb. 3, 1986, p. 10.

ending point, for constitutional interpretation.⁶⁰ While the moral content of the Constitution may be illuminated by history, tradition, original intent, and precedent, the full and necessary meaning of liberty may extend beyond those sources.⁶¹ Accordingly, Kennedy's opinions have cited to social science research, the direction of political consensus ("evolving standards of decency"), and international law to provide "objective referents" for the moral content of liberty in our Constitution.⁶² Kennedy's opinions have relied upon such sources, even when such citations have ultimately led him to overturn past precedents and recant his own earlier votes.⁶³ Kennedy supports the use of a variety of sources, provided that the source aids in the substantive consideration of whether the specific case's challenged action violates "the essentials of the right of human dignity," results in "the inability of the person to manifest his or her own personality, the inability of a person obtain his or her self-fulfillment, or the inability of a person to reach his or her potential."⁶⁴ The type of source appears inconsequential, so long as it allows the judge to "discover the true nature of the substantive moral ideas stated in the text of the Constitution."⁶⁵

Part III: The Establishment Clause

"Congress shall make no law respecting an establishment of religion."⁶⁶

Kennedy's interpretation of the Establishment Clause distinguishes between government action that accommodates religion versus government action that establishes religion.⁶⁷ As discussed below, government action may accommodate to put religion on equal footing with secular activities. Government action that requires an individual's forced rather than voluntary

⁶⁰ *Sacramento v. Lewis*, 523 U.S. 833, 857 (1998).

⁶¹ FRANK J. COLUCCI, *supra*, at p. 11 (quoting *Lawrence*, 539 U.S. at 571).

⁶² *Id.* at p. 36.

⁶³ See FRANK J. COLUCCI, *supra*, at 30 (referring to *Roper v. Simmons*, discussed *infra*).

⁶⁴ U.S. Senate, *supra*, at p. 180.

⁶⁵ See FRANK J. COLUCCI, *supra*, at p. 4.

⁶⁶ U.S. Const. amend. I.

⁶⁷ See generally FRANK J. COLUCCI, *supra*, at p. 14.

participation establishes religion violates Kennedy's "coercion principle," his "ideal of liberty of conscience against government coercion" in the belief and exercise of religion.⁶⁸

A. Establishing the coercion principle prior to *Lee v. Weisman*

For Kennedy, the Free Exercise Clause and Establishment Clause preserve the uniquely personal liberty decision to practice religion as one pleases without government interference.⁶⁹

Prior to his landmark Establishment Clause decision in *Lee v. Weisman*, Kennedy formulated the foundations for his coercion principle in *Allegheny County*⁷⁰ and *Board of Education of Westside Community Schools*.⁷¹ Conservatives on the Court, most notably Scalia, who mistook Kennedy's position in these cases for Originalism would later harshly rebuke Kennedy in *Weisman* for "betraying the Constitution."⁷²

In *Allegheny County*, Kennedy voted to uphold the constitutionality of a menorah display and crèche display on public property in downtown Pittsburgh.⁷³ Criticizing the majority's "unjustified hostility towards religion," Kennedy held that the Constitution "permits government some latitude in recognizing and accommodating the central role religion plays in our society."⁷⁴ Kennedy carefully distinguished between government action which "accommodates" religion versus government action that "establishes religion."⁷⁵ The government can neither coerce support or participation for a religion, nor give direct benefits to a religion in such a way that establishes or tends to establish a religious faith.⁷⁶ The government may, however, recognize

⁶⁸ See generally *id.*

⁶⁹ See generally *id.*

⁷⁰ *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (Kennedy, A., concurring in part, dissenting in part).

⁷¹ *Bd. of Educ. of Westside Cmty. Sch. v. Mergens By & Through Mergens*, 496 U.S. 226 (1990) (Kennedy, A., concurring).

⁷² See generally FRANK J. COLUCCI, *supra*, at p. 14.

⁷³ *Allegheny County*, 492 U.S. at 573.

⁷⁴ *Id.* at 655.

⁷⁵ *Id.* at 659.

⁷⁶ *Id.*

religion through “passive and symbolic accommodation.”⁷⁷ Such accommodation does not breach the Establishment Clause unless the government “benefits religion in way more direct and more substantial than practices that are accepted in our national heritage.”⁷⁸ Joined by Justices Rehnquist, Scalia, and White, Kennedy found the menorah and crèche displays within the realm of “flexible accommodation.”⁷⁹ The displays neither advanced one faith over another, nor compelled others to observe or participate.⁸⁰ Observers were free to view, ignore, or easily avoid the displays.⁸¹ As such, there was no “realistic risk” that the displays constituted state actions to establish religion.⁸²

In *Board of Education of Westside Community School*, Kennedy voted to uphold federal legislation that required secondary schools receiving federal aid to allow equal after-school access to student groups based on “religious, political, philosophical, or other content.”⁸³ Allowing religious groups equal access to the school after hours was an “incidental benefit” that placed the religious groups on “the same footing” as secular school groups.⁸⁴ There was no risk of state establishment of religion because the government was in no way coercing students to participate in a religious activity, even though that religious activity took place on school property.⁸⁵ Like the observers of the religious displays in *Allegheny County*, children could choose to participate in the religious groups, ignore them for secular groups, or participate in

⁷⁷ *Id.* at 661-662.

⁷⁸ *Id.* at 662-663.

⁷⁹ *Id.* at 662.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 663-664.

⁸³ *Bd. of Educ. of Westside Cmty. Sch.*, 496 U.S. at 226.

⁸⁴ *Id.* at 260.

⁸⁵ *Id.* at 261.

nothing. Foreshadowing *Weisman*, Kennedy does note that “the line between voluntary and coerced participation may be difficult to draw.”⁸⁶

B. Lee v. Weisman: the “coercion principle” (majority opinion # 1)

In *Lee v. Weisman*, writing for a 5-4 majority, Kennedy applied his coercion principle to strike an invocation and benediction given at a middle school graduation on school property as a violation of the Establishment Clause.⁸⁷ Kennedy initially voted that the graduation prayer was Constitutional and was assigned to write the majority opinion by Chief Justice Rehnquist, but reversed when he realized “my draft looked quite wrong.”⁸⁸ Ironically, Kennedy was assigned to write the new majority opinion striking the school prayer by Justice Blackmun, the senior justice of the new majority.⁸⁹

Deborah Weisman graduated from Nathan Bishop Middle School, a public school, at a formal ceremony in 1989.⁹⁰ The school had a policy that allowed principals to invite clergy members to give invocations and benedictions at the school graduation.⁹¹ Clergy members who accepted were given a pamphlet entitled “Guidelines for Civic Occasions,” informing them that public prayer at nonsectarian events were to be prepared with “inclusiveness and sensitivity.”⁹² The pamphlet further acknowledged that “prayer [was] inappropriate for some events.”⁹³ Over Weisman’s father’s objections, a rabbi delivered an invocation and benediction at the school.⁹⁴

⁸⁶ *Id.* at 261-262.

⁸⁷ *Lee v. Weisman*, 505 U.S. 577 (1992) (Kennedy, A., majority).

⁸⁸ Blackmun Papers, Box 586, Folder 6.

⁸⁹ Blackmun Papers, Box 586, Folder 9.

⁹⁰ *Weisman*, 505 U.S. at 581.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* The text of the invocation and benediction can be found from 581-582.

Weisman's father filed for a temporary restraining order and later a permanent injunction to prohibit having invocations and benedictions during school graduation ceremonies.⁹⁵ The district court held that the school's policy allowing school-led prayer at graduation ceremonies violated the Establishment Clause.⁹⁶ Applying the tripartite "Lemon test,"⁹⁷ the district court found the school-led prayer violated the first prong of the test by identifying the state with a religion or religion in general.⁹⁸ On appeal, the United States Court of Appeals for the First Circuit found that the school-led prayer violated all three prongs of the Lemon test.⁹⁹

Kennedy's opinion focuses on his coercion principle rather than the Lemon test. Kennedy begins by restating the central principle of the Establishment Clause: "[the] government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"¹⁰⁰ Religious belief and expression are essential aspects of individual personality and liberty, and are "too precious to be either proscribed or prescribed by the State."¹⁰¹ Unlike the broad First Amendment protections afforded to free speech, which extends even to speech by the government, the Establishment Clause specifically prohibits state intervention in religious affairs because of concerns over the state's powers to coerce and indoctrinate.¹⁰² Attributing the public school principal's actions to the state, the challenged school prayer violates this central principle through pervasive state involvement that "creat[es] a state-sponsored and state-directed religious

⁹⁵ *Id.* at 584.

⁹⁶ *Id.*

⁹⁷ As set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), for government activity to satisfy the Establishment Clause, it must: (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion.

⁹⁸ *Weisman*, 505 U.S. at 585.

⁹⁹ *Id.* at 586.

¹⁰⁰ *Id.* at 587.

¹⁰¹ *Id.* at 589.

¹⁰² *Id.* at 591.

exercise in a public school.”¹⁰³ Put more bluntly, by seeking “to produce a prayer to be used in a formal religious exercise” at an event “which students, for all practical purposes, are obliged to attend,” the school violated the Establishment Clause.¹⁰⁴

Distinct from the challenged governmental acts in *Allegheny County* and *Board of Education of Westside Community School*, the prayer in *Weisman* took place at an event of great importance where “attendance and participation ... were in a fair and real sense obligatory.”¹⁰⁵ Although the parties stipulated that attending the graduation was voluntary, Kennedy vehemently disagreed, stating, “to say that a teenage student has a real choice not to attend her high school graduation is formalism in the extreme.”¹⁰⁶ Not attending graduation would require a student to forfeit “intangible benefits” that motivated her through her school years, such as celebrating her academic success with family and friends, and to denigrate the significance of the achievement itself.¹⁰⁷ The students could not choose to ignore the graduation like a crèche display or choose not to attend or participate in the graduation like a religious after-school group, unless the student wanted to sacrifice some of what she had earned by reaching this academic stage. The school-led prayer violated Kennedy’s coercion principle by placing dissenting students in an “untenable position,” using the inevitable choice to attend one’s school graduation to coerce students into forced participation in state-sponsored religion.¹⁰⁸

Kennedy is quick to note his heightened concerns at protecting the freedom of conscience of schoolchildren in elementary and secondary public schools.¹⁰⁹ Research indicates that

¹⁰³ *Id.* at 586.

¹⁰⁴ *Id.* at 588-589.

¹⁰⁵ *Id.* at 586.

¹⁰⁶ *Id.* at 595(emphasis added).

¹⁰⁷ *Id.* at 595-596.

¹⁰⁸ See generally *id.* at 593.

¹⁰⁹ *Id.*

students of such a young age and in a group environment have a tendency towards conformity.¹¹⁰ At a graduation ceremony in particular, young students are in a highly-controlled environment where there is public pressure and peer pressure on attending students to stand as a group or, at the very least, maintain respectful silence.¹¹¹ Objectors are “placed in the dilemma of participating, with all that implies, or protesting.”¹¹² Dissenting students can either cause a scene by adhering to their beliefs or sacrifice their beliefs to avoid embarrassment and unwanted attention. Kennedy concludes, “[i]t is a tenet of the First Amendment that the State cannot require one of its Citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.”¹¹³ For Kennedy, the choice alone produces an intrusion on the individual's liberty of conscience against government coercion in the belief and exercise of religion.

