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Justice Kennedy: The Value of Liberty May Never Be Infringed

Matthew Ahkao

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PART I: BIOGRAPHY

Anthony Mcleod Kennedy (hereinafter “Kennedy”) was born on July 23, 1936 and raised in Sacramento, California.¹ His father, Anthony “Bud” Kennedy (“Bud”), was a politically connected lawyer and lobbyist in Sacramento, while his mother, Gladys Mcleod Kennedy, was a schoolteacher and a well-known civic booster amongst the community.² Kennedy’s childhood in Sacramento was “a very reasonable place with reasonable values.”³ In the wake of World War II, the seat of California government was a “basically nonpartisan community” dedicated to “problem solving over finger pointing,” and from an early age Kennedy witnessed a “system that worked” by taking an ad hoc approach to issues which favored those who could find middle ground.⁴

When he was ten years old, Kennedy took a year off from school to serve as a page in the State Senate.⁵ It was during this apprenticeship that the young Kennedy formed a friendship with then-governor – and future Chief Justice – Earl Warren.⁶ Under Warren’s wing, Kennedy learned intimate details about the legislative and political process, and by the time Kennedy graduated high school at the top of his class, his mentor was immortalized as the author of the landmark Brown v. Board of Education.⁷

¹ See BIOGRAPHIES OF CURRENT JUSTICES OF THE SUPREME COURT, SUPREME COURT OF THE UNITED
⁴ Id.
⁵ See Robert Reinhold, supra note 2.
⁶ See Massimo Calabresi & David Von Drehle, supra note 3.
⁷ Id.
Kennedy earned an undergraduate degree from Stanford University in three years, and with the extra year, he went to England and studied at the London School of Economics. Kennedy then went to Harvard Law School, where he graduated cum laude in 1961. After passing the bar, Kennedy served for one year in the California Army National Guard before he returned to Sacramento. Soon after Kennedy returned, however, his father died unexpectedly, and Kennedy took over his father’s practice.

Kennedy flourished as a lawyer and lobbyist. Working for Capital Records in the 1960’s, he drafted an exemption from several sales taxes that the California legislature approved, saving Capital Records more than $1 million in LP sales. The work experience and political connections Kennedy gained while working in his father’s practice helped to further his career and his path to the judicial bench. In fact, Justice Kennedy often refers to his experiences as a working lawyer “in front of a particularly disagreeable judge or intractable zoning board” when discussing Supreme Court cases with his law clerks.

In 1967, Kennedy was recruited to perform miscellaneous legal work for then-Governor Ronald Reagan. Kennedy thrived in this position, and in 1973 he was put in charge to draft a state constitutional amendment that would cut taxes and spending throughout California. Although the initiative failed, Governor Reagan was so impressed with Kennedy that he personally recommended Kennedy for appointment to the United States Court of

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8 See Massimo Calabresi & David Von Drehle, supra note 3.
9 See SUPREME COURT BIOGRAPHY, supra note 1.
10 See Massimo Calabresi & David Von Drehle, supra note 3.
11 Id.
12 Id.
13 Id.
14 Id.
15 Id.
16 See SUPREME COURT BIOGRAPHY, supra note 1.
Appeals for the Ninth Circuit. President Gerald Ford followed the recommendation,\(^{17}\) and at 38 years old, Anthony Kennedy became the youngest federal court of appeals judge in United States history.\(^{18}\)

Kennedy became the head of the Ninth Circuit’s conservative minority after the Carter administration expanded the Ninth Circuit and flooded the federal courts of appeal with liberal judges.\(^{19}\) Though the Ninth Circuit was sharply divided during this period of time, Kennedy’s case-by-case approach and his refusal to adopt broad conclusions and political rhetoric won him national support among the judiciary, and even Kennedy’s opponents admired his “well-crafted and thoughtful opinions”\(^{20}\).

In addition to his work as a lawyer and a circuit judge, Kennedy also taught Constitutional Law at the Pacific McGeorge School of Law in Sacramento from 1965 until his appointment to the Supreme Court in 1988.\(^ {21}\) Known to be an enthusiastic teacher, Professor Kennedy’s constitutional law classes were exciting and dramatic. For example, on a lecture on the Fourth Amendment limits placed on the government’s powers of search and seizure, Professor Kennedy secretly arranged to have the chief of the campus police burst into the classroom and put him in handcuffs, unbeknownst to his students.\(^ {22}\) In honor of the Constitution’s two-hundredth anniversary, Kennedy put on a powdered colonial wig and taught the day’s lectures dressed as James Madison.\(^ {23}\)

\(^{17}\) Id.

\(^{18}\) See Massimo Calabresi & David Von Drehle, supra note 3.


\(^{20}\) See SUPREME COURT BIOGRAPHY, supra note 1.


\(^{22}\) See Massimo Calabresi & David Von Drehle, supra note 3.

\(^{23}\) Id.
Admiring Kennedy’s charisma, the law school’s dean, Gordon Schaber, asked Kennedy to help transform Pacific McGeorge Law School into an internationally renowned institution. With Kennedy’s help, the two accomplished this goal, and during the process the pair became close friends with a deep intellectual bond lasting well beyond the 23 years Kennedy taught at Pacific McGeorge Law School up until Schaber’s death in 1997. Significantly—and without a word spoken between Kennedy and Schaber—during the 1970’s Kennedy learned that Schaber was living the difficult life of a secretly gay man. In light of Kennedy’s later decisions in favor of gay rights, a former law clerk to the Justice opined that Kennedy’s long friendship with Schaber “must have had some impact” on him, noting that Kennedy often tries to reconcile the past with the future.

When Justice Lewis Powell retired from the Supreme Court in 1987, now-President Ronald Reagan, who was nearing the end of his second term, nominated Kennedy to fill Justice Powell’s vacancy. However, Kennedy was not Reagan’s first choice to fill the vacancy, but his third. Reagan’s first nominee, Robert Bork, a staunch conservative with controversial views on social issues such as abortion, the death penalty, and civil rights, was blocked by Senate Democrats after 12 days of public hearings. Bork’s controversial legal writings—such as a 1963 magazine article in which he denounced a civil rights bill that would require businesses to serve blacks and lengthy paper trail of judicial opinions in which he

24 Id.
25 Id.
26 Id.
27 Id.
28 See SUPREME COURT BIOGRAPHY, supra note 1.
29 See Massimo Calabresi & David Von Drehle, supra note 3.
opposed the Supreme Court on issues such as gender equality, legislative apportionment, and a 1965 Supreme Court ruling that struck down a state law banning contraceptives for married couples—led to Bork’s defeat by the largest margin in history and the origin of a new verb in the Oxford dictionary. Reagan’s second nominee, a federal circuit judge on the United States Court of Appeals for the District of Columbia named Douglas Ginsburg, was forced to withdraw his nomination after admitting that he had used marijuana in the 1960’s and 1970’s while a college student and Harvard Law School professor. Unlike Reagan’s last two choices, Kennedy’s nomination encountered little resistance. After the Senate Judiciary Committee hearings in December 1987, the Senate unanimously confirmed Kennedy’s appointment to the Supreme Court, and Kennedy took his seat as an Associate Justice on February 18, 1988.

