

## ESSAY: Justice Kennedy and the Ideal of Equality

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### **SUMMARY:**

We can see that *content* based discriminations--reserving Tuesday for a health care debate and Wednesday for a welfare reform debate--is in some contexts more permissible than *viewpoint* based discriminations. We can see that a working democracy requires not merely negative protection against state censorship, but also affirmative government action to promote free speech--to create the Town Hall or Assembly Room or other Public Forum where the freedom of speech can occur. ... Our public forum doctrine ought not to be a jurisprudence of categories rather than ideas, or convert what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat . . . .Public spaces and thoroughfares that are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of property. ... It must nurture the public forum. ... And this is a public forum about which Justice Kennedy has had a lot to say. ... The principal [also] chose the religious participant, here a rabbi [Third, via his guidelines and advice] the principal directed and controlled the content of the prayer. ... Even if affirmative action in other contexts (like contracting set-asides) is unconstitutional, might education be different, as a special public forum, permitting special sensitivity to "marginal voices," to use Justice Kennedy's own phrase? ...

### **TEXT:**

I grew up a few miles down the road from here, and it is good to be back home. By instinct, I am a Northern Californian; by training, a constitutional scholar. At times, I have wondered whether there is a tension between these two. Massachusetts, it might be said, gave Americans the Revolution; Pennsylvania, one could say, gave lovers of liberty the Declaration of Independence and the Constitution (not to mention a hall and a bell); Connecticut, according to lore, gave students of the Constitution a famous compromise; Virginia and New York gave us state and federal Bills of Rights; Illinois gave us Lincoln, and thus Emancipation; Ohio, via John Bingham, gave us the Fourteenth Amendment; and in our century, the Deep South gave us both Hugo Black and Martin Luther King, Jr. What, it might be asked, has Northern California given to our Constitutional Tradition?

One answer--my answer this afternoon--is Justice Anthony Kennedy. This seems an apt venue to offer such an answer--in the city where Anthony Kennedy was born, grew up, went to high school, practiced law, and first took the bench; and at the law school where he taught for many years. And this seems an apt moment to take stock of Justice Kennedy's contributions to our Constitutional Tradition, meeting, as we are, in the shadow of the sixtieth anniversary of his birth and twentieth anniversary on the bench, and within sight of what will be the tenth anniversary of his nomination to the High Court. Thus, the time and the place are right; the stars, it seems, are all in line. Let us see where they lead us.

This afternoon, I propose to examine a handful of Justice Kennedy's opinions, handed down at

various points in his tenure on the Supreme Court. Doctrinally, these cases raise distinct issues; but they are, I think, linked together by a certain vision of Justice Kennedy's. It is, for me, an attractive and often inspiring vision--a vision of truly equal citizenship in a diverse, pluralistic, boisterous, participatory democracy. It is a vision remarkable in both substance and style. Substantively, these Kennedy opinions enable us to see many facets of the equality ideal. Indeed, I shall suggest that each case can be usefully seen through the lens of a different constitutional clause. Sometimes this clause explicitly appears in Justice Kennedy's analysis; other times, his imagery and instincts summon it up more subtly, perhaps even subconsciously. Stylistically, Justice Kennedy tries to teach us about the Constitution by example. The Constitution is a tolerant document enabling diverse folk to live together as democratic equals. And so Justice Kennedy's tone is consistently tolerant [\*516] and measured--he disagrees with his colleagues on the bench without being disagreeable. The Constitution proclaims itself in the name of ordinary citizens--We the People--and so Justice Kennedy writes clean, straight prose, with as little legalese as possible. Remarkably, in none of the opinions I have chosen does a footnote clutter the page: the gist of his argument reads well in the *New York Times* and the *Sacramento Bee*. The Justice is a teacher here; all Americans are his students; and he tries to reach us by using words and images we can understand. <sup>1</sup>

As I said, it is a remarkable vision, both in style and substance, calling to mind Jimmy Stewart and Frank Capra at their best. Let us explore it together.

## I. *TEXAS V. JOHNSON*

Consider first the 1989 case of *Texas v. Johnson*. <sup>2</sup> During the 1984 Republican National Convention in Dallas, Gregory Lee Johnson participated in a political demonstration to protest the policies of the Reagan Administration and of some Dallas-based corporations. At the end of the demonstration, Johnson unfurled the American flag, doused it with kerosene, and set it on fire as the protesters chanted "America, the red, white, and blue, we spit on you." Texas criminally prosecuted Johnson for desecrating the flag; Johnson claimed that the First Amendment barred such prosecution. The case reached the Supreme Court in 1989--very early in Justice Kennedy's tenure on the Court. In fact, he was the most junior Justice in the case.

And also the swing Justice in the case--for his eight senior colleagues split four-to-four on the issue. As Kennedy went, so would go the Court. In the end, he went with the First Amendment claim, and he explained his reasons in an elegant six-paragraph concurrence.

It is an extraordinarily respectful and deferential concurrence. He begins by praising "the words Justice Brennan chooses so well" in the majority opinion, (which he joins); but he also goes out of his way to tip his hat to "our colleagues in dissent [who] advance powerful arguments." <sup>3</sup> Both of these are generous gestures. Justice Brennan's opinion makes some powerful logical points, but the "words he chooses so well" do not really soar or soothe. <sup>4</sup> Conversely, Chief Justice Rehnquist's dissent bubbles over with emotion and rhetoric, but is rather short on hard logic; judged by conventional legal standards of text, structure, doctrine, and logic, "shoddy" might [\*517] be a more accurate description of its arguments than "powerful." <sup>5</sup> But also, a less charitable description--and as noted, Justice Kennedy chooses the path of charity.