Part IV: Substantive Due Process and the 14th amendment

A. Lawrence v. Texas: Protecting Private Conduct Through Liberty (majority opinion # 2)

In *Lawrence v. Texas*¹¹⁴, writing for a 5-4 majority, Kennedy held that a Texas statute proscribing two persons of the same sex from engaging in certain intimate sexual conduct violated the Fourteenth Amendment's Due Process Clause by “impinging on the exercise of liberty” of adult males to engage in consensual sodomy in the privacy of their own homes.¹¹⁵ *Lawrence* expressly overruled the Court's opinion in *Bowers v. Hardwick*, where the court held that a Georgia statute proscribing sodomy did not violate the fundamental rights of homosexuals because the Constitution did not confer upon homosexuals a right to engage in sodomy.¹¹⁶

¹¹⁰ *Id.*

¹¹¹ See FRANK J. COLUCCI, *supra*, at p. 19.

¹¹² *Weisman*, 505 U.S. at 593.

¹¹³ *Id.* at 596.

¹¹⁴ *Lawrence v. Texas*, 539 U.S. 558 (2003)(Kennedy, A., majority).

¹¹⁵ *Id.* at 564.

¹¹⁶ *Bowers v. Hardwick*, 478 U.S. 186, 189-190 (1986).

Kennedy's *Lawrence* opinion criticizes *Bowers* for focusing too narrowly on whether the Constitution protected a "fundamental right [of] homosexuals to engage in sodomy," "misapprehend[ing] the claim of liberty there presented."¹¹⁷ Instead, Kennedy protects such private activity through the full and necessary meaning of liberty, which "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."¹¹⁸

Texas police officers were sent to John Geddes Lawrence's apartment in response to a weapons disturbance.¹¹⁹ There, the officers observed and arrested Lawrence and another man for engaging in "deviate sexual intercourse," anal sex with a member of the same sex.¹²⁰ Both men were adults at the time of the offense, their conduct was consensual, and the acts were conducted in private.¹²¹ Petitioners challenged the statute as a violation of the Fourteenth Amendment's Equal Protection Clause.¹²² The trial court convicted Petitioners, and Court of Appeals for the Texas Fourteenth District affirmed the conviction.¹²³

Consistent with his jurisprudential philosophy, Kennedy's *Lawrence* opinion uses the full and necessary meaning of liberty to protect the private, homosexual conduct of consenting adult males.¹²⁴ Using liberty rather than privacy to protect such conduct avoids textual objections, bringing the issue's "moral and practical considerations" to the forefront.¹²⁵ At his confirmation hearing, Kennedy stated, "[the] concept of liberty is quite expansive, [and] quite sufficient, to protect the values of privacy that Americans legitimately think are part of their constitutional

¹¹⁷ *Lawrence*, 539 U.S. at 567.

¹¹⁸ *Id.* at 562.

¹¹⁹ *Id.* at 563.

¹²⁰ *Id.*

¹²¹ *Id.* at 564.

¹²² *Id.* at 563.

¹²³ *Id.* at 564.

¹²⁴ *Id.*

¹²⁵ Frank J. Colucci, *supra*, at p. 22.

heritage.”¹²⁶ As such, Kennedy frames the issue as “whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Fourteenth Amendment’s Due Process Clause.”¹²⁷ The *Bowers* court’s prior formulation of the issue, “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy,”¹²⁸ failed to “appreciate the extent of the liberty at stake.”¹²⁹ Kennedy explains:

“To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”¹³⁰

Unlike the *Bowers* court, the *Lawrence* court does not “misapprehend the claim of liberty there presented to it.”¹³¹ Kennedy makes his holding clear: “adults 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 person.”¹³² Both the statute in *Bowers* and the statute in *Lawrence* sought to control an adult, homosexual male’s personal relationship” by controlling “private human conduct [and] sexual behavior, and in the most private of places.”¹³³ The full and necessary meaning of liberty, however, presumes an autonomy of self that includes “freedom of thought, belief, expression, and certain intimate conduct.”¹³⁴ By impinging on the consensual, intimate sexual conduct of adult homosexual males in the privacy of their own homes, the State becomes a dominant presence in a place in which it should not be present at all.¹³⁵ Such intrusion demeans the homosexual individual and his relationship, stigmatizing their relationship as less

¹²⁶ See U.S. Senate, *supra*, p. 20.

¹²⁷ *Lawrence*, 539 U.S. at 564.

¹²⁸ *Bowers*, 478 U.S. at 190.

¹²⁹ *Lawrence*, 539 U.S. at 567.

¹³⁰ *Id.* at 567.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 562(emphasis added).

¹³⁵ See generally *id.*

worthy than more traditional relationships and leaving a permanent mark on the individual's personality and his permanent criminal record.¹³⁶ Kennedy concludes:

“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”¹³⁷

Kennedy's *Lawrence* opinion is also notable for its reliance on traditional and nontraditional sources in reaching its conclusion. Kennedy uses precedent, history, and tradition as a starting point for his analysis.¹³⁸ The precedent prior to *Bowers* indicated that the protection of liberty under the Due process Clause had a “substantive dimension of fundamental significance in defining the rights of the person.”¹³⁹ In *Eisenstadt*, the court held:

“if the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹⁴⁰

Further, in *Roe v. Wade*, the court held that a woman's right to choose to abort was deserving of “real and substantive protection” as an exercise of her liberty under the Due Process Clause.¹⁴¹ The precedent following *Bowers* appeared to limit the scope of *Bowers*'s holding.¹⁴² In *Casey*, the court held that our laws and traditions afford constitutional protection to intimate personal decisions relating to “marriage, procreation, contraception, family relationships, child rearing, and education.”¹⁴³ Writing for the majority, Kennedy stated:

“These matters, involving the intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”¹⁴⁴

¹³⁶ See generally *id.* at 575.

¹³⁷ *Id.* at 567.

¹³⁸ See generally *id.* at 572.

¹³⁹ *Id.* at 565.

¹⁴⁰ *Id.* (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

¹⁴¹ *Id.* (quoting *Roe v. Wade*, 410 U.S. 113 (1973)).

¹⁴² *Id.* at 573-575.

¹⁴³ *Id.* at 574 (quoting *Casey*, 505 U.S. at 851).

¹⁴⁴ *Id.* (quoting *Casey*, 505 U.S. at 851).

Kennedy's *Lawrence* opinion extends this *Casey* rationale to persons in homosexual relationships.¹⁴⁵ Similarly, in *Romer v. Evans*, the court, with Kennedy again writing for the majority, struck down on Equal Protection grounds Colorado legislation which explicitly refused to recognize homosexuals as a protected class.^{146 147}

Next, Kennedy's *Lawrence* opinion looks to the history and tradition of our laws. Kennedy finds that the United States has no longstanding history of laws "directed at homosexual conduct as a distinct matter."¹⁴⁸ Laws which did prohibit sodomy prohibited "noncreative sexual activity more generally," with no regard to whether the participants were of the same or opposite sex.¹⁴⁹ Moreover, laws which prohibited sodomy do not seem to have been enforced against "consenting adults acting in private."¹⁵⁰ Kennedy finds no "ancient roots," language used by the *Bowers* court, in American laws targeting same-sex couples.¹⁵¹ Such laws did not develop until the 1970s, and, even then, were only enacted by nine states.¹⁵² Further, many states that passed laws targeting same-sex couples have since moved towards abolishing those laws over the past few decades.¹⁵³ The only "ancient roots" for condemnation of homosexual behavior stem from religion and traditional concepts of right and acceptable behavior.¹⁵⁴ Kennedy matter-of-factly states that such consideration is not determinative for the

¹⁴⁵ *Id.* Kennedy notes, "[t]he decision in *Bowers* would deny [persons in homosexual relationships] this right." *Id.*

¹⁴⁶ *Id.* at 574-575 (quoting *Romer v. Evans*, 517 U.S. 620 (1996)).

¹⁴⁷ Kennedy admits there it is "tenable" that *Lawrence*, like *Romer v. Evans*, could be decided on Equal Protection grounds. *Id.* at 575. Kennedy chooses to invalidate *Lawrence* through the Due Process Clause, with a focus on liberty, to prevent *Bowers* from having "continuing validity." *Id.* If *Bowers* remained binding precedent, the constitutionality of a law prohibiting both same-sex and different-sex participants could still be questioned. *Id.*

¹⁴⁸ *Id.* at 568.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 569.

¹⁵¹ *Id.* at 570.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 571.

Court, and, quoting his majority opinion in *Casey*, notes, "our obligation is to define the liberty of all, not to mandate our own moral code."¹⁵⁵

More controversially, Kennedy relies heavily on "emerging awareness" within the United States and comparative international law to buttress his *Lawrence* analysis. Kennedy declares, "history and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry."¹⁵⁶ The expansive duty to define and enforce liberty's full meaning and moral content under the Constitution may necessitate that the judge find "objective referents" for liberty in non-traditional sources, such as emerging awareness and international law. In reviewing the laws and traditions of the United States over the past half century, Kennedy notes an emerging awareness that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."¹⁵⁷ In 1955, the American Law Institute declined to recommend or provide for criminal penalties for consensual sexual relations conducted in private.¹⁵⁸ Further, when *Bowers* was decided in 1986, 25 states ~~which~~ had laws proscribing sodomy.¹⁵⁹ Since *Bowers*, the number of states proscribing sodomy ~~has~~ been reduced to 13 states, of which only four states enforce such laws only against homosexual conduct.¹⁶⁰ Even where sodomy is proscribed, there is a "pattern of nonenforcement with respect to consenting adults acting in private," including in Texas as of 1994.¹⁶¹ Next, Kennedy considers the comparative international law of other countries with similar Judeo-Christian moral and ethical standards.¹⁶² 5 years prior to *Bowers*, the European Court of Human Rights ("ECHR") held that "laws proscribing ... [consensual homosexual conduct] were invalid

¹⁵⁵ *Id.* (quoting *Casey*, 505 U.S. at 833).

¹⁵⁶ *Id.* at 572.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 573.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* (citing *State v. Morales*, 869 S.W.2d 941, 943 (Tex. 1994)).

¹⁶² *Id.* at 572.

under the European Convention on Human Rights.”¹⁶³ This declaration was authoritative when *Bowers* was decided and remained authoritative after *Bowers* was decided, despite the fact that the ECHR's membership has expanded from 21 nations to 45 nations during that time.¹⁶⁴

At the time of *Lawrence*, the position in *Bowers* seemed unique to the United States. While Kennedy admits that “*stare decisis* is essential ... to the stability of the law,” he continues to say that “[*stare decisis*] is not, however, an exorable command.”¹⁶⁵ The Constitution's moral concepts themselves, rather than their prior interpretations, must provide the basis for “determining the extent of the personal liberty that courts have a duty to enforce.”¹⁶⁶ Here, *Bowers* lacked the detrimental individual and social reliance that is typical of most precedent. In fact, *Bowers* itself “cause[d] uncertainty,” as precedents before and after *Bowers*, subsequent actions by state legislatures, and international law conflicted with *Bowers*' central holding.¹⁶⁷ Kennedy bluntly declares, “*Bowers* was not correct when decided and [is] not correct today.”¹⁶⁸ Overruling *Bowers*, Kennedy holds that in the exercise of their liberty, adults may engage in intimate, consensual sexual conduct with members of the same-sex “in the confines of their homes and their private lives and still retain their dignity as free persons.”¹⁶⁹

What about
stare decisis
Moral
concepts

Part V: Cruel and Unusual Punishment

A. *Roper v. Simmons*: the “emerging awareness” on juvenile death penalty¹⁷⁰ (majority opinion #3)

¹⁶³ *Id.* at 573 (quoting *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981)).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 577.

¹⁶⁶ FRANK J. COLUCCI, *supra*, at p. 4.

¹⁶⁷ *Lawrence*, 539 U.S. at 577.

¹⁶⁸ *Id.* at 578.

¹⁶⁹ *Id.* at 567.