PART II: KENNEDY’S JURISPRUDENTIAL PHILOSOPHY: A MORAL PERSPECTIVE

According to Justice Kennedy, the greatest tension in interpreting the Constitution lies between “what the text says and what the dictates of the particular case require from the

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32 The vote was 58 to 42. See id.
33 Indeed, the organized campaign of harsh public outcry and zealous political attack against Robert Bork’s nomination gave rise to the addition of a new dictionary definition: to “bork.” See OXFORD DICTIONARY, http://www.oxforddictionaries.com/us/definition/american_english/bork (last visited Nov. 16, 2015) (defining the verb borking to mean “obstructing (someone, especially a candidate for public office) through systematic defamation or vilification”).
34 See TIME MAGAZINE, supra note 30.
35 Id.
36 See SUPREME COURT BIOGRAPHY, supra note 1.
standpoint of justice and from the standpoint of our constitutional tradition." In response to such duality, Kennedy’s jurisprudential philosophy embraces a moral reading of the Constitution, rather than originalism or textualism; two approaches often taken by the Court’s conservative justices in reading the Constitution. Kennedy has commented that the proper method of constitutional interpretation begins with the words of the Constitution, the case law, and the known understanding of American constitutional tradition; and the question of where to go from there is governed by overarching and fundamental principles which Kennedy considers more authoritative than even the Constitution itself.

On questions involving liberty and unenumerated rights, Kennedy has stated that judges must always keep in mind the Framers’ central idea regarding American tradition and the rule of law – “That there is a zone of liberty, a zone of protection, a line that is drawn where the individual can tell the Government: Beyond this line you may not go.” Though this line may be amorphous and wavering, it indeed exists, and it is the function of the judiciary to define and enforce liberty’s breadth and moral content.

At Kennedy’s nomination hearings, when questioned about what factors and considerations judges should consider when determining where this line must be drawn and what the Constitution protects under liberty, Kennedy answered:

“A very abbreviated 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,

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39 Nomination Hearings, supra note 37, at 86 (statement of Hon. Anthony M. Kennedy).

40 Id.

41 Id.
the inability of a person to obtain his or her own self-fulfillment, the inability of a person to reach his or her own potential.\textsuperscript{42}

However, Kennedy also cautioned that the above factors must be weighed against "the rights of states which are very strong," and cautioned that in performing this balancing technique, judges must not forget "the deference that the Court owes to the legislative process...because [the legislature] knows the values of the people."\textsuperscript{43}

For Justice Kennedy, the great constitutional question is not spoken in terms of enumerated and unenumerated rights, but rather a question of "whether or not liberty extends to situations not previously addressed by the courts, to protections not previously announced by the courts,"\textsuperscript{44} and whether such protections can properly be extended while still respecting the constitutional boundaries and deference the Court owes to the legislative process.\textsuperscript{45}

Likewise, the nomination hearings proved to be the first venue that captures the soon-to-be-justice articulating his strong adherence to a moral approach in reading the Constitution, where he is candidly speaking of an overarching and guiding moral principle that exists in and of itself, which is neither defined by nor owes its existence to the Constitution, and is greater than even the Constitution itself. As Kennedy put it, "I am searching, as I think many judges are, for the correct balance in constitutional interpretation,"\textsuperscript{46} and described the effort to understand and implement transcendent moral principles found outside the Constitution as an "exploration."\textsuperscript{47}

\textsuperscript{42} Id. at 180.
\textsuperscript{43} Id.
\textsuperscript{44} Id. at 87.
\textsuperscript{45} Nomination Hearings, supra note 37, at 88 (statement of Hon. Anthony M. Kennedy).
\textsuperscript{46} Id. at 154.
\textsuperscript{47} Id.
During those hearings, Kennedy was pressed to discuss the ways in which society’s values have changed over time and the effect that any change has had on the nation’s laws. Kennedy retorted that although society may initially accept certain inequities that it later shuns, the transformation in the nation’s thinking does not mean that society’s values have changed over a period of time. Explaining that “a Constitution that simply enacted the status quo” would serve no purpose, Kennedy believes that “what the framers had in mind was to rise above their own injustices,” and shares the framers’ understanding that “sometimes it takes humans generations to become aware of the moral consequences, or the immoral consequences, of their own conduct. That does not mean that moral principles have not remained the same.”

These moral principles are the bedrock to Justice Kennedy’s jurisprudential philosophy – that enduring, overarching values ring true regardless of the meaning attached to the Constitution at any given time, and that these principles and values are implicit to the Constitution. While the moral content of the Constitution may be clarified by traditional sources such as history, American tradition, original intent, and precedent, the full and necessary meaning of liberty may extend to non-traditional sources as well. Accordingly, Kennedy’s opinions have cited to social science research, the direction of political and

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48 Id. at 152-53.
49 Id.
50 Nomination Hearings, supra note 37, at 152 (statement of Hon. Anthony M. Kennedy).
51 Id.
52 Id. at 153.
national consensus, and international law to provide objective secondary sources for the moral content of liberty in the Constitution.\textsuperscript{54}

\textbf{PART III: CASE ANALYSIS}

A: RELIGIOUS FREEDOMS

Kennedy's position on religious freedoms and the Establishment Clause draws a distinction between governmental action that establishes religion versus governmental policies of "accommodation, acknowledgment, and support for religion," which Kennedy considers to be an acceptable part of American political and cultural heritage.\textsuperscript{55} As discussed more fully below, governmental action may accommodate religion by passively recognizing the central role religion plays in society, while governmental action that compels an individual to support or participate in religious practice violates Kennedy's "coercion principle." Absent coercion, religious accommodation never violates the Establishment Clause unless it provides "substantial and direct benefits" to religion.\textsuperscript{56}

\textit{County of Allegheny v. ACLU (concurring opinion with partial dissent #1)}

In \textit{County of Allegheny v. ACLU}, a case involving the public display of a menorah and a nativity scene inside a county courthouse, the Court voted to allow the menorah to be displayed inside the courthouse but not the nativity scene. The majority held that the display of the nativity scene was unconstitutional because the display had the impermissible effect of indicating government endorsement of religion, in violation of the Establishment Clause.\textsuperscript{57} The majority concluded that the menorah, which was displayed next to a Christmas tree in the

\textsuperscript{54} Id.


\textsuperscript{56}Id. at 662-663.