Justice Kennedy's main audience is not his colleagues but his countrymen. He is aware that many ordinary citizens will be "dismayed by our holding"--especially perhaps, veterans "who have had the singular honor of carrying the flag in battle." <sup>6</sup> Why, then, does Justice Kennedy in the end choose their "dismay"? Not because he respects what Gregory Lee Johnson said and did. On the contrary he pointedly distances himself from Johnson. He refers to him only as "this respondent," and wonders aloud about whether the respondent even possessed "the ability to comprehend how repellent his statements must be to the Republic itself." <sup>7</sup> Rather, Justice Kennedy holds for Gregory Lee Johnson because: (1) Justice Kennedy is a judge, and a judge must follow the law, even when--especially when--the law protects some-one the judge may not like; and (2) the law in question--the Constitution--protected what Johnson did, however loathsome. Ordinary people need to understand both points, and so Justice Kennedy tries to explain them in clear prose.

On the first point:

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. <sup>8</sup>

On the second point:

It is poignant but fundamental that the flag protects those who hold it in contempt . . . The fact remains that [Johnson's] acts were speech, in both the technical and the fundamental meaning of the Constitution. So I agree with the Court that he must go free. <sup>9</sup>

Justice Kennedy's second point merits careful analysis. First, Johnson's antics were "speech," in both a "technical" and a "fundamental" sense. The Justice, I submit, is right on both counts, synthesizing principled formalism and honest realism. Technically, and fundamentally, Johnson *spoke*: "America, the red, white, and blue, we spit on you." And had he spoken other words, his overall performance would not have been flag desecration, but flag respect. Patriots burn flags every day--when a flag becomes soiled, one is *supposed* to burn it. But patriots burn flags with respect, speaking words like the pledge of allegiance. And even without the particular words [\*518] spoken by Johnson and his fellow protesters, isn't it true--both technically and fundamentally--that Johnson was being punished for the *message* he communicated? Of course, burning is an *act*--but that doesn't make it nonspeech. A sign language gesture is an *act*; typing an essay is an *act*; vocalization of words is an *act*; laser printing is an *act*--but these are all speech, too, both technically and fundamentally. <sup>10</sup> To deny this--as the *Johnson* dissenters tried to do--is gimmicky, even unworthy.

But even if Johnson's antics were "speech," why must they be absolutely protected? This brings us to Justice Kennedy's claim that because Johnson's "acts were speech . . . he must go free." In formal doctrinal terms--terms that Justice Kennedy avoids, perhaps because they seem a bit too sterile for a lay audience in this highly charged case--the Constitution bars "viewpoint discrimination," especially viewpoint discrimination aimed at political critics of the government or the established order. In Kennedy's more poetic formulation, "the flag protects those who hold

it in contempt."

"But where does the Constitution say that?" a critic might press. Surely "speech" is not an absolute. Surely a person may be criminally punished for uttering the words "your money or your life" or "I'll pay you ten thousand dollars if you'll pardon me, governor." Surely a person may be sued for an intentionally false statement of fact that destroys another's reputation. Why are the words, "America, we spit on you" any different?

Justice Kennedy does not directly engage this critic in his short concurrence; but the Brennan opinion he joins makes clear that expressions of *opinion* are very different from threats or bribes or false statements of fact; and that the protection of political opinion--especially anti-governmental political opinion--lies at the core of the First Amendment. <sup>11</sup> Hence, there is a strict ban on governmental discrimination based upon political viewpoint. If it is permissible to say "I support government policy" it must be permissible to say "I oppose government policy" or even "I despise--I spit on--government policy." <sup>12</sup> Implicit in this ban on viewpoint discrimination is a rather powerful ideal of equality of a certain sort--equality of *political opinion*. And so, because the flag protects those who adore it, and so profess, it must "protect those who hold it in contempt."

Justice Kennedy points to no specific clause in his six-paragraph concurrence. He speaks of "the Constitution" and "the law," and of "the flag" as a metaphor for both. He also speaks of "speech"--an obvious allusion to the First Amendment's Freedom of Speech Clause, the centerpiece of Justice Brennan's opinion. But the simple word "speech" should also remind us, I suggest, of the *other* free speech [\*519] clause in the Constitution, the Article I section 6 clause protecting freedom of "speech or debate" in Congress. <sup>13</sup>

If we think seriously about speech and debate in a well governed legislative assembly--a town meeting or a Parliament (literally, a "speaking body," from the French "parler")--we see further confirmation of some of Justice Kennedy's insights and instincts. First, and most important, a well-running assembly should not discriminate on the basis of political viewpoint. If *A* can take the floor to support the war, *B* must be free to take the floor to oppose it. *Speech* may be limited: five minutes per person. But the *freedom of speech*--understood here as a protection against viewpoint discrimination--is an absolute. And the First Amendment can be understood as extending this absolute freedom beyond the legislative assembly hall itself to the people "out of doors"--the ultimate National Assembly. (This, in a nutshell, is the insight of the great speech theorist, Alexander Meiklejohn. n14)