¹⁷⁰ In addition to *Roper*, Kennedy wrote the majority opinion in *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (prohibiting death penalty where individual's crime did not result in death of the victim) and joined the majority opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002) (Eighth Amendment prohibits the execution of mentally handicapped offenders).

In *Roper v. Simmons*¹⁷¹, writing for a 5-4 majority, Kennedy held that the Eighth and Fourteenth Amendment forbid imposing the death penalty on offenders who were under age 18 at the time their capital crimes were committed.¹⁷² *Roper* expressly overruled the Court's decision in *Stanford v. Kentucky*, where the court held that the Eighth and Fourteenth Amendments did not proscribe the execution of offenders who were over the age of 15 but under 18 as cruel and unusual punishment.¹⁷³ The majority opinion in *Stanford*, written by Scalia and joined by Kennedy, indicated there was no national consensus on whether the execution of offenders aged between 15 and 18 years old was proscribed by the Constitution, as 22 of 37 death penalty states permitted the execution of 16 year old offenders and 25 of 37 permitted it for 17 year old offenders.¹⁷⁴

At age 17, Christopher Simmons and two even younger confederates conspired to and committed murder.¹⁷⁵ Simmons detailed his plan to break into a woman's home, burgle her home, tie her up, and throw the victim off of a bridge.¹⁷⁶ Simmons and his two co-conspirators performed their plan to the letter, concluding with their tying the victim up with electrical wire and throwing her off a bridge, leaving her to drown in the waters below.¹⁷⁷ Simmons was arrested and charged, *inter alia*, with murder.¹⁷⁸ He waived his *Miranda* rights and made a full confession.¹⁷⁹

¹⁷¹ *Roper v. Simmons*, 543 U.S. 551 (2005)(Kennedy, A., majority).

¹⁷² *Roper*, 543 U.S. at 578.

¹⁷³ *Stanford v. Kentucky*, 492 U.S. 361 (1989).

¹⁷⁴ *Id.*

¹⁷⁵ *Roper*, 543 U.S. 556.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 556-557.

¹⁷⁸ *Id.* at 557.

¹⁷⁹ *Id.*

By the time Simmons was tried and sentenced, he had turned 18.¹⁸⁰ The State of Missouri sought the death penalty for Simmons.¹⁸¹ Defense counsel reminded the jury that people of Simmons' age "cannot drink, serve on juries, or even see certain movies, because 'the legislatures have wisely decided that individuals of a certain age aren't responsible enough.'"¹⁸² The jury recommended the death penalty for Simmons, and the judge accepted their recommendation.¹⁸³ The Missouri trial court denied Simmons' motion for post-conviction relief by reason of ineffective assistance of counsel.¹⁸⁴ Subsequently, the Supreme Court decided *Atkins v. Virginia*, in which it held that the Eighth and Fourteenth Amendments prohibited the execution of mentally handicapped persons.¹⁸⁵ Simmons filed a new petition for state postconviction relief, arguing that *Atkins* established that the Constitution prohibited the execution of juveniles who were under the age of 18 when they committed their capital offense.¹⁸⁶ The Missouri Supreme Court agreed, and resented Simmons to "life imprisonment without eligibility for probation, parole, or release except by act of the governor," citing the "national consensus ... against the execution of juvenile offenders."^{187 188}

Like liberty, "cruel and unusual punishment" is a spacious phrase in the Constitution. Judges have an expansive duty to find the full and necessary meaning of "cruel and unusual punishment," and enforce the moral concepts within it.¹⁸⁹ To perform this duty, judges must engage in case-by-case moral arguments "about the nature of liberty, human personality, and

¹⁸⁰ *Id.* at 556.

¹⁸¹ *Id.* at 558.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 559.

¹⁸⁵ *Atkins v. Virginia*, 543 U.S. 304 (2002).

¹⁸⁶ *Roper*, 543 U.S. at 560.

¹⁸⁷ *Id.* at 560.

¹⁸⁸ Interestingly, in a later opinion, *Graham v. Florida*, 130 S.Ct. 2011 (2010), Kennedy holds that the Eighth Amendment prohibits imposing life sentences without the possibility of parole on juveniles who have not committed murder. As Simmons committed murder, even if *Graham* had been in place, he still would have received a life sentence without the possibility of parole.

¹⁸⁹ See generally FRANK J. COLUCCI, *supra*, at p. 11.

human dignity, as well as judicial power to enforce them.¹⁹⁰ Imposing the death penalty on juvenile offenders classifies as cruel and unusual punishment because of the extent to which it disproportionately violates the juvenile offender's liberty. The death penalty prevents the juvenile offender from ever manifesting his or her personality, from obtaining his or her own self-fulfillment, and prevents the individual from ever reaching his or her potential, all of which are factors protected by the Constitution under the full and necessary meaning of liberty.¹⁹¹

Kennedy's entire analysis in *Roper* revolves around finding the juvenile offender less capable than an adult offender who commits a similar crime, as the juvenile offender has not yet fully developed his personality or fixed his traits to become who he will ultimately be.¹⁹² The death penalty is the "most severe punishment,"... [and] should be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution."¹⁹³ Kennedy states that juvenile offenders "cannot be classified with reliability among the worst offenders" in the way that adult offenders can be.¹⁹⁴ First, juveniles lack maturity and have an underdeveloped sense of responsibility, resulting in a proclivity for impetuous, ill-considered actions.¹⁹⁵ Second, juveniles are more susceptible to negative influences and outside pressures than adults.¹⁹⁶ Quoting precedent, Kennedy states, "youth ... is a time and condition when a person may be most susceptible to influence and to psychological change."¹⁹⁷ Third, a juvenile's character is not as well formed as that of an adult, with more transitory and less fixed character traits.¹⁹⁸ In light of their fluid character traits,

¹⁹⁰ *Id.*

¹⁹¹ See generally U.S. Senate, *supra*, at p. 31.

¹⁹² *Roper*, 543 U.S. at 569.

¹⁹³ *Id.* at 568 (quoting *Atkins* at 319).

¹⁹⁴ *Id.* at 569.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

¹⁹⁸ *Id.* at 570.

incomplete personality, and susceptibility for influence, the behavior of juveniles “is not as morally reprehensible as that of an adult.”¹⁹⁹ For Kennedy, the juvenile offender’s youth is a mitigating factor because “the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.”²⁰⁰

Sentencing a juvenile offender, such as Simmons, to the death penalty permanently stunts the growth of his personality and potential, before he or the Court can ever determine if the crime was symptomatic of an irretrievably depraved character deserving of the death penalty or if the crime was an uncharacteristic mistake of the man he could have become.

Notably, Kennedy relies upon non-traditional sources to support his contention that the death penalty for juveniles is a “punishment[] ... so disproportionate as to be cruel and unusual.”²⁰¹ Kennedy cites to the “evolving standards of decency that mark the progress of a maturing society,” social science research, and international law to provide “objective referents” for the moral content of liberty. First, enactments by state legislatures and the Court’s own determination demonstrate that the death penalty is a disproportionate punishment for juveniles. Kennedy remarks that the evolving standards of decency that proscribed the death penalty against the mentally impaired in *Atkins* is very similar to the national consensus to proscribe the death penalty against juveniles.²⁰² 30 states prohibit the juvenile death penalty, including 12 that prohibit the death penalty altogether and another eight states that maintain the death penalty but, “by express provision or judicial interpretation, exclude juveniles from its reach.”²⁰³ Additionally, juries recommend the death penalty for juveniles very infrequently.²⁰⁴ Kennedy

¹⁹⁹ *Id.*(quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).

²⁰⁰ *Id.*(quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993))(emphasis added).

²⁰¹ *Id.* at 561.

²⁰² *Id.* at 564.

²⁰³ *Id.*

²⁰⁴ *Id.* at 565.

posits that the slower rate of juvenile death penalty abolition over the last 15 years, in comparison to the abolition of the death penalty against the mentally impaired, is likely a result of the juvenile death penalty gaining wider recognition earlier.²⁰⁵ Second, Kennedy cites to scientific studies, sociological studies, and psychological studies to show that juvenile offenders do not reliably share the same culpability as adult offenders committing the same crime.²⁰⁶

Lastly, Kennedy cites to international law to demonstrate that imposing the death penalty on juveniles constitutes cruel and unusual punishment. Kennedy points out that the "United States is the only country in the world that continues to give official sanction to the juvenile death penalty."²⁰⁷ Since 1990, only seven countries have executed juvenile offenders, but, other than the United States, all of those countries have since repudiated the practice.²⁰⁸ While the opinion of the world community is not controlling, it does provide "respected and significant confirmation for our own conclusions."²⁰⁹ In response to Justice Scalia's vociferous dissent decrying reliance on "alien law" to interpret the Constitution, Kennedy continues:

"It does not lessen our fidelity to the Constitution or pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."²¹⁰

Namely, what the traditional and non-traditional sources of Constitutional interpretation used by Kennedy in *Roper* make clear is that "when a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity."²¹¹

²⁰⁵ *Id.* at 566-567.

²⁰⁶ *Id.* at 569-571.

²⁰⁷ *Id.* at 575.

²⁰⁸ *Id.* at 577.

²⁰⁹ *Id.* at 578.

²¹⁰ *Id.*

²¹¹ *Id.* at 573-574.

Part VI: Abortion

A. Kennedy's abortion jurisprudence prior to *Casey*

Kennedy has admittedly struggled with the issue of abortion during his 25 years on the Supreme Court.²¹² In the years leading to *Casey*, Kennedy's opinions on abortion attempted to limit rather than overturn the import of the holding in *Roe v. Wade*.²¹³ Specifically, Kennedy attempted to limit the holding of *Roe* in such a way that would "allow for more governmental regulation of the procedure while retaining a judicial role in enforcing individual liberty."²¹⁴

In *Webster*, the court addressed a Missouri law which required that doctors test for fetal age before performing an abortion, if he had reason to believe the fetus was 20 weeks or older.²¹⁵ The court held that the requirement was a reasonable regulation for promoting the State's interest in protecting potential human life.²¹⁶ The court upheld the regulation despite the fact that the regulation would be unconstitutional under *Roe*'s trimester framework.²¹⁷ While he joined the majority opinion, in conference, Kennedy stated that he would not find the right to abort to be a fundamental right under the right of privacy or the Equal Protection Clause, but rather as a protected liberty under the Fourteenth Amendment's Due Process Clause.²¹⁸ To Kennedy, such a change would "return this debate to the democratic process." Kennedy's later opinions would show that a 'return to the democratic process' meant giving state's more latitude to regulate the abortion procedure, in light of their interest in promoting respect for fetal life and free and informed choices.²¹⁹

²¹² FRANK J. COLUCCI, *supra*, at p. 47.

²¹³ *Id.* at p. 40.

²¹⁴ *Id.* at p. 40, 48.

²¹⁵ *Webster v. Reproductive Health Systems*, 492 U.S. 490 (1989).

²¹⁶ *Id.* at 519-520.

²¹⁷ *Id.*

²¹⁸ FRANK J. COLUCCI, *supra*, at p. 40.

²¹⁹ *Id.* at p. 39.