\textsuperscript{57}Id. at 603.
courthouse halls, simply recognized that two secular holidays both occurred during the winter season, while the nativity scene, which was separately placed on a staircase and contained distinct Christian text, unconstitutionally endorsed a patently Christian message.\textsuperscript{58} In making the determination that the nativity display unconstitutionally established governmental endorsement of religion, the majority indicated that the primary question is that of "what viewers may fairly understand to be the purpose of the display."\textsuperscript{59}

Justice Kennedy filed a concurring opinion with a partial dissent in which he noted that the Constitution "permits government some latitude in recognizing and accommodating the central role religion plays in our society."\textsuperscript{60} To hold otherwise would require a "relentless extirpation of all contact between government and religion," where the government would be "preferring those who believe in no religion over those who do believe."\textsuperscript{61}

Criticizing the majority's approach as "unjustified hostility towards religion,"\textsuperscript{62} Kennedy advocated for the "accommodation, acknowledgment, and support for religion" by arguing that "any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government... to acknowledge only the secular, to the exclusion and to the detriment of the religious."\textsuperscript{63}

Kennedy carefully distinguishes governmental action that "accommodates" religion versus action that "establishes" religion by applying two principles: first, the "government may not coerce anyone to support or participate in any religion or its exercise;" and second,

\textsuperscript{58} Id.
\textsuperscript{59} Id. at 595.
\textsuperscript{60} Allegheny, 492 U.S. at 657.
\textsuperscript{61} Id. at 658.
\textsuperscript{62} Id. at 655.
\textsuperscript{63} Id. at 657.
that government “may not give direct benefits to religion in such a degree that it in fact establishes a religion or religious faith, or tends to do so.”

Kennedy disagreed with the majority who voted to allow the menorah to be displayed inside the courthouse but not the nativity scene. Joined by Justices Rehnquist, White, and Scalia, Kennedy argued that both the menorah and the nativity scene were “within the realm of flexible accommodation” because both were purely passive symbols and posed no realistic danger as a form of coercion on individuals inside the courthouse.

*Lee v. Weisman: The Protection of Personal Liberty Trumps All (majority opinion #1)*

Following his dissent in *Allegheny*, where he voted to uphold the public display of two religious symbols on government property, Kennedy’s majority opinion in *Lee v. Weisman* came as a surprise to those expecting him to follow similar reasoning. In *Allegheny*, Kennedy argued that the symbols were noncoercive because they served as passive reminders of the faiths represented in the community, and that their presence inside the courthouse did not force anyone to participate in any religious activity.

The issue in *Lee v. Weisman* involved clergy led prayer at a public middle school graduation and arose when a student’s father challenged the prayer as a form of government sponsorship of religion in violation of the Establishment Clause. The school had a policy allowing clergy members to deliver invocations and benedictions during school graduation ceremonies. The issue seemed identical to *Allegheny* because the students at the graduation ceremony were not being forced to actively participate in the prayer and could ignore it if they

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64 Id. at 659.
65 Id. at 577.
66 Id. at 663.
68 See id.
wished, and as Justice Scalia noted in his dissent, prayer at public school graduations is a "longstanding American tradition" that has as little of an effect on nonparticipating students as the menorah and nativity scene displays did on individuals inside Allegheny's courthouse.

Initially voting to uphold the school prayer, Kennedy reversed after realizing that "[his] draft looked quite wrong" Kennedy instead focuses on personal liberty and began his opinion by stating that "divisiveness over the choice of a particular member of the clergy to conduct the ceremony" is highly apparent. Utilizing the coercion principle, Kennedy found that the pressures brought against students in formal school ceremonies such as a graduation coupled with no reasonable alternative other than nonattendance, could act as a form of coercion.

Differentiating the factors from Allegheny, Kennedy noted that while attendance at the ceremony was not technically mandatory in order to graduate, "[e]veryone knows that in our society high school graduation is one of life's most significant occasions...and to say a teenage student has a real choice not to attend her high school graduation is formalistic to the extreme." Calling the school's level of involvement in the graduation ceremony, including the choice of prayer, "pervasive to the point of creating a state-sponsored and state-directed religious exercise," Kennedy was concerned that in the school setting this "may end in a policy to indoctrinate and coerce" – a concept that is antithetical to personal liberty.

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69 Id. at 632.
70 Id. at 587.
71 Id. at 593.
72 Weisman, 505 U.S. at 595.
73 Id. at 587.
74 Id. at 592.
Kennedy concluded by declaring “[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights as the price of resisting conformance to state-sponsored religious practice.” Accordingly, despite the possibility that a majority of the students might not have objected to the prayer or been supportive of it, these factors were outweighed by the demand to guarantee that all persons are able to fully exercise their personal liberty and be free from any form of coercion.

B: HUMAN DIGNITY AND PERSONAL LIBERTY

Without question, the foundation of Justice Kennedy’s jurisprudential philosophy lies in the values of human dignity and personal liberty. As discussed more fully below, in the event that Kennedy has taken an unexpected or surprise position on a controversial issue, it is safe to say that the reason is due to Kennedy’s fear that any other conclusion would infringe upon the values of human dignity and personal liberty in violation of the United States Constitution.

I: ABORTION

The Road to Casey

In 1973, the Supreme Court decided Roe v. Wade, the landmark case that established the right to choose to have an abortion as a constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment. However, the majority qualified its

75 Id. at 596.
76 Id. at 595-96.
77 410 U.S. 113 (1973).
78 See id. at 170 (“Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment”) (Stewart, P., concurring).
ruling by stating that abortion is not an absolute right and states may enact regulations to limit the abortion decision by demonstrating a compelling state interest.\(^79\) That monumental holding caused a sharp division among the nation, and a meager sixteen years later the Court was faced with its first legitimate opportunity to reverse its decision. In the 1989 case of *Webster v. Reproductive Health Services*,\(^80\) the State of Missouri and the United States expressly asked the Supreme Court to reverse *Roe v. Wade*.\(^81\)

In *Webster v. Reproductive Health Services*, the Court was presented with a constitutional challenge of a Missouri statute regulating the performance of abortions.\(^82\) The statute's preamble specified that "[t]he life of each human being begins at conception," and the statute codified the following restrictions on abortion: physicians were required to perform viability tests upon women beginning in their twentieth week of pregnancy; public employees and public facilities could not to be used in performing or assisting abortions unnecessary to save the mother's life; and "encouragement and counseling" to have abortions was prohibited.\(^83\)

In a fractured 5-4 decision, a majority of the Court declined to explicitly overrule *Roe*, although it upheld all of the statute's challenged provisions. Justice Rehnquist, who authored the majority opinion, asserted that "[t]his case ... affords us no occasion to revisit the holding of *Roe* ... and we leave it undisturbed."\(^84\)

\(^79\) *Id.* at 154.


\(^81\) Indeed, the United States argued for *Roe*’s reversal alongside the State of Missouri as amicus curiae, *see id.* at 496. When the Court accepted review of *Planned Parenthood v. Casey*, the United States again participated as amicus curiae and argued for *Roe*’s reversal, *see Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 842 (1992).

\(^82\) *See id.*

\(^83\) *Webster*, 492 U.S. at 490.