The image of freedom of speech in a well run assembly also helps illuminate other aspects of our First Amendment Tradition. Through it, we can see that political speech--the stuff of legislative speech and debate--is structurally and historically central, deserving priority of place over, say, commercial advertising. We can see that *content* based discriminations--reserving Tuesday for a health care debate and Wednesday for a welfare reform debate--is in some contexts more permissible than *viewpoint* based discriminations. We can see that a working democracy requires not merely negative protection against state censorship, but also affirmative government action to promote free speech--to create the Town Hall or Assembly Room or other Public Forum where the freedom of speech can occur. Finally, the assembly model reminds us of another

equality principle: speech rights should not simply track property or wealth distributions. Even if Ross Perot and Steve Forbes own more than the rest of us put together, they are not entitled to speak at the town meeting longer than the rest of us put together. Speech time in our assembly hall should be distributed more equally--a poor man should get his turn at the microphone, too, as Norman Rockwell so beautifully reminds us. "Speech" is not merely property; it is democracy, too--and thus it must be allocated with an eye towards equality.

These last points, I suggest, were at the heart of Justice Kennedy's message in his 1992 concurrence in *International Society for Krishna Consciousness v. Lee*.<sup>15</sup> Let us now turn to that case.

[\*520] II. *INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS V. LEE*

In the 1992 *Krishna* case, the major New York City airports banned both the solicitation of funds and the distribution or sale of leaflets inside the terminals. Four Justices voted to uphold both bans; three other Justices voted to strike down both bans. In the middle sat Justices O'Connor and Kennedy, who thought that the ban on solicitation could stand, and that the ban on leafleting must fall. Although they reached this result by different paths, together these two Justices cast the decisive votes, siding with the four to uphold the solicitation ban, and with the three to strike down the leafleting ban. Once again, we see Justice Kennedy in the center; as he (and in this case Justice O'Connor) went, so went the Court.

For our purposes here, Justice Kennedy's opinion contains several noteworthy moves. First, he insists that judges should not be stingy in recognizing special "public fora" where vigorous free speech receives special judicial protection. A couple of years before *Krishna*, Justice Kennedy put the point as follows: "As society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place."

<sup>16</sup> In *Krishna*, he pleads with his colleagues not to adopt a rigid historical test that would deny "public forum" status to new venues simply because these places were not historically or traditionally viewed as such:

Our public forum doctrine ought not to be a jurisprudence of categories rather than ideas, or convert what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat . . . .

Public spaces and thoroughfares that are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of property.<sup>17</sup>

Once again, we see a beautiful synthesis of principled legalism and honest realism. Justice Kennedy is not making up new constitutional principles, but trying to apply old ones to new contexts.<sup>18</sup> The deep principles of freedom of the press must apply not merely to printing presses, but to airwaves and cyberspace. The Fourth Amendment must protect our papers, but also our floppy disks; it must limit physical government trespass upon our homes, but also high-tech wiretaps. Traditional, historical public fora may be withering away, Justice Kennedy warns, and so judges must be vigilant to protect new fora, like airports:

[\*521] Without this recognition our forum doctrine retains no relevance in times of fast-changing technology and increasing insularity. In a country where most citizens travel by automobile, and parks all too often become locales for crime rather than social intercourse, our failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity.

One of the places left in our mobile society that is suitable for discourse is a metropolitan airport.<sup>19</sup>

Finally, let us note a trio of passages in which Justice Kennedy offers up his substantive vision of the freedom of speech:

The liberties protected by our doctrine derive from the Assembly, as well as the Speech and Press Clauses of the First Amendment, and are essential to a functioning democracy. See Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 S. Ct. Rev. 1, 14, 19. Public places are of necessity the locus for discussion of public issues, as well as protest against arbitrary government action. At the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other persons in public places. The recognition that certain government-owned property is a public forum provides open notice to citizens that their freedoms may be exercised there without fear of a censorial government, adding tangible reinforcement to the idea that we are a free people.

....

The danger of allowing the government to suppress speech is shown in the case now before us. A grant of plenary power allows the government to tilt the dialogue heard by the public, to exclude many, more marginal voices. . . . We have long recognized that the right to distribute flyers and literature lies at the heart of the liberties guaranteed by the Speech and Press Clauses of the First Amendment.

....

". . . It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge." The effect of a rule of law distinguishing between sales and distribution would be to close the marketplace of ideas to less affluent organizations and speakers, leaving speech as the preserve of those who are able to fund themselves. One of the primary purposes of the [\*522] public forum is to provide persons who lack access to more sophisticated media the opportunity to speak. A prohibition on sales forecloses that opportunity for the very persons who need it most.<sup>20</sup>

Several points deserve emphasis here. First, we see again an effort to harmonize formal legal theory with flesh-and-blood, embodied reality. In *Johnson*, Justice Kennedy paid tribute to ordinary citizens who "had the singular honor of carrying our flag in battle," and here he again summons up a vision of ordinary citizens in action. These men and women need real freedom of



speech, not merely formal freedom of speech. This is what the Justice means when he speaks of "*tangible* reinforcement to the idea that we are a free people." <sup>21</sup> And he shows particular concern for poor folks' speech--for "marginal voices" and "the very persons who need [speech protection] most." A strict formalist might see a total ban on airport leaflets as viewpoint neutral--formally applying to liberals and conservatives, establishment and nonestablishment, rich and poor alike. But Justice Kennedy sees that this formal neutrality masks a real-life skew--the "*effect*" of the rule is to selectively "close the marketplace of ideas," to "tilt the dialogue." <sup>22</sup>