In *Hodgson*, the court upheld a statute that required minors to wait 48 hours prior to obtain an abortion, but rejected its requirement that both parents be notified of the abortion.²²⁰ Kennedy wrote a concurrence that upheld both the time delay and parental notification requirements, unless the minor obtained a judicial bypass.²²¹ To justify the notification requirement, Kennedy cited to the states interests in (1) promoting the welfare of pregnant minors; and (2) acknowledging and promoting the role of parents in the care and upbringing of their children.²²² Kennedy emphasized the importance of family ties, both for the minors in making their abortion decision and for their parents's liberty interest in having a reasonable opportunity to develop close relations with their children.²²³ Mirroring later language about abortion decisions having "consequences beyond the fetus," here the notification requirement did not place an "absolute obstacle" on any minor seeking an abortion, and represented a "considered weighing of the competing interests of minors and their parents."²²⁴

In *Akron Center*, heard by the Court on the same day as *Hodgson*, the court heard a state that, *inter alia*, required physicians performing an abortion on a minor to provide timely notice to the minor's parent, unless the physician obtained a judicial bypass.²²⁵ Writing for a plurality, Kennedy held that the law did not impose "an undue or otherwise unconstitutional burden on a minor seeking an abortion."²²⁶ The language Kennedy uses lays the foundation for *Casey* and his later abortion decisions, wherein he uses liberty rather than privacy to protect the right to abort and justifies greater government regulation of the procedure.²²⁷ A woman's decision to abort is a "grave one that will embrace her own destiny and personal dignity, and the origins of

²²⁰ *Hodgson v. Minnesota*, 497 U.S. 417 (1990)(Kennedy, A., concurrence).

²²¹ *Id.* at 481.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 496.

²²⁵ *Ohio v. Akron Center*, 497 U.S. 502 (1990).

²²⁶ *Id.* at 519-520.

²²⁷ See generally FRANK J. COLUCCI, *supra*, at p. 44

the other human life that lies within the embryo."²²⁸ Kennedy argues that it is rational for the state to assume the beginning of that understanding will come from the family, and that is fair for the State to pass laws to allow that family to give a "lonely or even terrified minor" advice.²²⁹

Kennedy concludes:

"It would deny all dignity to family to say state cannot take reasonable step in regulating its health professions to ensure that in most cases a young woman will receive guidance and understanding from a parent."²³⁰

With his rhetoric in *Akron Center*, Kennedy strives to classify a woman's decision to abort as a philosophical choice that implicates the woman's personal destiny and dignity.²³¹

Using paternalistic language, Kennedy emphasizes the gravity of the decision and the importance of a family support system to advise the "terrified minor."²³² By demonstrating that a woman's decision to abort is informed by her family's advice, Kennedy sets the stage to discuss the effect that abortion has on the woman's family.²³³ Then, to protect the woman's family and their liberty interest in raising and remaining close to their child, greater state regulation on abortion is necessary.²³⁴ Once that has been established, Kennedy could justify greater state regulation in order to protect the state's own interests in a woman's decision to abort, while also upholding the core holding of *Roe*.²³⁵

B. *Planned Parenthood v. Casey*: shifting the foundation of abortion to liberty (majority opinion # 4)

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See FRANK J. COLUCCI, *supra*, at p. 44

²³² See generally *id.*

²³³ See generally *id.*

²³⁴ See generally *id.*

²³⁵ See generally *id.*

In *Casey*,²³⁶ the Court reviewed the constitutionality of changes made to the Pennsylvania abortion statute. The proposed changes required a woman seeking an abortion to: (1) give informed consent prior to the procedure; (2) endure a 24 hour waiting period before the procedure is performed; (3) if a minor, to obtain the informed consent of one of her parents, with the possibility of judicial bypass; (4) if married, woman must sign a statement indicating husband has been notified.²³⁷ Additionally, the changes imposed reporting requirements on facilities providing abortion services.²³⁸ Prior to the provisions going into effect, petitioners, five abortion clinics and one physician providing abortion services, filed for declaratory and injunctive relief.²³⁹ Writing for a 5-4 majority, Kennedy upheld all the abortion procedure regulations other than the spousal notification requirement, finding that the other four regulations did not pose an “undue burden” on a woman’s right to choose to abort.²⁴⁰

In reaching this conclusion, the Court reaffirmed the holding of *Roe* and recast *Roe*’s constitutional foundations in liberty.²⁴¹ As an initial matter, the Court restates what it believes are the three prongs of *Roe*’s central holding.²⁴² First, a woman has the right to choose to have an abortion before the fetus is viable²⁴³ without undue interference from the state.²⁴⁴ Prior to the fetus’ viability, the State’s interests are not strong enough to support prohibiting or imposing substantial obstacles on a woman’s right to abort.²⁴⁵ Second, the State can restrict abortions after the fetus becomes viable, provided the law contains exceptions where the pregnancy endangers

²³⁶ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)(Kennedy, A., majority).

²³⁷ *Id.* at 844.

²³⁸ *Id.*

²³⁹ *Id.* at 845.

²⁴⁰ *Id.* at 879-901.

²⁴¹ *Id.* 846-857.

²⁴² *Id.* at 846.

²⁴³ A fetus is viable when it has a “realistic possibility of maintaining and nourishing a life outside the womb.” *Id.* at 870.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

the woman's life or health.²⁴⁶ Third, from the outset of the pregnancy, the State has legitimate interests in protecting the woman's health and the life of the fetus that may become a child.²⁴⁷ Kennedy believes that this important state interest provided for in *Roe* has been overlooked by *Roe*'s progeny.²⁴⁸

Having established what *Roe* stands for, the Court explains why *Roe* should not be overturned by *stare decisis*.²⁴⁹ When the Court reexamines a prior holding, it is customarily informed by prudential and pragmatic considerations to test the consistency and respective costs of reaffirming or overruling a prior case.²⁵⁰ Here, overruling *Roe* would mean denying that for over two decades, people have created intimate relationships and "defined themselves and their places in society "in reliance on the availability of abortion .. [should] contraception fail."²⁵¹ *Roe*'s passage has not made it so courts are likely to "hand down erroneous decisions." Kennedy concludes, "[t]he sum of the precedential enquiry to this point shows *Roe*'s underpinnings unweakened in any way affecting its central holding. While it has engendered disapproval, it has not been unworkable."²⁵²

With the central holding of *Roe* reaffirmed, Kennedy attempts to reclassify a woman's right to choose to abort as a right protected under liberty.²⁵³ Kennedy states:

"The Constitutional protection [for] the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall "deprive any person of life, liberty, or property, without due process of law." **The controlling word in the cases before us is "liberty."**²⁵⁴

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 856-860.

²⁵⁰ *Id.* at 854.

²⁵¹ *Id.* at 856.

²⁵² *Id.* at 860.

²⁵³ *Id.* at 846.

²⁵⁴ *Id.* (emphasis added).

Kennedy recasts the right to choose to abort as a substantive liberty protected by the Fourteenth Amendment's Due Process Clause. Although not expressly enumerated in the Constitution, Kennedy reminds the reader that not all liberties protected by the Fourteenth Amendment are expressly mentioned in the Constitution.²⁵⁵ Indeed, "the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution."²⁵⁶ The Constitution's full and necessary meaning of liberty does, however, clearly "place[] limits on [the] state's right to interfere with person's most basic decisions about family and parenthood, as well as bodily integrity."²⁵⁷ The law guarantees Constitutional protection to this type of "personal decisions" relating to marriage, procreation, contraception, family relationships, child rearing, and education."²⁵⁸ In his famous "heart of liberty" passage, Kennedy makes this clear:

"These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the 14th amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."²⁵⁹

✓ Beliefs about this type²⁶⁰ of matters could not define the "attributes of personhood" if they were formed under compulsion of the State.²⁶⁰ Given the anguish a woman would experience from being denied the choice to abort, majority and historical beliefs about fetal life and motherhood "cannot alone be grounds for the State to insist she make the sacrifice."²⁶¹ Kennedy

²⁵⁵ *Id.* at 847.

²⁵⁶ *Id.* at 848 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

²⁵⁷ *Id.* at 849.

²⁵⁸ *Id.* at 851.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 852.

declares, “[The Supreme Court’s] obligation is to define the liberty of all, not to mandate our own moral code.”²⁶²

While the State cannot flatly prohibit a woman’s right to choose to abort, the Court is careful to note that the consequences from a woman’s choice to abort affect more than just that woman and her fetus. Kennedy describes the ripples cascading from a woman’s choice to abort:

“Abortion is a unique act. **It is an act fraught with consequences for others:** for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist.”²⁶³

Kennedy continues, “It was this dimension of personal liberty that *Roe* sought to protect.”²⁶⁴ By mentioning all those affected by a choice to abort, Kennedy sets the foundation to discuss the interests of the other affected persons and how to protect those interests.

Kennedy begins by establishing the State’s interests in a woman’s choice to abort. He notes, “[a] woman’s liberty [to abort] is not so unlimited ... that from the outset [of pregnancy] the State cannot show its concern for the life of the unborn.”²⁶⁵ On the “other side of the equation” is the State’s interest in protecting potential life.²⁶⁶ While *Roe* acknowledged the State’s “important and legitimate interest in protecting the potentiality of life,” subsequent abortion cases have done too little to acknowledge and protect this State interest.²⁶⁷ Indeed, *Roe* and subsequent cases have treated all pre-viability government attempts to influence a woman’s decision to abort as unwarranted, choosing to completely insulate the woman until the fetus becomes viable at the expense of the State’s interest.²⁶⁸ Additionally, Kennedy establishes that

²⁶² *Id.* at 850.

²⁶³ *Id.* at 852(emphasis added).

²⁶⁴ *Id.* at 853.

²⁶⁵ *Id.* at 869.

²⁶⁶ *Id.* at 871.

²⁶⁷ *Id.* at 871-872 (quoting *Roe*, 410 U.S. at 162).

²⁶⁸ *Id.* at 876.

the State has an interest in ensuring that the woman's choice to abort is "thoughtful and informed," and can take steps to protect said interest, even before viability.²⁶⁹

To better protect the State's legitimate interests in a woman's choice to abort, Kennedy abandons *Roe*'s rigid trimester²⁷⁰ framework in favor of an undue burden standard.²⁷¹ The Court found that the trimester system was not an essential part of *Roe*'s holding.²⁷² The trimester framework was not necessary to protect the woman's right to choose to abort, and, more importantly, was extremely ineffective in protecting the State's legitimate interests in protecting the potentiality of fetal life and ensuring that women made thoughtful and informed decisions on whether to abort.²⁷³ Instead, the Court applied the undue burden standard to state regulation of abortion:

"Only when state regulation of abortion imposes an undue burden on woman's ability to decide whether to terminate pregnancy does power of state reach into heart of liberty protected by due process clause; fact that regulation has incidental effect of making it more difficult or more expensive to procure abortion cannot be enough to invalidate it."²⁷⁴

Under the undue burden standard, State regulation imposed an undue burden on a woman's decision to abort if the regulation "has the purpose or effect of placing a substantial obstacle in the path of women who seek the abortion of a nonviable fetus."²⁷⁵ Regulations which only create structural mechanisms for the state, or a minor's parent or guardian, to "express profound respect for the life of the unborn" are permitted, as long as the regulation is not a

²⁶⁹ *Id.* at 872.

²⁷⁰ *Roe* established a trimester system governing when the State could regulate a woman's choice to abort. *Id.* at 872 (quoting *Roe*, 410 U.S. at 163-166). During the first trimester, almost no regulation at all is permitted. During the second trimester, regulations designed to protect the woman's health, but not to further the State's interest in potential life, are permitted. *Id.* During the third and final trimester, when the fetus is viable, the State may prohibit the woman's choice to abort, provided the mother's life or health is not at stake. *Id.*

²⁷¹ *Id.* at 872-878.

²⁷² *Id.* at 873.

²⁷³ *Id.* at 872, 876.

²⁷⁴ *Id.* at 874(emphasis added).

²⁷⁵ *Id.* at 877(emphasis added).

substantial obstacle to a woman's right to choose.²⁷⁶ With the undue burden standard, the Court could reconcile the state's interests in human life and ensuring women made thoughtful, informed choices with the woman's constitutionally protected liberty in deciding whether to abort.²⁷⁷ Further, under the undue burden standard, the State could now more freely regulate abortion at the pre-viability stage. The undue burden standard protected what the trimester framework could not, and without sacrificing the woman's constitutionally protected liberty.