\(^84\) *Id.* at 521.
The majority found that the statute’s conclusion that life begins at conception does not contradict *Roe* because the conclusion is encompassed in the statute’s preamble and thus imposes no substantive restrictions on access to abortion.\(^{85}\) The majority also held that prohibiting the use of government workers and facilities to perform abortions is constitutionally permissible because the constitutionally protected liberty interest in the right to abortion established by *Roe* does not include the right to government assistance in obtaining one, and Missouri’s ban on the use of its facilities and employees for abortion purposes “places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.”\(^{86}\) Lastly, the majority ruled that the requirement of viability testing at 20 weeks is constitutional, stating that “we do not see why the State’s interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability.”\(^{87}\)

Although the *Roe* decision narrowly survived *Webster*, the *Webster* holding revealed a new conservative majority on the Supreme Court with a greater willingness to uphold governmental restrictions placed on abortions. In fact, Justice Rehnquist concludes the opinion with a dire warning regarding the constitutional protection of abortion as a liberty interest under the Fourteenth Amendment by stating: “To the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases.”\(^{88}\)

*Planned Parenthood v. Casey (majority opinion #2)*

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\(^{85}\) *Id.* at 506 ("*Roe v. Wade* implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion. The preamble can be read simply to express that sort of value judgment").

\(^{86}\) *Id.* at 509.

\(^{87}\) *Id.* at 519.

\(^{88}\) *Webster*, 492 U.S. at 521.
In light of *Webster*, a mere three years later Justice Kennedy took an unexpected position in disregard to conventional conservative politics and ideology in the seminal abortion case *Planned Parenthood v. Casey*, where Justice Kennedy joined Justices O’Connor and Souter to issue a joint opinion upholding as constitutional a woman’s right to have an abortion. In its analysis, the joint opinion reasoned that the Fourteenth Amendment protects from governmental interference more liberty interests than the provisions of the first eight amendments enumerate or that have been declared by judicial decision. According to the plurality, “[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.” For example, even though the Constitution does not expressly enumerate a constitutionally protected liberty interest in a married couple’s choice to use contraceptives, the Fourteenth Amendment indeed protects such a liberty interest.

The joint opinion noted that the test for whether the Fourteenth Amendment protects a liberty interest is not whether that interest is expressly included in the Constitution’s text, but rather, “[t]he inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.” To this extent, the plurality

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90 Id. at 847 (“It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. But of course this Court has never accepted that view”).
91 Id. at 848.
92 Id. at 849 (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).
93 Id. at 849.
argued that reasoned judgment should be the test used to determine whether a constitutionally protected liberty interest exists.

Applying the reasoned judgment test, the joint opinion stated that "[t]he controlling word in the cases before us is "liberty,""94 and in what is now famously known as the "mystery passage," Justices O'Connor, Souter, and Kennedy (who, it later turned out, authored the passage)95 declare that:

“Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education…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 Fourteenth 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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”96

According to the joint opinion, the liberty that the Fourteenth Amendment protects extends to matters such as marriage, procreation, contraception, family relationships, child rearing, and education. The crucial characteristic that these matters share is that they all concern "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." Recognizing that "in some critical respects the abortion decision is of the same character"97 as the matters listed therein, the Justices believe that this shared

94 Id. at 846.
96 Casey, 505 U.S. at 851.
97 Id. at 852.
characteristic tips the reasoned judgment test in favor of recognizing a constitutionally protected liberty interest in the right to terminate a pregnancy.98

In his dissent, Justice Scalia criticized the Justices for employing the reasoned judgment test, arguing that it does not yield an intelligible rule. Noting that the Court cannot look to history to consistently interpret which liberty interests are contained in the Constitution because some forms of conduct to which the mystery passage applies have long been criminalized in American society,99 Justice Scalia concluded, "[i]t is not reasoned judgment that supports the Court's decision; only personal predilection."100 According to Scalia, if the Court does not find the scope of constitutionally protected liberty interests strictly from the text of the Constitution itself, only personal preferences, not reasoned judgment, can shape the scope.

Despite Justice Scalia’s concerns, the plurality confines the legal analysis to the single issue of whether a constitutionally protected liberty interest extends to the right to terminate a pregnancy, and if so, what limits the government may impose on it. Moreover, in the paragraph immediately following the mystery passage, the Justices distinguish the choice to terminate a pregnancy from those decisions traditionally recognized as liberty interests carrying Fourteenth Amendment protections, such as marriage, procreation, contraception,
family relationships, child rearing and education. Finally, the Justices distinguish the right to choose abortion from all other choices, stating, "[a]bortion is a unique act."[101]

Reminding the reader that not all liberties protected by the Fourteenth Amendment are expressly enumerated in the Constitution, the plurality recognized that prior case law documented "the right of the individual...to be free from unwarranted governmental intrusion."[102] Moreover, "[t]he 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" and Kennedy points to precedent in which the Court extended constitutional protection to other unmentioned liberty interests relating to marriage, procreation, contraception, family relationships, child rearing, and education.[103]

Given the personal and intimate suffering a woman experiences in choosing whether or not to terminate a pregnancy and the anguish she endures in living with the implications of that decision, traditional beliefs and the dominant cultural vision of motherhood and fetal life "cannot alone be grounds for the State to insist she make the sacrifice."[104] Staying true to his jurisprudential philosophy, Kennedy boldly asserts, "[o]ur obligation is to define the liberty of all, not to mandate our own moral code."[105]

Though he found a constitutionally protected liberty interest in the right to have an abortion, Kennedy qualified this right by stating that this liberty is not unlimited, and States may permissibly create measures designed to persuade mothers to choose childbirth over

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[101] Casey, 505 U.S. at 852.
[102] See id. (emphasis in original).
[104] Id. at 852.
[105] Id. at 850.
abortion provided they are reasonably related to that goal and do not unduly burden the woman in exercising her right to choose abortion.106

**Stenberg v. Carhart (dissenting opinion #1)**

Justice Kennedy wrote a vehement dissent in *Stenberg v. Carhart*, in which the majority struck down Nebraska’s ban on partial birth abortion.107 The law at issue banned two partial birth abortion procedures, the D & E and the D & X.108 Kennedy described the former as a procedure “forcing the fetus into the vagina, the pulling of extremities off the body in the process of extracting the body parts from the uterus...kills the fetus,” and the latter as “the fetus is partially delivered into the vagina before a separate procedure, the so-called reduction procedure, is performed in order to kill the fetus.”109 The majority held the law unconstitutional for two reasons. First, the law was unconstitutional because it did not include an exception to protect the health or life of the mother. Second, the law was unconstitutionally vague in that "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,"110 thereby by placing an undue burden on the ability for women to obtain an abortion.

Although he wrote the *Casey* opinion, Kennedy felt Nebraska’s law did not place an undue burden on the right to choose an abortion and was therefore constitutional. Kennedy believed that the majority was extending abortion rights far beyond the holding of *Casey*, and that the majority further disregarded *Casey*’s assertion that states have a substantial interest in protecting unborn life.