If, in *Johnson*, Justice Kennedy's rhetoric wafted in the direction of Alexander Meiklejohn, here he is much more explicit. He invokes the Assembly Clause, alongside the Speech and Press Clauses, vividly bringing to mind the image of a democratic assembly. He reminds us that the First Amendment is "essential to a *functioning democracy*." <sup>23</sup> He pointedly cites Meiklejohn's ally and co-theorist, Harry Kalven. He accentuates the *public* aspects of speech--in "public places" on "public issues." And the entire structure of his analysis reminds us that government's role is not merely negative, but affirmative. Government must not censor, but it must do more than this. It must nurture the public forum. As Meiklejohn reminds us, government may not *abridge* the freedom of speech, but it may and must *promote* it. <sup>24</sup>

If we seek a clause beyond the First Amendment to further support this vision, I nominate the Article IV, section 4 Republican Government Clause: "The United States shall guarantee to every State in this Union a Republican Form of Government." <sup>25</sup> In its essence this clause is about democratic equality and self-government <sup>26</sup> --reminding us that, in Kennedy's grand phrase, "we are a free people." The clause goes beyond formal viewpoint neutrality to address the real need for robust political participation of all elements of the republic. The clause is not merely [\*523] negative but affirmative: Congress must affirmatively *guarantee* the conditions of a free republic. And the clause, of course, highlights the centrality of the *res publica*--the public thing. This, in the end, is exactly what Meiklejohn, Kalven, and Kennedy mean to conjure up with images like town meetings, public spaces and public fora--places where we the people do our public "thing" of republican self-government through the give and take of public discourse.

Another place where the people do this thing is the jury box. And this is a public forum about which Justice Kennedy has had a lot to say. Let us now turn to the jury.

### III. *POWERS V. OHIO AND EDMONSON V. LEESVILLE CONCRETE CO.*

In *Powers v. Ohio*, <sup>27</sup> an Ohio prosecutor used peremptory challenges to keep seven blacks off the jury in a murder trial. The defendant, a white man, objected, claiming that the prosecutor was excluding those would-be jurors *because* they were black. The trial court held that even so, it didn't matter; in a trial of a white, a prosecutor could indeed intentionally exclude black jurors. In 1991, the Supreme Court reversed, in an opinion by Justice Kennedy. Here are his inspiring opening words: "Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life." <sup>28</sup>

Once again, we hear an ode to ordinary citizens in a participatory democracy. In *Johnson* we caught a glimpse of citizens who had "the singular honor of" serving their country in war; and

here we envision ordinary citizens serving their country in peace through "an exercise of responsible citizenship"--what the Justice refers to later in *Powers* as the "honor and privilege of jury duty." <sup>29</sup> In *Krishna* we saw a vision of face-to-face "discussion of public issues" by ordinary citizens who "lack access to more sophisticated media;" and here we see a similar effort to include "those who otherwise might not have the opportunity to contribute to our civic life."

For Justice Kennedy, the key to the case is that--whatever exclusion does to defendants--it violates the right to democratic participation of the excluded *jurors*:

The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system . . . . [As Tocqueville remarked:] "I do not know [\*524] whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ."

Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people. <sup>30</sup>

Justice Kennedy then goes one step further, linking jury service with voting:

With the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process . . . . "Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise." <sup>31</sup>

Justice Kennedy's explicit textual basis in *Powers* is the Equal Protection Clause of the Fourteenth Amendment; but his instinct that jury service is closely allied with democracy, political participation, and voting rights reminds us of the obvious relevance of the Fifteenth Amendment. <sup>32</sup> That Amendment, of course, explicitly bars government from depriving a person of the vote because of his race. <sup>33</sup> Technically and fundamentally, this command is violated by race discrimination in jury selection. Jurors *vote*--that is what they do--and typically, ordinary voters have been eligible to serve as jurors, as Justice Kennedy notes.

This insight helps explain the result and reasoning in *Edmonson v. Leesville Concrete Co.*, <sup>34</sup> handed down by the Court a couple of months after *Powers*. In *Edmonson*, a private litigant had used peremptory challenges to keep two blacks off a civil jury; and the Court, per Justice Kennedy, struck down this allegedly race-based denial of "the honor and privilege of participating in our system of justice." <sup>35</sup> [\*525] The dissenters in *Edmonson* claimed that the discrimination was mere *private* prejudice, rather than state action regulated by the Constitution. <sup>36</sup> But Justice Kennedy understood that the jury is inherently a *public* body. "Though the motive of a peremptory challenge may be to protect a private interest, the objective of jury selection proceedings is to determine representation on a governmental body . . . ." <sup>37</sup>



Surely the state could not empower private "registrars" to deny blacks the right to vote in ordinary elections. And, once we see that voting for legislatures and voting on juries are intimately linked--as Justice Kennedy teaches us in *Powers*--we can see that "private" race-based peremptories must also fall. To hammer this point home in *Edmonson*, Justice Kennedy prominently relies on the White Primary Cases--involving voting--to invalidate the peremptory challenge at hand.<sup>38</sup>

If we take seriously this democratic, participatory vision of jury service linked arm-in-arm with voting, it argues strongly for the abolition of peremptory challenges altogether, even when these challenges are not based on race. We don't allow "registrars" to refuse to let some eligible voters vote; why should we allow litigants to exclude those voters from their other democratic "honor and privilege," during which they learn to become better citizens? Though Justice Kennedy has not yet gone this far, this is, I hope, where his vision might ultimately lead.<sup>39</sup> No willing citizen should be peremptorily excluded from the jury box.