Applying the new undue burden standard, Kennedy upheld all of the changes to the Pennsylvania abortion statute, with the exception of the spousal notification requirement.²⁷⁸ Kennedy upheld the informed consent requirement, 24 hour waiting period requirement, parental notification requirement, and reporting requirements based on the State's interest in a woman's decision to abort being more "informed and deliberate."²⁷⁹ The spousal notification requirement was struck as adult women would not benefit from consulting their husbands in the way minors would from consulting their parents.²⁸⁰

Casey reverberates as a resounding success for Kennedy and his jurisprudential project. In *Casey*, Kennedy was able to modify and narrow *Roe* without overturning it, recast the foundation of abortion from privacy to liberty, and allow for greater democratic regulation of the abortion procedure based on moral concerns by better protecting the State's interests in abortion.²⁸¹

C. *Stenberg v. Carhart: a step back from Casey?* (dissenting opinion # 1)

²⁷⁶ *Id.* at 877.

²⁷⁷ *Id.* at 876.

²⁷⁸ *Id.* at 881-902.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 895.

²⁸¹ See FRANK J. COLUCCI, *supra*, at p. 57.

In *Stenberg*²⁸², the Court invalidated a Nebraska statute that banned all “partial birth abortions,” without regard to the health of the mother. The Nebraska statute defined a “partial birth abortion” as “an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completely the delivery.”²⁸³ Carhart, a Nebraska physician who performs abortions at a clinic, filed suit that the Nebraska statute was unconstitutional, and sought an injunction to prevent its enforcement.²⁸⁴ The district court held the statute unconstitutional and the Eighth Circuit Court of Appeals affirmed the district court’s decision.²⁸⁵

In a 5-4 majority, Justice Breyer struck down the law as unconstitutional for two reasons. First, Nebraska’s ban on partial birth abortions was unconstitutional because the law lacked any exception for preservation of the mother’s health.²⁸⁶ The Court concludes, “where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women’s health, Casey requires the statute to include a health exception.”²⁸⁷ Second, the Nebraska ban on partial birth abortions was unconstitutional because the statute’s vague language could be applied to the commonly used dilation and evacuation (D & E) procedure as well as to the more dangerous dilation and extraction (D & X) procedure.²⁸⁸ Breyer explains, “even if the statute’s basic aim is to ban D & X, its language makes clear that it also covers a much broader category of procedures.”²⁸⁹ In prohibiting the commonly used dilation and

²⁸² *Stenberg v. Carhart*, 530 U.S. 914 (2000)(Kennedy, A., dissenting).

²⁸³ *Id.* at 922 (quoting Neb.Rev.Stat. Ann. § 28-326(9) (Supp.1999)).

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 936-937.

²⁸⁷ *Id.* at 938.

²⁸⁸ *Id.* at 938-939.

²⁸⁹ *Id.* at 939.

evacuation procedure, the law unduly burdened women's right to choose to abort by placing a substantial obstacle on the ability of women to obtain an abortion.²⁹⁰

Dissenting, Kennedy held that Nebraska's ban on partial birth abortions did not unduly burden women's ability to decide whether to terminate a pregnancy, in that the law did not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.²⁹¹ Instead, under the framework of *Casey*, Nebraska's law advanced its legitimate State interests in promoting the life of the unborn and ensuring respect for all human life and its potential.²⁹²

For Kennedy, *Casey* is premised, *inter alia*, on the States having "an important constitutional role in defining their interests in the abortion debate."²⁹³ *Casey* described the State's interests in promoting the life of the unborn, respect for all human life, and encouraging thoughtful and informed abortion decisions by women.²⁹⁴ Additionally, States also have an interest in proscribing medical procedures which they reasonably determine "might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus."²⁹⁵ To protect this interest, a State can take steps to ensure that medical professionals are viewed as healers, who are "sustained by a compassion and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others."²⁹⁶ Here, in its brief, Nebraska described its interests as "including concern for the life of the unborn and 'for the partially-born, 'in preserving the integrity of the medical

²⁹⁰ *Id.*

²⁹¹ *Id.* at 965 (quoting *Casey*, 505 U.S. at 875).

²⁹² *Id.* at 957 (quoting *Casey*, 505 U.S. at 871).

²⁹³ *Id.* at 961.

²⁹⁴ *Casey*, 505 U.S. at 871-872.

²⁹⁵ *Stenberg*, 530 U.S. at 961.

²⁹⁶ *Id.* at 962.

profession, and in 'erecting a barrier to infanticide."²⁹⁷ Kennedy frankly states, "A review of *Casey* demonstrates the legitimate of [Nebraska's] policies. The Court should say so."²⁹⁸

Kennedy takes the majority to task for failing to award any weight to Nebraska's legitimate State interests. His repeated use of the colorful word "abortionist" and lengthy, graphic description of the D & X procedure indicate his moral discomfort with the D & X procedure and his incredulity at the majority's opinion.²⁹⁹ Kennedy accuses the majority of viewing the procedure from "the perspective of an abortionist," rather than from "the perspective of a society shocked when confronted with a new method of ending life."³⁰⁰ In light of Nebraska's intent to only ban the D & X procedure and the graphic description of the D & X procedure, it goes without saying that "Nebraska's ban on partial birth abortion furthers purposes States are entitled to pursue."³⁰¹ Notably, Kennedy makes a point to discuss Justice O'Connor's contention that Nebraska's ban does not further its stated interests because the permitted D & E method is "no less dehumanizing than the [proscribed] D & X method."³⁰² Kennedy replies:

"The issue is not whether members of the judiciary can see a difference between the two procedures. It is whether Nebraska can. The Court's refusal to recognize Nebraska's right to declare a moral difference between the procedures is a dispiriting disclosure of the illogic and illegitimacy of the Court's approach to the entire case."³⁰³

Unlike the majority, Kennedy takes no issue with Nebraska's failure to include a health exception in its law, to allow D & X whenever the physician thinks it is best for the health of the woman. By deferring to the doctor's judgment through a health exception, the State would allow individual physicians to "set [the] abortion policy for the State of Nebraska, [rather than] the

²⁹⁷ *Id.* at 961 (quoting Brief for Petitioners 48-49).

²⁹⁸ *Id.* at 961.

²⁹⁹ See generally FRANK J. COLUCCI, *supra*, at p. 59. For description of D & X procedure, see *Stenberg*, 530 U.S. at 958-960.

³⁰⁰ *Stenberg*, 530 U.S. at 957.

³⁰¹ *Id.*

³⁰² *Id.* at 962.

³⁰³ *Id.* (emphasis added).

legislature or the people.”³⁰⁴ Such deference would require the Court to revisit pre-*Row* cases, which gave a physician's treatment decisions controlling weight.³⁰⁵ Instead, Kennedy follows *Casey*, which does not give precedence to the views of a single physician or group of physicians regarding a particular procedure's relative safety.³⁰⁶ In further support, Kennedy cites to relevant medical authorities who opine that a health exception would be D & X unnecessary:

“The American College of Obstetricians and Gynecologists (ACOG) “could identify no circumstances under which [D & X] would be the only option to save the life or preserve the health of the woman.” App. 600–601. The [American Medical Association] AMA agrees, stating the “AMA's expert panel, which included an ACOG representative, could not find ‘any’ identified circumstance where [D & X] was ‘the only appropriate alternative.’”³⁰⁷

Lastly, Kennedy addresses the majority's position that the Nebraska law forbade both the D & X procedure and the more common D & E procedure, thus unduly burdening a woman's right to choose to abort.³⁰⁸ By making such argument, the majority contradicts *Casey*'s premise that States have an important Constitutional role in defining their interests in the abortion debate and misapplies well-settled doctrines of statutory construction.³⁰⁹ Kennedy explains, “[to] requir[e] a State to meet [such] unattainable standards of statutory draftsmanship in order to have its voice heard on this grave ... subject is no different from foreclosing state participation altogether.”³¹⁰

Turning to statutory interpretation, Kennedy states that the Nebraska law only applies to D & X procedures based on statutory references to “partial-birth abortion, “delivery” of a fetus,” and requiring that delivery occur “before” the death-causing procedure.³¹¹ First, the term “partial

³⁰⁴ *Id.* at 965.

³⁰⁵ *Id.* at 968.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 965-966(emphasis added).

³⁰⁸ *Id.* at 972.

³⁰⁹ *Id.* at 973, 961.

³¹⁰ *Id.* at 973.

³¹¹ *Id.* at 973-974.

birth abortion” is synonymous with the D & X procedure.³¹² Carhart’s lead expert prefaced his description of D & X by noting that D & X has been called “partial-birth abortion” by the lay press.³¹³ The AMA agrees, stating that “the ‘partial birth abortion’ legislation is by its very name aimed exclusively [at the D & X.] There is no other abortion procedure which could be confused with that description.”³¹⁴ Second and third, the proscribed procedure requires partial delivery of the fetus into the vagina and completion of a “delivery” at the end of the procedure.³¹⁵ Kennedy elucidates, and the AMA concurs, “Only removal of an intact fetus can be described as a “delivery” of a fetus and only the D & X involves an intact fetus.”³¹⁶ By contrast, D & E leaves the physician with “a tray full of pieces,” constituting neither delivery nor an intact fetus.³¹⁷ Thus, as intended, Nebraska’s law would only operate to prohibit D & X procedures, and would not operate to place a substantial obstacle on any woman seeking to abort. If a woman chose to abort, the common D & E procedure would still be available to her. As Nebraska’s law serves legitimate State interests and does not have the purpose or effect of “deny[ing] women a safe abortion,” the law imposes no undue burden on a woman’s ability to decide to terminate her pregnancy.

Part VII: Substantive Due Process under the 5th Amendment

A. *United States v. Windsor*: the equal liberty of same sex marriage(majority opinion #5)

In the recently decided *Windsor*³¹⁸, the Court addressed the constitutionality of the Defense of Marriage Act’s (“DOMA”) definition of marriage. In relevant part, DOMA stated:

“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United

³¹² *Id.* at 974.

³¹³ *Id.*

³¹⁴ *Id.* (quoting AMA Factsheet 3).

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *US v. Windsor*, 133 S. Ct. 2675 (2013) (Kennedy, A., majority).

States, the word '**marriage**' means only a legal union between one man and one woman as husband and wife, and the word '**spouse**' refers only to a person of the opposite sex who is a husband or a wife.³¹⁹

Section 3 of DOMA, which defines "marriage" and "spouse," does not forbid States from enacting laws which permit same-sex marriage or civil unions.³²⁰ The section is, however, binding on over 1,000 federal laws and regulations.³²¹

Edith Windsor and Thea Spyer, both women, met in 1963 in New York, New York, and, soon after, entered into a romantic relationship.³²² In 1993, after New York city extended the right to same-sex couples, Windsor and Spyer registered themselves as domestic partners.³²³ In 2007, after 40 years of partnership, the couple married in Ontario, Canada and returned home to New York.³²⁴ The State of New York acknowledged the couple's marriage as valid.³²⁵ When Spyer died in 2009, she left her entire estate to Windsor.³²⁶ Windsor attempted to claim the estate tax exemption³²⁷ for surviving spouses, but her claim was denied because DOMA denied federal recognition to same-sex spouses.³²⁸ Subsequently, Windsor paid \$363,053 in estate taxes and sought a refund for same from the IRS, who similarly denied Windsor's claim, concluding that she was not a surviving spouse under DOMA.³²⁹

Windsor filed suit in federal court that DOMA violated equal protection under the Fifth Amendment.³³⁰ While her suit was pending, the US Attorney General notified the Speaker of the House of Representatives that the Department of Justice "would no longer defend the

³¹⁹ 1 U.S.C. § 7.