106 *Casey*, 505 U.S. at 877-78.
108 See *id.* at 975-76.
109 *Id.*
110 *Id.* at 939.
Agreeing with the majority that the procedures were indeed "clinically cold and callous," Kennedy noted the medical terminology the majority used when speaking about them, including "transcervical procedures," and "instrumental disarticulation" and further accused the majority of "view[ing] the procedures from the perspective of the abortionist rather than from the perspective of a society shocked when confronted with a new method of ending human life."\(^{111}\)

According to Kennedy, "Casey is premised on the States having an important constitutional role in defining their interests in the abortion debate,"\(^{112}\) and under that framework are allowed to enact laws to "promote the life of the unborn and to ensure respect for all human life and its potential."\(^{113}\) Additionally, in the need to protect the "dignity and value of human life,"\(^{114}\) states may take measures to ensure "the medical profession and its members are viewed as healers,"\(^{115}\) including the enactment of a ban "forbidding medical procedures which might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus."\(^{116}\)

II: GAY AND LESBIAN RIGHTS

Prior to Romer v. Evans, none of Kennedy's decisions have ever sided in favor of a gay or lesbian petitioner.\(^{117}\) While on the Ninth Circuit Court of Appeals, Kennedy ruled five

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\(^{111}\) Id. at 957.

\(^{112}\) *Stenberg*, 530 U.S. at 961.

\(^{113}\) Id. at 957.

\(^{114}\) Id. at 961-62.

\(^{115}\) Id.

\(^{116}\) Id.

times in cases dealing with homosexuals, each time ruling against them. Moreover, due to Kennedy’s voting record on this issue, his 1987 nomination was opposed by gay organizations. Despite this, Kennedy has indeed expressed an openness to provide gays and lesbians some form of constitutional protection. For example, in a 1980 decision upholding the Navy’s discharge of a gay sailor, Kennedy opined that had the case involved the same intimate activity in a private setting, as opposed to being in the military context, the case may very well “face substantial constitutional challenge.”

Moreover, at his nomination hearings, when questioned directly about which private consensual activities are constitutionally protected, Kennedy was steadfast in his belief that the Constitution must be interpreted beyond its text to include privacy rights not expressly enumerated. As discussed earlier, it is indeed in response to the constitutional protection specifically of “private consensual activities” where Kennedy provides his list of ‘liberty interest considerations’ – human dignity; the injury, harm, and anguish to the person; the inability to manifest his or her own personality; and the inability to obtain his or her own self-fulfillment and potential.

\[118\] Id.

\[119\] Id.

\[120\] Beller v. Middendorf, 632 F.2d 788, 810 (9th Cir. 1980) (“The reasons which have led the court to protect some private decisions intimately linked with one's personality...and family living arrangements beyond the core nuclear family suggest that some kinds of government regulation of private consensual homosexual behavior may face substantial constitutional challenge”).

\[121\] See Nomination Hearings, supra note 37, at 180 (question by Sen. Gordon J. Humphrey: “What standards are there available to a judge, a Justice in this case, to determine which private consensual activities are protected by the Constitution and which are not”).

\[122\] Id.
In light of this, it becomes clear that Justice Kennedy has in fact foreshadowed his future gay rights decisions by articulating his belief that there is some kind of constitutionally protected liberty interest the Due Process Clause of the Fourteenth Amendment.\textsuperscript{123}

\textit{Romer v. Evans: "A state cannot deem a class of citizens a stranger to its law" (majority opinion # 3)}

Writing for the majority in \textit{Romer v. Evans}, Justice Kennedy concluded that Colorado’s ‘Amendment 2’ violated the Constitution’s Equal Protection Clause.\textsuperscript{124} Approved by voters living in Colorado, Amendment 2 sought to overturn the state’s existing antidiscrimination protections provided to gays, lesbians, and bisexuals living in Colorado\textsuperscript{125} and to further prohibit the state from enacting any future protections.\textsuperscript{126}

Kennedy began the opinion by quoting Justice Harlan’s 1896 dissenting opinion in \textit{Plessy v. Ferguson}, in which Justice Harlan stated that the Constitution “neither knows nor tolerates classes among citizens,”\textsuperscript{127} and analogized it to the understanding of the Court’s commitment to the “law’s neutrality where the rights of persons are at stake.”\textsuperscript{128} By referencing one of the most criticized cases upholding institutionalized discrimination in U.S. history, Justice Kennedy has framed the struggle for gays and lesbians as an issue of human dignity and pursuing the moral content of liberty. Kennedy called Amendment 2

\textsuperscript{123} See COLUCCI, supra note 53, at 13 (noting that Justice Kennedy looks to “moral concepts embodied by the text of the Constitution ... [t]o provide the basis for determining the extent of the personal liberty that courts have a duty to enforce”).

\textsuperscript{124} Romer v. Evans, 517 U.S. 620 (1996).

\textsuperscript{125} See id. at 623-24 (including bans on “housing, employment, education, public accommodations, and health and welfare services”). See also BOULDER REV. CODE § 12-1-1 (defining “sexual orientation” as “the choice of sexual partners, i.e., bisexual, homosexual or heterosexual”); DENVER REV. MUNICIPAL CODE, ART. IV, § 28–92 (defining “sexual orientation” as “[t]he status of an individual as to his or her heterosexuality, homosexuality or bisexuality”).

\textsuperscript{126} Romer, 517 U.S. at 624.

\textsuperscript{127} 163 U.S. 537, 557 (1896).

\textsuperscript{128} Romer, 517 U.S. at 623.

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"unprecedented in our jurisprudence" and "not within our constitutional tradition" to enact such a law because it singles out a specific class of persons based on a single trait and denies them "the right to seek specific protection from the law."\textsuperscript{129}

Rejecting the argument that Amendment 2 merely removes the "special rights" conferred only to gays and lesbians, Kennedy is empathetic and humanizes gays and lesbians by explaining that the protections the law withholds "are protections taken for granted by most people because they already have them or do not need them"\textsuperscript{130} and to uphold the law would be to deny homosexuals "the safeguards that others enjoy or may seek without constraint."\textsuperscript{131} Reiterating the importance of human dignity, Justice Kennedy concludes the opinion by stating that Amendment 2 violates the Equal Protection Clause of the Constitution because the law makes "[homosexuals] unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws."\textsuperscript{132}

\textit{Lawrence v. Texas: The protection of private activity through the full meaning of liberty (majority opinion \#4)}

In \textit{Lawrence v. Texas}, Kennedy held that a Texas sodomy law criminalizing homosexuals, but not heterosexuals, from engaging in certain private, consensual, intimate activity unconstitutionally violated the Fourteenth Amendment because the statute "impinged on the[] exercise of liberty a interest protected by the Due Process Clause."\textsuperscript{133} Boldly overruling the court's prior decision in \textit{Bowers v. Hardwick}, Kennedy once again

\begin{footnotes}
\footnotetext{129}{\textit{Id.} ("Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.").}
\footnotetext{130}{\textit{Id.} at 631.}
\footnotetext{131}{\textit{Id.}}
\footnotetext{132}{\textit{Id.} at 635.}
\footnotetext{133}{\textit{Lawrence v. Texas}, 539 U.S. 558 (2003).}
\end{footnotes}
humanized the gay and lesbian community and the importance of their human dignity in stating: “Bowers was not correct when it was decided, and it is not correct today” and that “[i]ts continuance as precedent demeans the lives of homosexual persons.”