Or from her high school graduation, as our next case makes clear.

#### IV. *LEE V. WEISMAN*

The principal of a public school in Providence, Rhode Island invited a rabbi to deliver prayers at the school's graduation ceremony. The principal gave the rabbi a pamphlet setting out suggested "guidelines" for the prayer, and advised the rabbi to offer a "nonsectarian" invocation and benediction. As delivered, the prayers made no explicit reference to "the Bible" or "the God of Israel;" but they did use some scriptural language--from *Micah* 6:8, for example. Graduating student Deborah Weisman and her father objected to the graduation prayers on Establishment Clause grounds; and in 1992, the Supreme Court agreed with the Weismans, by a narrow five-to-four vote.

[\*526] Justice Kennedy wrote for the Court. (Once again, we see the Justice as a swing vote; as he went, so went the Court.) To a remarkable extent, his opinion avoids sterile legalese. Thus, in his opening paragraph in *Lee v. Weisman*, he explains to lay folk that the Fourteenth Amendment makes the Religion Clauses of the First Amendment "applicable with full force to the States and their school districts."<sup>40</sup> A Justice less sensitive to the fact that many ordinary Americans are listening in to this debate would probably have used the more technical--but less inclusionary--legal shorthand of "incorporation." In a similar vein, a less populist Justice might have processed the entire case through the formulaic three-prong *Lemon* test,<sup>41</sup> but Justice Kennedy instead explains his result to ordinary citizens more directly:

These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.<sup>42</sup>

Justice Kennedy then proceeds to unpack these points in language noteworthy for its candor, its

common sense, and its grasp of principle. To explain his first point--that "state officials direct the performance of a formal religious exercise," Justice Kennedy notes the following facts: A school official, the principal, decided that an invocation and a benediction should be given; this is attributable to the state, and from a constitutional perspective it is as if a state statute decreed that prayers must occur. The principal [also] chose the religious participant, here a rabbi [Third, via his guidelines and advice] the principal directed and controlled the content of the prayer. <sup>43</sup>

To explain his second point--that attendance and participation in this state-run religious ceremony were "in a fair and real sense obligatory," Justice Kennedy reminds us of some basic facts. Attendance at graduation is not formally required, but who would want to miss it? This is an event to bring us all together, not to separate and divide us by creating insiders and outsiders: [\*527] Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts. <sup>44</sup>

And so, in response to the government's claim that no coercion exists in Providence, because Deborah and her father were formally free to opt out, Justice Kennedy politely but firmly says, in effect, "get real": "Law reaches past formalism. And to say a teenage student has a real chance not to attend her high school graduation is formalistic in the extreme . . . Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions." <sup>45</sup>

But even if *attendance* is in a real sense obligatory, is *participation* in the state-run religious event required? Why can't Deborah simply stand aside during opening and closing prayers? Because of the whole choreography and atmosphere of the event, Justice Kennedy reminds us. Graduation is a time for all to come together; and given the reality of peer pressure in high school, it is not fair to force some to stand apart--and thus stand out--on a day when all should stand together:

The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students . . . . This pressure, though subtle and indirect, can be as real as any overt compulsion.

. . . Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention. <sup>46</sup>

The dissenters mocked Justice Kennedy's analysis here; but for me at least, Justice Kennedy better describes the reality of high school and graduation ceremonies--and better grasps the true constitutional principle at the heart of the Establishment and Free Exercise Clauses. That principle, it must be stressed, is deeply respectful of religion, not indifferent or hostile to it.

*Precisely because* religion is so important, government must keep its hands off. In Kennedy's words, trying to explain the Constitution to ordinary Americans (most of whom are religious): "The First Amendment's Religious Clauses mean that religious beliefs and religious [\*528] expression are too precious to be either proscribed or prescribed by the State."<sup>47</sup> Do we really want government bureaucrats in the prayer-writing business?, Justice Kennedy is asking. Won't this lead to watered-down civil religion--nonsectarian mush--that may in the end *hurt* true faith? Madison thought so, Kennedy reminds his readers.<sup>48</sup> In the Justice's own words, "while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference."<sup>49</sup> Thus, he closes his *Weisman* opinion by making clear that "we express no hostility to [religion] nor would our oath permit us to do so. A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself be inconsistent with the Constitution."<sup>50</sup>

This, in fact, was Justice Kennedy's message in the more recent *Rosenberger* case, where, speaking for five Justices, he invalidated a state university policy that discriminated against religious speakers.<sup>51</sup> Taken together, *Weisman* and *Rosenberger* again remind us of the middle course Justice Kennedy has steered. Only he and Justice O'Connor were in both majorities.