³²⁰ *Windsor*, 133 S.Ct. at 2683.

³²¹ *Id.*

³²² *Id.* at 2682-2683.

³²³ *Id.* at 2683.

³²⁴ *Id.* at 2682.

³²⁵ *Id.* at 2683.

³²⁶ *Id.* at 2682.

³²⁷ The federal estate tax exemption for surviving spouse "excludes from taxation "any interest in property which passes or has passed from the decedent to his surviving spouse." 26 U.S.C. § 2056(a).

³²⁸ *Windsor*, 133 S.Ct. at 2683.

³²⁹ *Id.*

³³⁰ *Id.*

constitutionality of section 3 of DOMA," the section which defined marriage and spouse.³³¹ The court did, however, allow the Bipartisan Legal Advisory Group ("BLAG") of the House of Representatives to intervene as an interested party to defend the constitutionality of Section 3 of DOMA.³³² The district court held that Section 3 of DOMA was unconstitutional and ordered the government to pay Windsor her refund.³³³ The Second Circuit Court of Appeals affirmed.³³⁴ As of the date the Court heard *Windsor*, Windsor had not received her refund and the Executive Branch continued to enforce Section 3 of DOMA.³³⁵

As an initial matter, Kennedy, writing for a 5-4 majority, addressed standing and prudential concerns. The Court held that Windsor had standing to bring the case and that there was a justiciable controversy.³³⁶ Windsor suffered an immediate, redressable economic injury when she was forced to pay estate taxes which she would be exempt from if not for the validity of § 3 of DOMA.³³⁷ While the government refused to defend the constitutionality of § 3 of DOMA, there was still a justiciable controversy because, in refusing to give effect to the court's order to pay Windsor her refund, Windsor had a "concrete, persisting, and unredressed" injury.³³⁸ The Court stated that prudential concerns, which protect courts from "deciding abstract questions of wide public significance, would not prevent it from hearing the case, as such concerns were overridden by the participation of *amici curae*.³³⁹ Here, BLAG's defense of

³³¹ *Id.*

³³² *Id.* at 2684.

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.* at 2685.

³³⁷ *Id.*

³³⁸ *Id.* at 2685-2656.

³³⁹ *Id.* at 2686-2687.

Section 3 of DOMA's constitutionality assured the adversarial presentation of issues with vigor.³⁴⁰

Kennedy begins his substantive analysis by noting an emerging awareness by states of same-sex marriage.³⁴¹ Until recent years, many Citizens likely had not considered the possibility of same-sex marriage, let alone that same-sex marriage might "aspire to occupy the same status and dignity as that of a man and woman in lawful marriage."³⁴² Over time, more and more States began to recognize same-sex marriage with the same recognition and validity as traditional marriage between a man and a woman.³⁴³ Indeed, the emerging awareness from these States indicated that "limiting lawful marriage to heterosexual couples ... [was] an unjust exclusion."³⁴⁴ In particular, New York first recognized same-sex marriages performed elsewhere, and then amended its own marriage laws to permit same-sex marriage.³⁴⁵ In doing so, New York enlarged the definition of marriage to "correct what its Citizens and elected representatives perceived to be an injustice that they had not earlier known or understood."³⁴⁶

Defining and regulating marriage has been treated as a "virtually exclusive province of the states," subject to the condition that such laws must respect a person's constitutional rights.³⁴⁷ The state has traditionally and historically possessed full, undelegated power over marriage and divorce.³⁴⁸ Congress does have some ability to enact discrete statutes that bear on marital rights and privileges, but precedent indicates that such limited laws are only constitutional if they

³⁴⁰ *Id.* at 2687-2688.

³⁴¹ *Id.* at 2689.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.* (emphasis added).

³⁴⁷ *Id.* at 2691.

³⁴⁸ *Id.*

regulate marriage's meaning in order to further federal policy.³⁴⁹ Consistent with this allocation of authority, the Federal Government has historically deferred to state-law policy decisions on marriage and divorce.³⁵⁰

Comparing the much broader and less deferential DOMA against this rubric, Kennedy finds:

“DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next.”³⁵¹

Rather than focusing on potential federalism concerns, Kennedy's analysis here focuses on the effect that the State's decision to grant same-sex marriage has on the same-sex married couple.³⁵² Kennedy explains, “the state's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import.”³⁵³ When the State used its “historical and essential authority” to define marriage in this way, the State enhanced the “recognition, dignity, and protection of the class in their own community.”³⁵⁴ Such language and rhetoric is typical of Kennedy's jurisprudential goal of putting liberty and its moral content at the heart of constitutional interpretation. Mirroring, and later quoting, his language in *Lawrence*, Kennedy affirms that the State's interest in defining and regulating marriage stems from its understanding that “marriage more than a routine classification for purpose of certain statutory benefits.”³⁵⁵ Instead, marriage and the intimacy it entails are “element[s] in a personal bond that

³⁴⁹ *Id.* at 2690.

³⁵⁰ *Id.* at 2691.

³⁵¹ *Id.* at 2692.

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.*

is more enduring.”³⁵⁶ By recognizing the validity of same-sex marriage in its own and other jurisdictions, “New York sought to give further protection and dignity to that bond.”³⁵⁷

In light of this analysis, Kennedy holds that DOMA’s definition of marriage is an unconstitutional deprivation of the liberty of persons protected by the Fifth Amendment.³⁵⁸ In essence, “DOMA seeks to injure the very class [that] New York seeks to protect.”³⁵⁹ DOMA’s unusual deviation from tradition involving defining marriage, the history of DOMA’s enactment, and its express and demonstrated purpose indicate a “bare Congressional desire to harm a politically unpopular group through disparate treatment of that group.”³⁶⁰ First, DOMA departs from the history and tradition of federal reliance on state law to define marriage.³⁶¹ Second, the history of DOMA’s enactment indicates that interfering with the equal dignity of same-sex marriage was more than an incidental effect of its federal statute. It was its essence.³⁶² In House Report 3396, which discussed the passage of DOMA, Congress stated, “it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage.”³⁶³ The House went on to conclude that DOMA expresses “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”³⁶⁴ Further, the Act’s “title and dynamics” indicate its purpose to discourage state same-sex marriage laws and, if unsuccessful, to restrict the freedom of couples married under those laws.³⁶⁵ The Act makes it clear that if any State does

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.* at 2695.

³⁵⁹ *Id.* at 2693.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.* (quoting H.R.Rep. No. 104-664, pp. 12-13 (1996)).

³⁶⁴ *Id.* (quoting H.R.Rep. No. 104-664, pp. 19 (1996)).

³⁶⁵ *Id.*

decide to recognize same-sex marriage, those unions will be treated as “second-class marriages” under the federal law.³⁶⁶

Kennedy concludes, “though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.”³⁶⁷ Here, DOMA has the “principal purpose and the necessary effect ... of demean[ing] those persons who are in a lawful same-sex marriage,” denigrating those persons to a “second-tier marriage.”³⁶⁸ No legitimate policy purpose can overcome DOMA’s purpose and effect of “disparag[ing] and injur[ing] those that the state sought to protect in personhood and dignity.”³⁶⁹ The liberty protected by the Fifth Amendment’s Due Process clause prohibits such disparate treatment under the law, rendering DOMA unconstitutional.

Part VIII: Free Speech

A. Texas v. Johnson: protecting political protest and the right to dissent (concurring opinion # 1)

In *Johnson*,³⁷⁰ the Court addressed the issue of flag desecration during political protest rallies. With Justice Brennan writing for a 5-4 majority, the Court held that defendant’s act of burning an American flag during a protest rally constituted expressive conduct that was protected under the First Amendment.³⁷¹

While attending the Republican National Convention in Dallas in 1984, Johnson participated in a political protest entitled the “Republican War Chest Tour.”³⁷² The event protested the policies of Ronald Reagan’s administration and certain Dallas-based

³⁶⁶ *Id.* at 2693-2694.

³⁶⁷ *Id.* at 2695.

³⁶⁸ *Id.* at 2695, 2694.

³⁶⁹ *Id.* at 2696.

³⁷⁰ *Texas v. Johnson*, 491 U.S. 397 (1989)(Kennedy, A., concurring).

³⁷¹ *Id.* at 406.

³⁷² *Id.* at 399.

corporations.³⁷³ Demonstrators marched through the streets of Dallas chanting political slogans and staging “die-ins,” “intended to dramatize the consequences of nuclear war.”³⁷⁴ Some protestors, but not Johnson, also spray-painted buildings and overturned potted plants.³⁷⁵ The protest culminated in front of Dallas City Hall.³⁷⁶ There, Johnson “unfurled an American flag, doused it in kerosene, and set it on fire,” while protestors chanted, “America, the red, white, and blue, we spit on you.”³⁷⁷ While no one was injured, several witnesses attested to being “seriously offended” by the flag burning.³⁷⁸

Johnson was the only protestor to be charged with a crime.³⁷⁹ He was charged with “desecration of a venerated object ... [under] Tex.Penal Code Ann. § 42.09(a)(3) (1989).”³⁸⁰ After trial, Johnson was convicted, and sentenced to one year in prison plus a \$2,000 fine.³⁸¹ The Fifth Circuit Court of Appeals affirmed.³⁸² The Texas Court of Criminal Appeals, however, reversed, holding that Johnson’s flag burning was symbolic speech protected by the First Amendment.³⁸³

The Court held that based on the context of Johnson’s flag burning being part of a political demonstration taking place near a political convention to nominate a Republican candidate to run for President, Johnson’s action constituted expressive conduct protected by the First Amendment.³⁸⁴ Brennan concludes, “if there is a bedrock principle underlying the First

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.* at 400.

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ *Id.* at 406.

Amendment, it is that government may not prohibit expression of an idea simply because society finds [the] idea itself offensive or disagreeable.”³⁸⁵

In his concurrence, Kennedy attests that, despite his and his fellow justices' very real disgust for what Johnson did, protecting Johnson's flag burning as expressive conduct is compelled by the Constitution.³⁸⁶ Kennedy appears to write this opinion not for himself, but to clarify to the public that the Justices are only too aware of what the outcome of this decision is. To Kennedy, the cost of the jurisprudential goal of attempting to find and enforce the full and necessary meaning of liberty sometimes leads to unsavory or distasteful results. But, all the same, as appalling as the speech or expressive conduct may be, the Court is in some cases compelled to protect it in light of the moral content of liberty. Kennedy states, ““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.”³⁸⁷

Here, what the American flag represents commits the Court to protecting Johnson's flag burning as expressive conduct under the First Amendment.³⁸⁸ The American flag is a constant symbol of expressing beliefs and speech, beliefs in “law and peace and that freedom which sustains the human spirit.”³⁸⁹ Kennedy somberly continues, “the case here today forces recognition of the costs to which those beliefs commit us.”³⁹⁰ As perverse as it may sound, the very flag which Johnson burned protects his freedom to burn it. Accordingly, the Court had no choice but to affirm the holding of the Texas Criminal Court of Appeals.

B. Hill v. Colorado: protecting political speech post-*Casey* (dissenting opinion # 2)

³⁸⁵ *Id.* at 414.

³⁸⁶ *Id.* at 421.

³⁸⁷ *Id.* at 420-421.

³⁸⁸ *Id.* at 421.