Framing the issue as “whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment,” Kennedy uses Lawrence as an opportunity to expand on his comments during his nomination hearings regarding the importance of some form of constitutional protection for private, consensual, intimate activity; and begins the opinion in full:

“Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.”

Noting that the constitutional liberty interest extends beyond mere spatial bounds to embrace “an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” Kennedy concludes that it is a simple task to find that private, consensual, intimate activity falls within the confines of a constitutionally protected liberty interest.

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134 Id. at 578.
135 Id. at 575.
136 Id. at 564.
137 Lawrence, 539 U.S. at 562.
138 See id. at 578 (“The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government”).
The scope of the liberty interest Kennedy articulated in *Lawrence*, even by its own terms, reaches beyond private, consensual, intimate activity. Citing his majority opinion in *Planned Parenthood v. Casey*, Justice Kennedy stated that homosexuals are entitled to the same level of constitutional protection as heterosexuals when it comes to “choices central to personal dignity and autonomy” and, just as heterosexuals, homosexuals also have the right “to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.”

As in *Romer v. Evans*, Kennedy provides little discussion on the state’s asserted basis for the sodomy law. Texas claimed that it had an interest in “the preservation of marriage, families and the procreation of children” that was independent from a moral disapproval of gay people.141

Kennedy rejected Texas’s assertions for the basis for the criminalization of same-sex sodomy, and stated that the only believable basis for the criminal statute was majoritarian and moral disapproval, which was not a valid justification for the law. For this point, Kennedy cited to Justice Stevens’ dissent in *Bowers v. Hardwick*: “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”

*Obergefell v. Hodges: Same Sex Marriage As a Constitutional Liberty Right* (majority opinion #5)

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139 *Id.* at 574.

140 *Id.*


In the landmark decision authored by Justice Kennedy, the Court held that there was a fundamental constitutional right for same sex couples to marry under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.\footnote{Obergefell v. Hodges, 135 S. Ct. 2584 (2015).}

In the opinion, Kennedy wrote that the Constitution guarantees fundamental liberty to all individuals, and in addition to the liberty rights specifically enumerated in the Constitution, these liberties extend to “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”\footnote{Id.} Liberty has been extended to include “the right to marry,” which the court had reiterated in previous decisions to be “fundamental under the Due Process Clause.”\footnote{Id. at 2598 (citing M.L.B. v. S.L.J., 519 U.S. 102 (1996); Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 639–640 (1974); Griswold, supra, at 486, 85 S.Ct. 1678; Skinner v. Oklahoma ex rel. Williamson (1942); Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).} Deeming marriage “essential to our most profound hopes and aspirations,” the right to marry is a constitutionally protected liberty interest because marriage promises “nobility and dignity to all persons,” and is tethered to the “centrality… of the human condition.”\footnote{Id. at 2594.}

Kennedy identified four principles and traditions that prove the right to marry was a fundamental liberty interest under the Constitution and equally applicable to same sex couples. First, “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”\footnote{Obergefell, 135 S. Ct. at 2599.} Second, “the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”\footnote{Id. at 2594.}

\footnote{Id. at 2599.}
childrearing, procreation, and education."\textsuperscript{149} Fourth and finally, the Court's prior cases and the nation's traditions make clear that "marriage is a keystone of our social order."\textsuperscript{150}

Addressing the first principle, Kennedy wrote that the enduring connection between marriage and liberty is the reason why in 1967 the \textit{Loving} Court invalidated interracial marriage bans under the due Process Clause.\textsuperscript{151} Decisions concerning marriage are among the most intimate that an individual can make, and for the Court to have found protectable liberty interests in choices concerning "contraception, family relationships, procreation, and childbearing" – but not the right to marry – would be, in the court's own words, "contradictory with respect to the decision to enter the relationship that is the foundation of the family in our society."\textsuperscript{152} Kennedy wrote that the nature of marriage is that through an enduring bond, two people can find other freedoms and build a singular life together – and "this is true for all persons, whatever their sexual orientation."\textsuperscript{153} "There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices."\textsuperscript{154}

In his second principle, Kennedy wrote that the Court's jurisprudence shows a vehement protection of the importance of marriage and the intimate association between partners marriage supports, and thereby regarding marriage fundamental. Kennedy noted that the intimate association protected by this right was central in \textit{Griswold v. Connecticut}, which held the Constitution protects the right of married couples to use contraception. Suggesting

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{149}] \textit{Id.} at 2600.
\item[\textsuperscript{150}] \textit{Id.} at 2601.
\item[\textsuperscript{151}] See \textit{Loving v. Virginia}, 388 U.S. 1 (1967).
\item[\textsuperscript{152}] \textit{Obergefell}, 135 S. Ct. at 2599 (quoting Zablocki v. Redhail, 434 U.S. 374, 384 (1978)).
\item[\textsuperscript{153}] \textit{Id.} at 2599.
\item[\textsuperscript{154}] \textit{Id.}
\end{enumerate}
\end{footnotesize}
that marriage is a right “older than the Bill of Rights,” in which two people “come[] together for better or worse,” the Griswold Court described marriage as a “harmony in living, bilateral loyalty…for as noble a purpose as any involved in our prior decisions.” Kennedy wrote, “the right to marry thus dignifies couples who wish to define themselves by their commitment to each other,” and same-sex couples have the same right as heterosexual couples to enjoy intimate association. Noting that Lawrence merely confirmed a liberty interest in freedom from laws making same-sex intimacy a criminal offense, Kennedy was clear in that “it does not follow that freedom stops there,” and the right for same sex couples to enjoy intimate association extends beyond Lawrence because that case “does not achieve the full promise of liberty.”

Addressing the third principle, Kennedy wrote that the Court has indeed recognized that the right to marry, establish a home, and bring up children is a “central part of the liberty protected by the Due Process Clause.” Kennedy argued that the marriage laws at issue harmed and humiliated the children of same-sex couples because “without the recognition, stability, and predictability” marriage offers, children being raised by unmarried parents would suffer stigma by feeling that their families are somehow lesser. Noting that there are “hundreds of thousands of children are presently being raised by [same-sex] couples,” Kennedy looked to social science research to show that a majority of states currently allow gays and lesbians to adopt to confirm that even the government itself believes that gays and lesbians “can create loving, supportive families.” Kennedy also stated that the right to

155 Id. at 2599-00.
156 Id. at 2600.
157 Obergefell, 135 S. Ct. at 2600-01.
158 Id.
159 Id.
marry could not be held less meaningful for those who cannot have children and the states may not condition the right to marry on the capacity to procreate because “constitutional marriage right has many aspects, of which childbearing is only one.”

Finally, Kennedy argued that States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order, and there is no difference between same-sex and heterosexual couples with regard to this final principle. Because same-sex couples are denied the right to marry, they are also denied the benefits that have been attached to marriage, which Kennedy believed to have “the effect of teaching that gays and lesbians are unequal,” and same-sex couples have been “consigned an instability many opposite-sex couples would deem intolerable in their own lives.”