Taken as a whole, Kennedy's vision of the Establishment and Free Exercise Clauses--and of the Speech Clause, too, in *Rosenberger*--places powerful limits on the government's ability to create a favored religious caste--a hierarchical scheme of insiders and outsiders. In Justice Kennedy's vision, no citizen should be excluded from equal citizenship and respect simply because of who he is, or what he believes or feels. And this, I suggest, was also his basic message in our final case, *Romer v. Evans*.<sup>52</sup>

## V. ROMER V. EVANS

In 1992, the Colorado electorate passed a statewide referendum known as Amendment 2. In relevant part, it proclaimed that no state (or city or county) agency should treat "homosexual, lesbian, or bisexual orientation" as a basis for heightened anti-discrimination protection. Earlier this year, the Supreme Court struck down this referendum by a six-to-three vote. Justice Kennedy wrote for the majority.

Supporters of Amendment 2 portrayed it as affirming equal rights for all and simply denying special rights to gays. But Justice Kennedy saw that--both formally [\*529] and realistically--the Amendment targeted queers for specially disfavored treatment and heaped unique disabilities on them. Heterosexuals could get laws protecting *themselves* from being discriminated against on the basis of *their* sexual orientation; but gays and bisexuals could not seek symmetric laws. Under Amendment 2, Aspen could pass an ordinance preventing a gay apartment complex owner from posting a "For Rent--No Straights" sign; but Aspen could not likewise prevent a straight apartment complex owner from posting a "For Rent--No Queers" sign. Indeed, in its larger social meaning Amendment 2 *itself* was a kind of "No Queers" sign writ large--a targeting of gays, lesbians, and bisexuals, singling them and them alone out for disfavored treatment.

Once again, Justice Kennedy writes an opinion that tries to keep formulaic jargon about tiers of scrutiny and so forth down to a minimum. Instead, in everyday words that are at once plain and

poetic, he explains to decent, fair-minded, ordinary citizens what is wrong with Colorado's referendum. In a nutshell, Amendment 2 creates outcasts and outsiders--a group of second-class citizens subject to special disfavor and humiliation simply because of their *status*. Sexual *orientation*--as distinct from sexual *conduct*--implicates fantasies, desires, thoughts and the like that should not be made the basis of legal penalty. Amendment 2 wrongly singles some persons out and makes them pariahs because of who they *are* rather than because of anything they *do*. In this respect, Amendment 2's efforts to treat gays as unclean and untouchable resemble Jim Crow--a legal regime classifying and degrading a class of persons because of their *status*.

Here are Justice Kennedy's opening words: "One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.'"

<sup>53</sup> And here are his closing words:

It is not within our constitutional tradition to enact laws of this sort . . . . Laws singling out a certain class of citizens for disfavored legal status or general hardships are rare . . . .

. . . .

. . . Laws of this kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected [--born of] "a bare . . . desire to harm a politically unpopular group."

. . . [Amendment 2] is a status-based enactment[,], a classification of persons undertaken for its own sake . . . . "Class legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment"

[\*530] We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. <sup>54</sup>

I have elsewhere discussed *Romer* at length, <sup>55</sup> and so here I shall be brief. As with the other Kennedy opinions we have discussed, *Romer* exemplifies an elegant blending of legal formalism and legal realism at their best: The Justice sees both the technical and the real-life inequality in Amendment 2. Everyone else in the world, from heterosexuals to hot dog vendors to fat people, can seek special anti-discrimination laws, but gays and bisexuals--who, the Justice realistically notes, may need these laws most <sup>56</sup> --cannot. Laws singling persons out--because of who they are--for disfavored treatment are in tension with our constitutional tradition, and should be strongly disfavored.

But what about a law singling persons out for *inclusion* rather than *exclusion*? This seems rather different, perhaps. And although Justice Kennedy placed his primary emphasis on the Equal Protection Clause, at one key point in his argument he waded in the direction of another provision: the Bill of Attainder Clause. <sup>57</sup> Under this clause, a law singling out, say, Jagdish Chadha for deportation would be unconstitutional (as Justice Powell noted in the famous *Chadha* case); <sup>58</sup> but a law singling out Jagdish Chadha for special inclusion--a private immigration bill--

would not. At some point, if special favors created a truly privileged upper caste, the deep equality principles of the Title of Nobility Clause might be violated;<sup>59</sup> but not every specially targeted benefit creates such an upper caste.

[\*531] Consider, for example, the vexed question whether public universities should ever give a special "plus" to underrepresented racial minorities. Should this use of race to include those who have been historically excluded or underrepresented be constitutionally permissible? If the Attainder and Nobility Clauses were the only texts at stake, it would be hard to see university diversity programs as unconstitutional--surely, blacks in America are not an aristocracy even if they do benefit from affirmative action.

But what about the Equal Protection Clause itself? Under it, is all diversity-based affirmative action in public universities unconstitutional? Must *Bakke*<sup>60</sup> be overruled? Justice Kennedy has not yet faced these questions, but he may soon. In a brief postscript, let me think aloud with you about the dilemma *Bakke* may pose for Justice Kennedy.