³⁸⁹ *Id.*

³⁹⁰ *Id.*

In *Hill*,³⁹¹ the Court upheld against a First Amendment challenge a criminal statute prohibiting any person from knowingly approaching another person within eight feet of a health care facility to provide the other with leaflets to engage in oral protest, education, or counseling, without the other's consent. Petitioners stated that, prior to the statute's enactment, they had engaged in "sidewalk counseling" on public walkways and sidewalks within 100 feet of facilities where abortions were performed.³⁹² In an opinion delivered by Justice Stevens, the majority held that the statute was a permissible content-neutral and viewpoint-neutral restriction on the time, place, and manner of speech.³⁹³ The law was narrowly tailored to further substantial, legitimate government interests.

Dissenting, Kennedy finds that the majority's position conflicts with "more than a half century of well-established First Amendment principles" and the essence of *Casey*.³⁹⁴ Kennedy's discussion of free speech in *Hill* is palpably molded by his substantive views on abortion, attempting to find a balance between the constitutionality of abortion legislation and the larger conception of free speech under the First Amendment.³⁹⁵ Kennedy uses rhetoric and oft-criticized paternalistic language typical of his abortion decisions to discuss the importance of social and moral debate on abortion, the psychology of women who consider abortion, and the potential for women who receive an abortion to suffer post-abortion regret.³⁹⁶

Kennedy disdainfully declares, "[f]or the first time, the Court approves a law which bars a private Citizens from passing a message, in a peaceful manner and on a profound moral issue, to a fellow Citizens on a public sidewalk."³⁹⁷ To Kennedy, such a position is not in keeping with

³⁹¹ *Hill v. Colorado*, 530 U.S. 703 (2000)(Kennedy, A., dissenting).

³⁹² *Id.* at 709.

³⁹³ *Id.* at 725-726.

³⁹⁴ *Id.* at 765.

³⁹⁵ See generally FRANK J. COLUCCI, *supra*, at p. 61.

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 767.

the expansive right of free speech and the liberty interests attendant with that right. Since *Casey* prevents “pleas to the government to outlaw abortion” from having effect, opponents of abortion must seek to “convince their fellow Citizens of the moral imperative of their cause.”³⁹⁸

Colorado’s law plainly prevents opponents from voicing such concerns where it is most important, “the time and place where the act is about to occur,” and to whom it is most important, those near the health facility who are about to receive the procedure.³⁹⁹ He continues, “we learn today that Citizens have a right to avoid unpopular speech in a public forum, a position that flies in the face of the First and Fourteenth Amendment”⁴⁰⁰

Kennedy’s analysis reveals that the statute is neither content nor viewpoint-neutral. First, Kennedy finds the statute to be content-based, as it restricts speech on particular topics.⁴⁰¹ The law, as written, applies only to a special class of locations: “entrances to buildings with health care facilities.”⁴⁰² Kennedy declares, “we would close our eyes to reality were we to deny that ‘oral protest, education, or counseling’ outside the entrances to medical facilities concern a narrow range of topics—indeed, one topic in particular.”⁴⁰³ By restricting speech in locations where the prohibited discourse occurs, the law is content-based.⁴⁰⁴ Kennedy quips, “clever content-based restrictions are no less offensive than censoring on the basis of content.”⁴⁰⁵ Second, the statute is not viewpoint-neutral. The law’s purpose and design are to very cleverly “restrict speakers on one side of the debate: those who protest abortions.”⁴⁰⁶ Kennedy concludes:

³⁹⁸ *Id.* at 787-788.

³⁹⁹ *Id.* at 788.

⁴⁰⁰ *Id.* at 771. See also *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) (“The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views.”)

⁴⁰¹ *Id.* at 767.

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* at 767.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* at 768.

"To say that one Citizen^s can approach another to ask the time or the weather forecast or the direction to Main street, but not to initiate discussion on one of the most basic moral and political issues in all of contemporary discourse ... is an astonishing view of the First Amendment"⁴⁰⁷

Additionally, Kennedy's dissent in *Hill* is noteworthy for its paternalistic language and idea that women suffer post-abortion regret. Emphasizing his rhetoric in *Casey* that an abortion decision must be "cautious and mature," Kennedy discusses the "profound difference" a leaflet can have on a woman's decisionmaking process.⁴⁰⁸ He characterizes the woman considering abortion as "young" and "uninformed," and that abortion protestors are merely asking her to "understand and contemplate the nature of the life she carries within her."⁴⁰⁹ By providing a woman seeking an abortion with less information, it is more likely that she will come to regret such decision than if more information had been provided to her.⁴¹⁰ In a decision that has consequences for both the woman and society, others can and should use their liberty to inform others through peaceful protest.

C. *International Society for Krishna Consciousness v. Lee*: expanding the public forum
(concurring opinion # 2)

In *Int'l Society for Krishna Consciousness*,⁴¹¹ the International Society for Krishna Consciousness ("ISKCON"), a nonprofit religious corporation, challenged a New York Port Authority restriction banning the distribution of literature and solicitation of contributions in airport terminals. ISKCON members perform *sankirtan*, a ritual where go into public places, disseminate religious literature, and solicit funds to support the religion.⁴¹² ISKCON sued for declaratory and injunctive relief, claiming the ban deprived its members of their First

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* at 790.

⁴⁰⁹ *Id.* at 789.

⁴¹⁰ See generally *id.* at 790.

⁴¹¹ *Int'l Soc'y for Krishna Consciousness v. Lee*, 112 S.Ct. 2701 (1992).

⁴¹² *Id.* at 2703.

Amendment rights.⁴¹³ Analyzing the restriction under “traditional public forum” doctrine, the district court held that airport terminals were akin to public streets, and no argument had been evidenced that the ban was narrowly tailored to support a compelling state interest.⁴¹⁴

Accordingly, the district court granted ISKCON summary judgment.⁴¹⁵ The Second Circuit Court of Appeals held that the ban on solicitation was reasonable, but the ban on distribution was not.⁴¹⁶

Chief Justice Rehnquist, writing for a 6-3 majority, upholds the Port Authorities’ restrictions.⁴¹⁷ As an initial matter, Rehnquist describes the “forum based” approach for assessing regulations that government places on the use of its property.⁴¹⁸ In the first category of public property, regulations of speech on traditional public forums, government property that has “traditionally been available for public expression,” is subject to the highest scrutiny.⁴¹⁹ Such regulations are uphold only if they are “narrowly drawn to achieve a compelling state interest.”⁴²⁰ In the second category, public property that is a “designated public forum,” property that the State has opened for expressive activity by part or all of the public, is subject to the same highest scrutiny as traditional public forums.⁴²¹ The third category is for nonpublic forums, constituting all remaining public property.⁴²² Regulations of nonpublic forums need only be reasonable, and will be upheld as long as the regulation is not an effort to “suppress the speaker’s activity due to disagreement with the speaker’s view.”⁴²³

⁴¹³ *Id.* at 2704.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* at 2708.

⁴¹⁸ *Id.* at 2705.

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.*

Rehnquist concludes that precedent and history foreclose the possibility of airport terminals as a public fora.⁴²⁴ A public forum must be made by “intentionally opening nontraditional forum for public discourse.”⁴²⁵ No such effort has been made with airport terminals. Further, given how recently modern air terminals have arose, they hardly qualify as “immemorially” being held in the public trust and used for purposes of expressive activity.⁴²⁶ In fact, the tradition of airport activity does not demonstrate that airports have historically been made available for speech activity.⁴²⁷ ISKCON-style solicitation has only begun occurring in airport terminals in recent years. As such, airport terminals are only nonpublic forums.

As nonpublic forums, restrictions on speech in airport terminals need only satisfy reasonableness.⁴²⁸ Rehnquist holds that this standard is met, as the regulation serves the airport's legitimate interest in assuring its travelers are not unduly interfered with by undesired solicitation.⁴²⁹

In his concurring opinion, Kennedy uses his expansive theory of free speech to enlarge the concept of public forums in order to better promote and protect the full and necessary meaning of liberty through diversity of expression.⁴³⁰ While concurring in the majority's judgment, Kennedy objects to the majority's analysis.⁴³¹ Kennedy holds that airport terminals are public forums and that speech in those places is entitled to the highest scrutiny, but the challenged regulation is content-neutral and narrowly tailored to further a legitimate state interest.⁴³²

⁴²⁴ *Id.* at 2706.

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ *Id.* at 2708.

⁴²⁹ *Id.*

⁴³⁰ See generally FRANK J. COLUCCI, *supra*, at p. 86.

⁴³¹ *Int'l Soc'y for Krishna Consciousness*, 112 S.Ct. at 2715.

⁴³² *Id.*

Kennedy finds the majority's approach contrary to the public forum doctrine's underlying purposes.⁴³³ For Kennedy, the public forum doctrine recognizes the "limits of the government's control over speech activities on property [that is] suitable for free expression."⁴³⁴ It stands for the constitutional recognition that the government cannot impose silence on a free people, giving effect to the First Amendment's command to protect speech from government interference.⁴³⁵ At the heart of our jurisprudence, Kennedy states, lies the principle that the liberties protected by the Assembly, Speech, and Press Clauses of the First Amendment protect the rights of free Citizens to gather and speak with one another in public places.⁴³⁶

Kennedy's concept of the public forum doctrine would "accord public forum status to other forms of property, regardless of their ancient or contemporary origins and whether or not they fit within a narrow historic tradition."⁴³⁷ He rejects the majority's formulation, which incorrectly predicates the decision to confer public forum status on a property on the government's defined purpose for that property.⁴³⁸ Such a concept of the public forum theory misunderstands the liberty interests justifying the theory, and prevents the Court from protecting the moral content of the liberties at issue. Under Kennedy's test, to determine whether public property is a public forum, the court must determine:

"If the objective physical characteristics of the property at issue and the actual public access and uses that have been permitted by government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum."⁴³⁹

⁴³³ *Id.* at 2716.

⁴³⁴ *Id.* at 2717.

⁴³⁵ *Id.*

⁴³⁶ *Id.* at 2716.

⁴³⁷ *Id.* at 2718.

⁴³⁸ *Id.* at 2716.

⁴³⁹ *Id.* at 2718.

Applying Kennedy's public forum test, it becomes "evident" that airport terminals are public forums.⁴⁴⁰ First, the district court's findings show that airports share physical similarities with public streets, a universally accepted public forum.⁴⁴¹ Second, airport terminals are open to the public without restriction.⁴⁴² Lastly, given adequate time, place and manner regulations, expressive activity is very compatible with the uses of major airports.⁴⁴³ By applying Kennedy's test, the Court is better able to adapt the public forum theory to recognize new social realities which serve the same practical purposes as public squares in times past.⁴⁴⁴

Although he finds airport terminals to be public forums, like the majority, Kennedy upholds the Port Authority's challenged regulations.⁴⁴⁵ Since airport terminals are public forums, any regulation of speech at airport terminals is valid only if it is narrowly tailored to further a compelling state interest.⁴⁴⁶ Kennedy explains that the bans are "either a reasonable time, place, and manner restriction, or ... a regulation directed at the nonspeech element of expressive conduct."⁴⁴⁷ As Kennedy understands it, the solicitation ban is directed at curbing the abusive practices attendant with in-person solicitation, particularly fraud and duress, and not at any particular "message, idea, or form of speech."⁴⁴⁸ As such, the regulation is a content-neutral rule that serves a significant government interest, and thus not violative of the First Amendment.

D. Citizens United v. Federal Election Commission: protecting corporate political expression
(majority opinion # 6)

⁴⁴⁰ *Id.* at 2719.

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ See generally FRANK J. COLUCCI, *supra*, at p. 86-87.

⁴⁴⁵ *Int'l Soc'y for Krishna Consciousness*, 112 S.Ct. at 2720.

⁴⁴⁶ *Id.* at 2715.

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.* at 2722.