In light of these four principles and traditions regarding the fundamental right to marry as a constitutionally protected liberty interest, Kennedy wrote “[i]t demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.”

Kennedy concluded the landmark decision not with traditional constitutional legalese often employed by the judiciary, but with a poetic passage about the morals of love, marriage, and human dignity – a message that surely resonates throughout the country:

“No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it,  

160 Id.  
161 Id. at 2602.
respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

*It is so ordered.* 162

**C: FREE SPEECH**

In the near three decades that Kennedy has served on the Supreme Court, he has gained a reputation as being "the foremost defender of free speech principles on the modern Court." 163 Kennedy has stated that the First Amendment is vital because it "ensures the dialogue that is necessary for the continuance of the democratic process" and that it protects individuals "to all ways in which we express ourselves as persons." 164

*Texas v. Johnson: “It is fundamental that the flag protects those who hold it in contempt” (concurring opinion #2)*

For Justice Kennedy, free speech must be protected regardless of the form that a person's expression may take, including expressive conduct. 165 In *Texas v. Johnson*, the Court was asked to decide whether the First Amendment protects a person's actions when he violates a state statute that prohibits him from burning the American flag. 166 The Court held that the respondent's act of burning an American flag during a political protest held outside

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162 Obergefell, 135 S. Ct. at 2608.
164 See Nomination Hearings, supra note 37, at 111 (statement of Hon. Anthony M. Kennedy).
166 Id. at 370.
the Republican National Convention in Dallas constituted expressive conduct that was protected under the First Amendment.\footnote{Id. at 371.}

The Court held that based on the context of Johnson burning the American flag as part of a political demonstration taking place outside the Republican as the GOP was officially renominating Ronald Reagan as presidential candidate, the overt political nature of Johnson’s act was “overwhelmingly apparent” and therefore the flag burning constituted expressive conduct protectable by the First Amendment.\footnote{Id. at 406.} The majority concluded that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.\footnote{Id. at 414.}

Kennedy filed a separate concurrence that sheds light on the moral interpretation he uses to read the Constitution and the values he interjects into the Constitution’s text. Making it perfectly clear that he did not condone Johnson’s actions, Kennedy described the flag as “hold[ing] a lonely place of honor… constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit.”\footnote{Johnson, 491 U.S. at 421.} However, Kennedy cautions that these same beliefs “forces recognition of the costs to which those beliefs commit us.”\footnote{Id. at 371.}
Admitting this to be a rare occurrence in which a Justice overtly expresses his distaste for a result despite the possibility of undermining the decision, Kennedy was fully aware as to the disagreeable implications of the holding. However, in Kennedy’s mind, the jurisprudential goal to insure “the word liberty in the Constitution is given its full and necessary meaning” means extending its constitutional protections to all individuals indiscriminately.

Though an individual’s speech or expressive conduct may be grossly offensive and appalling, such facts do not diminish that individual’s power to invoke the Constitution, and in light of the moral content of liberty, the Court must uphold the First Amendment. As Kennedy stated, “[t]he 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.” As poignant as it may be, indeed it is “fundamental that the flag protects those who hold it in contempt.”

**Hill v. Colorado (dissenting opinion #2)**

In *Hill v. Colorado*, the majority concluded that protestors were properly banned from demonstrating in front of an abortion facility and upheld a Colorado law that established a

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172 *See id.* at 420-21 (“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. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases”).

173 *Nomination Hearings, supra* note 37, at 122 (statement of Hon. Anthony M. Kennedy).


175 *Id.*
protestor-free buffer zone prohibiting speakers from "engaging in oral protest, education, or counseling" within one hundred feet of the entrance to an abortion clinic.\textsuperscript{176}

In his dissent, Kennedy stated that the essence of the First Amendment is to guard against the tyranny of "[l]aws punishing speech which protests the lawfulness or morality of the government's own policy,"\textsuperscript{178} Kennedy reminded the reader that under \textit{Planned Parenthood v. Casey}, any plea to outlaw abortions will be to no effect, and absent the ability to ask the government to intervene, citizens who oppose abortions have no other choice but to "seek to convince their fellow citizens of the moral imperative of their cause."\textsuperscript{179}

Kennedy continued that "[f]or the first time, the Court approves a law which bars a private citizen from passing a message, in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk,"\textsuperscript{180} and believed the law to be a "prohibition [which] seeks to eliminate public discourse on an entire subject and topic."\textsuperscript{181} Kennedy further argued that by restricting the right to engage in public protest of important moral and social issues is to "deny the neutrality that must be the first principle of the First Amendment."\textsuperscript{182} Kennedy challenged the majority's opinion as disregarding "the importance of free discourse and the exchange of ideas in a traditional public forum" and accused the majority of forgetting that:

"Our foundational First Amendment cases are based on the recognition that citizens... must be able to discuss issues, great or small, through the means of expression they deem best suited to their purpose. It is for the speaker, not the government, to choose the best means of expressing a message. The First Amendment

\textsuperscript{176} Hill v. Colorado, 530 U.S. 703, 707 (2000).
\textsuperscript{177} \textit{Id.}
\textsuperscript{178} \textit{Id.} at 787.
\textsuperscript{179} \textit{Id.} at 787-88.
\textsuperscript{180} \textit{Id.} at 765.
\textsuperscript{181} \textit{Id.} at 770.
\textsuperscript{182} Hill, 530 U.S. at 789.
\textsuperscript{183} \textit{Id.} at 778.
Amendment...protects citizens' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."

Here, just as he had communicated in *Texas v. Johnson*, Kennedy is steadfast in his jurisprudential philosophy of giving liberty its full and necessary meaning. To Justice Kennedy, this means that in a free society that promotes diversity of ideas, the moral content of liberty compels the Court to respect every person's right to freedom of speech regardless of the speaker's message, and the government cannot take it upon itself to decide which groups to intermittently protect from that message.

**Citizens United v. FEC (majority opinion #6)**

In *Citizens United*, Kennedy wrote the majority opinion in which the Court affirmed and extended the First Amendment free speech rights of corporations. The issue in this case dealt with federal campaign finance laws and the ability of corporations to spend its treasury money to support or oppose political candidates.

Citizens United was a nonprofit corporation that produced and released a documentary called *Hillary: The Movie* during Hillary Clinton's candidacy for the Democratic nomination in 2008. The movie was a "feature-length negative advertisement that urge[d] viewers to vote against Clinton for President" shot with "historical footage, interviews with persons critical of her, and voiceover narration" to criticize and question Clinton's "character and fitness for the office of the Presidency."\(^{186}\)

The nonprofit corporation wanted to increase the film's public distribution and was prepared to pay $1.2 million to make *Hillary* available for public viewing on video-on-

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\(^{184}\) *Id.* at 780-81.