## VI. *REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE*

In the past, Justice Kennedy has been a strong believer in the principle of colorblindness:<sup>61</sup> Government should not judge a person by his race, or take race into account in allocating benefits and burdens. In *Romer*, as we saw, the Justice began by invoking Justice Harlan's famous dissent in *Plessy*, which proclaimed the colorblind principle. In *Powers*, Justice Kennedy championed color-blindness in two ways: by preventing prosecutors from taking into account a juror's race; and by making clear that, when blacks are excluded from juries, a white defendant has just as much of a right to object as would a black defendant. So too, in *Edmonson*, the Justice spoke of "the racial insult inherent in judging a citizen by the color of his or her skin."<sup>62</sup>

But not all uses of race are or should be unconstitutional. The Equal Protection Clause nowhere prohibits all color consciousness. The Congresses that passed the Reconstruction Amendments apparently passed race-conscious laws to help the newly freed slaves.<sup>63</sup> Judges can use race in remedial contexts--for example, to integrate high schools.<sup>64</sup> Why should public universities be barred from using race to bring us together? On this view, using race to separate, or stigmatize, or degrade, or divide is quite different from using race to *integrate*, to unite.


[\*532] Justice Kennedy's jury and public forum cases envision places where diverse people come together to democratically discuss and deliberate. And this is the democratic mission of the public university--to bring all Americans together to a place where they will talk to and learn from each other face-to-face as democratic equals.<sup>65</sup> No special affirmative action may be necessary to generate diverse jury panels--the lottery wheel, combined with *Powers'* limits on peremptories, will guarantee diversity within the jury; but without some affirmative action, some historically excluded racial groups may be all but absent in public universities. As in *Krishna*, here too the "dialogue" may be "tilted" in "effect," and perhaps government may go beyond formal equality to ensure that Americans, at a formative point in their lives, are exposed to those who have lived in different neighborhoods, and have had very different lived racial and cultural experiences. Even if affirmative action in other contexts (like contracting set-asides) is unconstitutional, might education be different, as a special public forum, permitting special

sensitivity to "marginal voices," to use Justice Kennedy's own phrase?

Justice Powell thought so in *Bakke*.<sup>66</sup> What will Justice Kennedy--who now sits in Powell's seat--think about *Bakke*, when the issue reaches him? Here too, Justice Kennedy may well be a swing voter. Will he adhere to the formal principle of color blindness? Or will he decide that, here too, perhaps the law may "reach[] past formalism"? What will the great Justice from Northern California say, in the end, about the great case from Northern California, *Regents v. Bakke*? Much of the tale of Northern California and the Constitution, it seems, has yet to unfold.

### Legal Topics:

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### FOOTNOTES:

<sup>n1</sup> See generally JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION* (1992) (discussing the Supreme Court's obligation to maintain the Constitution as something We the People can understand).

<sup>n2</sup> [491 U.S. 397 \(1989\)](#).

<sup>n3</sup> [Johnson](#), 491 U.S. at 421 (Kennedy, J., concurring).

<sup>n4</sup> See Lackland H. Bloom, Jr., *Barnette and Johnson: A Tale of Two Opinions*, [75 IOWA L. REV. 417, 426-32 \(1990\)](#) (describing *Johnson* as tinny and tone-deaf); see also Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, [67 N.Y.U.L. REV. 961, 977-85 \(1992\)](#) (similar).

<sup>n5</sup> See Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, [106 HARV. L. REV. 124, 132-46 \(1992\)](#) [hereinafter Amar, R.A.V.].

<sup>n6</sup> [Johnson](#), 491 U.S. at 421 (Kennedy, J., concurring).

<sup>n7</sup> *Id.*

<sup>n8</sup> *Id.* at 420-21 (Kennedy, J., concurring).



<sup>n9</sup> [Id. at 421.](#)

<sup>n10</sup> For more analysis, see Amar, R.A.V., *supra* note 5, at 133-39.

<sup>n11</sup> [Johnson, 491 U.S. at 409-14.](#)

<sup>n12</sup> See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26-27, 34-36 (1960).

<sup>n13</sup> On the connection between these two speech clauses, see Akhil Reed Amar, *The Bill of Rights as a Constitution*, [100 YALE L.J. 1131, 1151 n.96 \(1991\)](#) [hereinafter Amar, *The Bill of Rights as a Constitution*].

<sup>n14</sup> See generally MEIKLEJOHN, *supra* note 12.

<sup>n15</sup> [505 U.S. 672 \(1992\)](#) [hereinafter *Krishna*].

<sup>n16</sup> [United States v. Kokinda, 497 U.S. 720, 737 \(1990\)](#) (Kennedy, J., concurring).

<sup>n17</sup> [Krishna, 505 U.S. at 693-94, 697](#) (Kennedy, J., concurring).

<sup>n18</sup> See Lawrence Lessig, *Fidelity in Translation*, [71 TEX. L. REV. 1165 \(1993\)](#) (describing model of applying old principles to new contexts).

<sup>n19</sup> [Krishna, 505 U.S. at 697-98](#) (Kennedy, J., concurring).

<sup>n20</sup> [Id. at 696, 702-03, 709](#) (citation omitted) (Kennedy, J., concurring).

<sup>n21</sup> [Id. at 696](#) (emphasis added) (Kennedy, J., concurring).

<sup>n22</sup> [Id. at 696, 702](#) (emphasis added) (Kennedy, J., concurring).

<sup>n23</sup> [Id. at 696](#) (emphasis added) (Kennedy, J., concurring).

<sup>n24</sup> MEIKLEJOHN, *supra* note 12, at 19-20.

<sup>n25</sup> U.S. CONST. art. IV,  4.