In *Citizens United*,⁴⁴⁹ the Court addressed governmental regulation of corporate political speech. In January 2008, Citizens United, a nonprofit corporation, made a movie named "*Hillary: The Movie*" ("*Hillary*"), a 90 minute political documentary about then-Senator and potential Democratic Party presidential candidate Hillary Clinton ("*Clinton*").⁴⁵⁰ To promote the film, Citizens United produced two 10-second ads and one 30-second ad on the movie, each of which included a short, "pejorative" statement about Senator Clinton, followed by the name of the movie and its Website address.⁴⁵¹ While the movie was released in theaters and on DVD, Citizens United sought to make the movie available via video-on-demand within 30 days of the 2008 primary elections.⁴⁵² They were, however, concerned that *Hillary* and the ads promoting *Hillary* would subject them to civil and criminal penalties, as they might be covered by federal laws banning corporate-funded independent expenditures expressly advocating the defeat of a candidate and electioneering communication within 30 days of a primary.⁴⁵³

Citizens United filed suit against the Federal Elections Commission ("FEC") seeking declaratory and injunctive relief, arguing that (1) 2 U.S.C. § 441(b) was unconstitutional as applied to *Hillary* and its ads; and (2) the Bipartisan Campaign reform Act of 2002 ("BCRA")⁴⁵⁴ § 203 was unconstitutional as applied to *Hillary* and its ads.⁴⁵⁵ ⁴⁵⁶ The District Court denied Citizens United's motion for preliminary injunction, and granted the FEC's motion for summary

⁴⁴⁹ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

⁴⁵⁰ *Id.* at 319.

⁴⁵¹ *Id.*

⁴⁵² *Id.*

⁴⁵³ *Id.* at 321 (referring to § 2 U.S.C. 441(b) (2000 ed.) and 116 Stat. 81 through 116 Stat. 116).

⁴⁵⁴ 116 Stat. 81 through 116 Stat. 116.

⁴⁵⁵ *Citizens United*, 558 U.S. at 320.

⁴⁵⁶ Citizens United initially raised a facial challenge to the constitutionality of BCRA § 203, but expressly abandoned the facial challenge on FEC's motion for summary judgment. 1:07-cv-2240-RCL-RWR, Docket Entry No. 52, pp. 1-2 (May 16, 2008). The parties later stipulated to dismissal of that claim. *Id.*, Nos. 53 (May 22, 2008), 54 (May 23, 2008), App. 6a. The Court, however, considers the case as a facial challenge. *Citizens United*, 558 U.S. at 333.

judgment.⁴⁵⁷ The district court held that *Hillary* and its ads were susceptible to “no other interpretation” than informing the electorate that Clinton was “unfit for office and that viewers should vote against her.”⁴⁵⁸

The federal laws in question are § 2 U.S.C. 441(b) and the BCRA of 2002. Under § 441(b), as the court describes it:

“[C]orporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections.”⁴⁵⁹

The BCRA of 2002 § 203 amended § 441(b) to further prohibit any “electioneering communication.” Electioneering communication is defined as: “any broadcast cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within 30 days of a primary or 60 days of a general election.”⁴⁶⁰ Additionally, electioneering communication must be “publically distributed.”⁴⁶¹ For potential Presidential nominee candidates, publically distributed means the communication “can be received by 50,000 or more persons in a State where a primary election ... is being held within 30 days.”⁴⁶²

Writing for the majority, Kennedy held that the “government may not, under the First Amendment, suppress political speech on the basis of the speaker’s corporate identity,” overruling the Court’s decision in *Austin* and partially overruling its opinion in *McConnell*.⁴⁶³

⁴⁵⁷ *Citizens United*, 558 U.S. at 321.

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.* at 320 (citing § 2 U.S.C 441(b) (2000 ed.))(emphasis added).

⁴⁶⁰ § 434(f)(3)(A)).

⁴⁶¹ 11 C.F.R. § 110.29(a)(2) (2009).

⁴⁶² 11 C.F.R. § 100.29(b)(3)(ii).

⁴⁶³ *Citizens United*, 558 U.S. at 366. The Court’s ruling in *Citizens United* expressly overrules *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) and partially overrules *McConnell v. Federal Elections Commission*, 540 U.S. 93 (2003).

Kennedy asserts, "the Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether."⁴⁶⁴

The *Citizens United* opinion represents a triumph for Kennedy, ratifying his expansive position on corporate speech in prior cases which treats corporations like individuals. Kennedy typically strikes most restrictions on campaign donations and campaign speech by individuals, organizations, and parties, viewing such laws as content-based restrictions of free speech and association.⁴⁶⁵ In *Austin*, the Court held upheld a law preventing corporations from spending general treasury funds to support candidates for office.⁴⁶⁶ Kennedy held that the majority's decision deprived Citizens of information necessary to a democracy based solely on the identity of the speaker.⁴⁶⁷ Similarly, in *McConnell*, Kennedy voted to invalidate most of the BCRA, holding that the First Amendment guaranteed Citizens the right to judge for themselves the most effective means for expressing political views and to decide for themselves which entities to trust as reliable speakers.⁴⁶⁸

As an initial matter, Kennedy finds that *Hillary* was an "electioneering communication" under the BCRA § 203 and § 441(b).⁴⁶⁹ Per electioneering communication's definition, the video-on-demand showing of *Hillary* on cable television would be a cable communication that referred a clearly identified candidate for Federal office and that was made within 30 days of a primary election.⁴⁷⁰ The video-on-demand system, with its 3.5 million subscribers, would make it so the film was capable of being received by 50,000 persons or more, which the Court found to

⁴⁶⁴ *Id.* at 319.

⁴⁶⁵ See FRANK J. COLUCCI, *supra*, at p. 81.

⁴⁶⁶ *Austin*, 494 U.S. at 652.

⁴⁶⁷ *Austin*, 494 U.S. at 700 (Kennedy, A., dissent).

⁴⁶⁸ *McConnell*, 540 U.S. at 286 (2003) (Kennedy, A., concurring in part, dissenting in part).

⁴⁶⁹ *Citizens United*, 558 U.S. at 323.

⁴⁷⁰ *Id.*

be sufficient to satisfy the definition, regardless of how many actually ordered the film.⁴⁷¹ Further, under § 441(b), *Hillary* was functionally equivalent to express advocacy against electing Senator Clinton.⁴⁷² A communication is functionally equivalent to express advocacy for or against electing a candidate only if, objectively, it is susceptible to “no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”⁴⁷³ Here, *Hillary* was effectively a 90-minute “negative advertisement” urging viewers not to vote for Clinton.⁴⁷⁴ Most viewers of *Hillary* would likely find its import to be an “extended criticism of [Clinton’s] character and her fitness for the office of the Presidency.”⁴⁷⁵

Next, Kennedy expounds on how the First Amendment protects political speech. He states, “the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.”⁴⁷⁶ Laws which burden political speech are subject to strict scrutiny, requiring the government to show that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.⁴⁷⁷ Nonetheless, any law which creates content-based or viewpoint-based restrictions of speech is categorically prohibited under the First Amendment.⁴⁷⁸

Having established this background analysis, Kennedy discusses what these First Amendment protections of free speech really mean for corporations. Through a line of precedent ranging all the way back to 1952, the Court has recognized that First Amendment protections extend to corporations.⁴⁷⁹ Kennedy makes the import of these precedents clear: “political speech

⁴⁷¹ *Id.*

⁴⁷² *Id.* at 325.

⁴⁷³ *Id.* at 324-325.

⁴⁷⁴ *Id.* at 325.

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.* at 339.

⁴⁷⁷ *Id.* at 340.

⁴⁷⁸ *Id.* at 340.

⁴⁷⁹ *Id.* at 342.

does not lose [its] First Amendment protection simply because its source is a corporation."⁴⁸⁰ Instead, under the First Amendment and the full and necessary meaning of liberty, political speech is protected, regardless of its source. Whether political speech comes from a corporation or an individual, the speech still contributes to the free flow of information in democratic decisionmaking.⁴⁸¹ Kennedy's concept of corporate political speech ignores the corporate form, treating the corporation as he would treat an individual. Thus, like an individual, the corporation's political speech is then a protected expression of its intimate beliefs and cannot be censored absent a compelling state interest. Accordingly, when a law restricts a corporation's political speech based on its status as a corporate entity, the law is an impermissible viewpoint-based restriction, impinging on the corporation's liberty just as it would impinge on the liberty of a similarly placed individual.

Here, § 441(b) and BCRA § 203 violated Citizens United's First Amendment rights by suppressing its political speech based solely on Citizens United's corporate identity.⁴⁸² § 441(b) and BCRA § 203's purpose and effect was to prevent corporations from presenting facts and opinions to the public based on their status as corporate entities.⁴⁸³ If the First Amendment's proclamation against viewpoint-based restrictions is to mean anything, it must mean that political speech cannot be given disparate treatment because it was made by a corporate speaker rather than an individual. Like an individual, Citizens United's political speech was a protected expression of its intimate beliefs, and the government did not state an interest sufficient to justify the speech's censor. Further, in restricting corporate speech, § 441(b) and BCRA § 203 impeded the free flow of information to the public, impairing the ability of the electorate to make

⁴⁸⁰ *Id.*

⁴⁸¹ *See generally id.* at 349.

⁴⁸² *Id.* at 365.

⁴⁸³ *Id.* at 355.

thoughtful, deliberate, and informed choices. Thus, in order to give effect to the moral content of liberty, the Court must find that § 441(b) and § BCRA § 203 are impermissible restrictions on Citizens United's corporate political speech.⁴⁸⁴

While the government could not suppress Citizens United's political speech, it could regulate Citizens United's speech through disclaimer and disclosure requirements. Disclaimer and disclosure requirements "burden the ability to speak ... but do not prevent anyone from speaking."⁴⁸⁵ In this manner, disclaimer and disclosure requirements are similar to the structural regulations to abortion that Kennedy discusses in *Casey*. Under the BCRA, televised electioneering communications funded by anyone other than the candidate must include a disclaimer identifying the person or entity responsible for the advertising's content.⁴⁸⁶ Here, Citizens United's three ads for *Hillary* were electioneering communications.⁴⁸⁷ The ads mentioned Clinton by name, were intended to be aired shortly before a primary, and contained pejorative references to her candidacy.⁴⁸⁸ The government could then validly require Citizens United to disclose that it was responsible for the ad, burdening Citizens United's ability to speak but not preventing it from speaking.

Part IX: Conclusion

Justice Kennedy's jurisprudence focuses on ensuring that liberty is given its full and necessary meaning under the Constitution as we understand it. The Constitution has "spacious phrases," with general concepts that have moral content. Judges have an obligation to define and

⁴⁸⁴ While Kennedy acknowledges that *Citizens United* wholly overrules *Austin*, he does not see this to be a problem. To Kennedy, *Austin* itself contravened the Court's earlier precedents in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, (1978). *Id.* at 363. Further, *Austin* was not well-reasoned, had been undermined by "experience since" and rapid changes in technology, and had no serious reliance interests at stake. *Id.* at 363-365. Consequently, the Court could properly overrule *Austin*.

⁴⁸⁵ *Id.* at 366 (quoting *Buckley*, 424 U.S. at 64).

⁴⁸⁶ *Id.* at 366.

⁴⁸⁷ *Id.* at 368.

⁴⁸⁸ *Id.* at 368.

enforce this moral content. In performing this duty, judges may look to traditional sources, such as tradition and history, or non-traditional sources, such as emerging political awareness and international law, to provide objective referents for liberty. In applying this jurisprudential philosophy on a case-by-case basis, Kennedy has been unpredictable in result, but consistent in substance. Over the last 25 years, this content-consistent “unpredictability” has allowed Kennedy to consistently write in and for the majority, molding the Court’s opinions to reflect his careful, reasoned beliefs and shaping the course of United States jurisprudence for years to come.