\(^{186}\) *Id.* at 325.
demand in the days leading up to the primary elections, but feared it would violate the Federal Bipartisan Campaign Reform Act ("BCRA") and sought declaratory judgment. The BCRA prohibited corporations from using general treasury funds to make independent expenditures for "electioneering communications," which was defined as "any broadcast, cable, or satellite communication" that refers to a "clearly identified candidate for Federal office" made within 30 days of a primary election.

Originally, the question presented to the Court was whether the BCRA applied to Hillary, which was a video-on-demand film. However, the Court conceded that it could not resolve the dispute on a narrower ground "without chilling political speech," and the much broader question of whether the BCRA – which limited corporations' independent spending in elections – is unconstitutional.

Writing for the majority, Kennedy reaffirmed that the First Amendment "extends to corporations" engaging in political speech and held that the BCRA's ban on corporate campaign spending violated the corporation's First Amendment right to free speech. According to Kennedy, "political speech does not lose First Amendment protection "simply because its source is a corporation," and a corporation, just like an individual, can contribute to the "discussion of the debate" by expressing ideas or opinions and spending

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187 Id. at 320.
188 Id. at 310.
189 Id.
190 Id. at 329.
192 See id. at 342 ("This protection has been extended by explicit holdings to the context of political speech")
193 Id.
money to support or oppose a political candidate. Kennedy rejected the argument that the political speech of “corporations and associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’” 194 Instead, Kennedy held that the First Amendment protected all political speech and does not allow restrictions of speech based upon “the identity of its source, whether corporation, association, union, or individual,” 195 and further stated that “[political speech is indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.” 196

Stating that “[t]his Court has not hesitated to overrule decisions offensive to the First Amendment,” 197 Kennedy overruled two of the Court’s previous First Amendment cases that upheld campaign finance laws that restricted corporate expenditures. In the first, Austin v. Michigan Chamber of Commerce, the Court upheld a Michigan law that banned corporation independent expenditures that supported or opposed candidates for state office. Similar to Citizens United, the corporation in Austin wanted to use its general treasury funds to print newspaper ads supporting a candidate for state office. Noting the corrosive and distorting effects of “immense aggregations of wealth accumulated with the help of the corporate form that has little or no correlation to the public’s support for the corporation’s political ideas,” the Austin court explained that the structure of the corporate form facilitates the amassing of large treasuries, and that these large aggregations of funds “can unfairly influence elections” when

194 Id. at 343.
195 Id. at 349 (quoting First Nat. Bank of Boston v. Bellotti, 435 U.S. 765 (1978)).
196 Id. at 349.
197 Citizens United, 558 U.S. at 363.
they are deployed in the guise of political contributions. Concluding that the Michigan law was designed to prevent corporations from obtaining “an unfair advantage in the political marketplace” by using “resources amassed in the economic marketplace” the Court held that the “State has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations.” In the second case, McConnell v. Federal Election Commission, the Court relied on the same “antidistortion rationale” recognized in Austin to uphold the BCRA provision at issue in Citizens United – the restrictions on corporate independent expenditures.

Kennedy rejected the antidistortion rationale recognized in Austin and McConnell because he felt it was contrary to the Constitution to focus on the economic wealth of corporate speakers, for “[t]he First Amendment’s protections do not depend on the speaker’s “financial ability to engage in public discussion.” According to Kennedy, the rule that political speech cannot be limited based on a speaker’s wealth is “a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.”

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199 Citizens United, 558 U.S. at 350.
200 Austin, 494 U.S. at 660.
202 McConnell, 540 U.S. 93 at 205.
203 See id.
204 See Citizens United, 558 U.S. at 365-66 (“The McConnell Court relied on the antidistortion interest recognized in Austin to uphold a greater restriction on speech than the restriction upheld in Austin, and we have found this interest unconvincing and insufficient. This part of McConnell is now overruled”) (citation omitted).
205 Id. at 350.
206 Id.
prohibits the suppression of political speech based on the speaker’s identity, it followed that
the Constitution also forbids limitations on political speech based on a speaker’s wealth.\textsuperscript{207}

The magnitude of this decision seems to contradict Kennedy’s prior views on
contributions made to political action committees ("PACs"). In the 1980 case \textit{California Medical Association}, Kennedy decided that placing limitations on contributions made to
PACs are not eligible for the full protections of the free speech clause of the First Amendment. When people contribute to a PAC they choose that committee in order to
express themselves on political issues and make the contribution to, in essence, advocate their
views.\textsuperscript{208} At his nomination hearings Kennedy was asked to explain why limiting this form of
expression would not be a limitation on the free speech principles of the First Amendment,
Kennedy responded:

"This was a case in which we were asked to interpret a new statute passed by
the Congress. We thought we had guidance from the Court that controlled the
decision. We expressed the view, as we understood the law of the Supreme Court, that this was speech by proxy. This was not direct speech by the person
who was spending the money, rather he or she was delegating it to an
intermediary. We thought that was a sufficient grounds for the Congress of the
United States in the interest of ensuring the purity of the election process to
regulate the amount of the contribution."\textsuperscript{209}

Notwithstanding, it is important to note that in \textit{Citizens United}, Kennedy never focused on the
issue of corporate personhood\textsuperscript{210} in his opinion, and he never stated that because corporations
are people, they must be treated the same as individuals for purposes of the First Amendment.
Rather, Kennedy framed the issue as whether the speech is the type of speech protected by the

\textsuperscript{207} Id.
\textsuperscript{208} Nomination Hearings, supra note 37, at 112 (statement of Hon. Anthony M. Kennedy).
\textsuperscript{209} See id., supra note 37, at 113.
\textsuperscript{210} Citizens United, 558 U.S. at 466 ("It might also be added that corporations have no consciences, no
beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human
beings, to be sure, and their "personhood" often serves as a useful legal fiction. But they are not themselves members of "We the People" by whom and for whom our Constitution was established").
First Amendment, not whether the speaker is the type of person who can claim First Amendment rights. In Justice Kennedy’s mind, because the political speech at issue is protected by the First Amendment, it is of no consequence whether the speaker is a corporation or a human being.

**PART IV: CONCLUSION**

Justice Kennedy’s jurisprudential philosophy takes a moral approach in interpreting the Constitution, and the Justice firmly believes that is possible for the constitutional protections of liberty to encompass situations and circumstances not specifically articulated by the court nor found in the Constitution’s text by virtue of them being implicitly contained therein. According to Kennedy, if the protection is just or central to “our American tradition and the rule of law,” not only does the court have an obligation to enforce such a protection, but where the text of the Constitution allows for this protection, the Constitution must be interpreted to include it, in order to insure “the word liberty in the Constitution is given its full and necessary meaning, consistent with the purposes of the document as we understand it.”

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211 *Id.* at 392-93 (Scalia, J., concurring) (“The Amendment is written in terms of “speech,” not speakers...We are therefore simply left with the question whether the speech at issue in this case is “speech” covered by the First Amendment. No one says otherwise”).

212 *Nomination Hearings, supra* note 37, at 86 (statement of Hon. Anthony M. Kennedy).

213 *See id., supra* note 37, at 122 (statement of Hon. Anthony M. Kennedy).