<sup>n26</sup> See generally Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, [65 U. COLO. L. REV. 749 \(1994\)](#).

<sup>n27</sup> [499 U.S. 400 \(1991\)](#).

<sup>n28</sup> [Powers, 499 U.S. at 402.](#)

[↗n29 \*Id.\* at 407.](#)

[↗n30 \*Id.\* at 406-07](#) (citation omitted). For a similar vision of the jury, published contemporaneously with *Powers*, see Amar, *The Bill of Rights as a Constitution*, *supra* note 13, at 1182-91.

[↗n31 \*Powers\*, 499 U.S. at 407-08](#) (citations omitted).

[↗n32](#) For much more elaboration, see Vikram D. Amar, *Jury Service as Political Participation Akin to Voting*, [80 CORNELL L. REV. 203, 239 \(1995\)](#).

[↗n33](#) See U.S. CONST. amend. XV, [◆ 1](#) ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

[↗n34 \*500 U.S. 614 \(1991\)\*.](#)

[↗n35 \*Edmonson\*, 500 U.S. at 619.](#)

[↗n36 \*Id.\* at 631-44](#) (O'Connor, J., dissenting).

[↗n37 \*Id.\* at 626.](#)

[↗n38](#) See [id.](#) at 625-26 (discussing [Terry v. Adams](#), 345 U.S. 461 (1953) and [Smith v. Allwright](#), 321 U.S. 649 (1944)).

[↗n39](#) See generally Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, [28 U.C. DAVIS L. REV. 1169, 1182-83 \(1995\)](#).

[↗n40 \*Lee v. Weisman\*, 505 U.S. 577, 580 \(1992\)](#).

[↗n41](#) See [Lemon v. Kurtzman](#), 403 U.S. 602, 612 (1971) (setting out a framework of analysis that later cases treated as a formulaic Establishment Clause test). On formulaic constitutionalism, see Robert F. Nagel, *The Formulaic Constitution*, [84 MICH. L. REV. 165 \(1985\)](#).

[↗n42 \*Weisman\*, 505 U.S. at 586.](#)

[↗n43 \*Id.\* at 587-88.](#)

[↗n44 \*Id.\* at 595.](#)

[↗n45 \*Id.\*](#)

[↗n46 \*Id.\* at 593.](#)

¶n47 [Id. at 589.](#)

¶n48 [Id. at 590.](#)

¶n49 [Id. at 589-90.](#)

¶n50 [Id. at 598.](#)

¶n51 [Rosenberger v. Rector & Visitors of Univ., 115 S. Ct. 2510 \(1995\).](#)

¶n52 [116 S. Ct. 1620 \(1996\).](#)

¶n53 [Romer, 116 S. Ct. at 1623](#) (quoting [Plessy v. Ferguson, 163 U.S. 537, 559 \(1896\)](#) (Harlan, J., dissenting)).

¶n54 *Id.* at 1628-29 (citations omitted).

¶n55 *See generally* Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, [95 MICH. L. REV. 203 \(1996\)](#) [hereinafter Amar, *Romer's Rightness*].

¶n56 [Romer, 116 S. Ct. at 1625-27.](#)

¶n57 *See* U.S. CONST. art. I, ¶ 10 ("No State shall . . . pass any Bill of Attainder."); *see also* U.S. CONST. art. I, ¶ 9 (similarly banning federal Bills of Attainder). On *Romer's* allusion to attainder, *see* [116 S. Ct. at 1628](#) (citing and elaborating upon [United States v. Brown, 381 U.S. 437 \(1965\)](#), a landmark attainder case). For more discussion of this aspect of *Romer*, *see generally* Amar, *Romer's Rightness*, *supra* note 55, at 208-28.

¶n58 *See* [Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 962 \(1983\)](#) (Powell, J., concurring). While sitting on the Ninth Circuit, then-Judge Kennedy--who would later assume Justice Powell's seat on the High Court--invalidated the Chadha legislative veto on general separation-of-powers grounds and noted that the treatment Jagdish Chadha received also raised "serious bill of attainder and equal protection problems." *See* [Immigration & Naturalization Serv. v. Chadha, 634 F.2d 408, 435 n.42 \(9th Cir. 1980\)](#), *aff'd*, [462 U.S. 919 \(1983\)](#).

¶n59 *See* U.S. CONST. art. I, ¶ 10 ("No State shall . . . grant any Title of Nobility."); *see also* U.S. CONST. art. I, ¶ 9 (similarly banning federal Titles of Nobility).

¶n60 *See* [Regents of the Univ. v. Bakke, 438 U.S. 265 \(1978\)](#).

¶n61 *See generally* Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, [43 UCLA L. REV. 1745 \(1996\)](#).

¶n62 [Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 \(1991\)](#).

¶n63 *See generally* Eric Schnapper, *Affirmative Action and the Legislative History of the*

*Fourteenth Amendment*, [71 VA. L. REV. 753 \(1985\)](#).

✦n64 See, e.g., [North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45-46 \(1971\)](#).

✦n65 For much more elaboration, see Amar & Katyal, *supra* note 61, at 1749-54, 1773-80.

✦n66 See [Bakke, 438 U.S. at 311-20](#) (opinion of Powell, J.) (developing diversity theory of affirmative action that paradigmatically applied to education, after rejecting other theories of affirmative action that would have swept more broadly outside the educational sphere).