CATHOLIC VALUES, HUMAN DIGNITY, AND THE MORAL LAW IN THE UNITED STATES SUPREME COURT: JUSTICE ANTHONY KENNEDY'S APPROACH TO THE CONSTITUTION

*By Anne Jelliff**

I. INTRODUCTION

The jurisprudence of Justice Anthony Kennedy has baffled legal scholars and political scientists from the beginning of his membership on the United States Supreme Court. Originally hailed as "a true conservative" by the President who nominated him to replace Justice Lewis Powell,[1] Kennedy almost immediately parted ways with his fellow conservative justices on a variety of contested issues related to individual liberty and human dignity.[2] Some of his most controversial opinions have covered subjects such as abortion,[3] and the separation of church and state,[4] but he has truly distinguished himself on the question of free speech where he, of all the current Justices, has most consistently voted to protect this individual liberty.[5]

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[1] JOHN MASSARO, SUPREMELY POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS 196 (1990) (quoting President Ronald Reagan).

[2] *See* Romer v. Evans, 517 U.S. 620, 635–36 (1996) (invalidating a state constitutional amendment that prohibited any law that sought to protect homosexuals); Texas v. Johnson, 491 U.S. 397, 420–21 (1989) (Kennedy, J., concurring) (agreeing with the ultimate determination of the majority that burning the American flag was protected under the First Amendment).

[3] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845–46 (1992) (delivering the opinion of the Court that certain amendments to Pennsylvania's abortion statute, which required preconditions to receiving an abortion, were valid).

[4] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 599 (1992) (writing for the majority and finding that the Establishment Clause prohibits public schools from including clergy prayers at a graduation ceremony).

[5] Kennedy's strongly pro-free speech voting record has been noted by several scholars. *See, e.g.*, FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY 75 (2009) (devoting Chapter Three entirely to discussing the "expansive" nature of Kennedy's protection of free speech); Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994–2000*, 48 UCLA L. Rev. 1191, 1193 (2001) (revealing

Over twenty-four years have passed since he took his Supreme Court seat,[6] and during this time, Kennedy has had a number of labels applied to him as commentators attempted to explain his seemingly inscrutable voting pattern.[7] He has been called "rudderless and unpredictable,"[8] and a "[s]phinx"[9] who "trims his jurisprudential sails to what he perceives to be the prevailing political winds."[10]

But most of these commentators who have evaluated Kennedy, even those analyzing his opinions for legal doctrine, have cast his jurisprudence in almost strictly political terms, overlooking the fact that each person is a complex figure, and that very few of us can be explained as merely political creatures.[11] One aspect of Kennedy, which has been insufficiently discussed, is his Roman Catholic faith and the influence that the teachings of the Catholic Church have had on his jurisprudence.[12]

This paper approaches Kennedy as a person of faith and looks at the effect this faith has inevitably had on his legal philosophy and on his court decisions, especially when they touch on matters pertaining to personal rights and human dignity. It first gives an

statistics that establish Justice Kennedy as the Court's most consistent protector of free speech). *See also* Ronald K.L. Collins, *Exceptional Freedom—The Roberts Court, The First Amendment, and The New Absolutism*, 76 ALB. L. REV. 409, 438 (2013) (noting Justice Kennedy's voting record in First Amendment cases). For an updated version of this voting analysis, see Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994–2002*, UCLA SCHOOL OF LAW, http://www2.law.ucla.edu/volokh/howvoted.htm (last visited Dec, 19, 2012).

[6] Kennedy is often thought to have joined the Supreme Court in 1987 because he was nominated by President Ronald Reagan in November of that year and because the Judiciary Committee Hearings which resulted in his unanimous confirmation took place December 14–16, 1987. But the Judiciary Committee vote (97-0) was actually held several weeks later in February, and Kennedy did not officially take his seat until February 18, 1988. *See Biographies of the Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, [hereinafter *Supreme Court Biography*] http://www.supremecourt.gov/about/biographies.aspx (last visited Dec. 19, 2012) (displaying brief biography of each currently-sitting Justice on the Supreme Court).

[7] One commentator has gone so far as to say that "[t]he more closely one examines Kennedy's Supreme Court jurisprudence, the more confused one becomes." Patrick D. Schmidt & David A. Yalof, *The "Swing Voter" Revisited: Justice Anthony Kennedy and the First Amendment Right of Free Speech*, 57 POL. RES. Q. 209, 210 (2004).

[8] Richard C. Reuben, *Man in the Middle*, CAL. LAW., Oct. 1992, at 36 (internal quotation marks omitted).

[9] Garrett Epps & Dahlia Lithwick, *Will the Real Anthony Kennedy Please Stand Up?*, SLATE.COM (Apr. 27, 2007, 6:01 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2007/04/the_sphinx_of_sacramento.html.

[10] Michael Stokes Paulsen, *The Many Faces of "Judicial Restraint"*, 1993 PUB. INT. L. REV. 3, 17 (1993).

[11] *See supra* notes 7–10 and accompanying text.

[12] Kennedy is open about his Catholic faith. *See Religious Affiliation of the U.S. Supreme Court*, ADHERENTS.COM, http://www.adherents.com/adh_sc.html (last updated Jan. 31, 2006).

overview of Kennedy's background prior to his joining the Supreme Court, and briefly summarizes his comments regarding his philosophy of constitutional interpretation.[13] It then discusses his view of the proper role for government in light of the Establishment Clause of the First Amendment, and goes on to look at the high value Kennedy places on the preservation and legal protection of human dignity, comparing his positions on each of these subjects with the official tenets of the Catholic Church, and noting that his broad interpretation of free speech rights is simply the logical outworking of his more fundamental, faith-based positions.[14] This piece concludes with observations on the ways that the apparent inconsistencies of Kennedy's positions on several issues may in fact be understood as expressions of personal conviction rather than as an adherence to any inexplicable or complex political affiliations.[15]

II. HISTORY OF A JUSTICE

Anthony McLeod Kennedy was born and raised in Sacramento, California,[16] and his upbringing there gave him an "approach to life [that] suggests a small-town innocence."[17] Following his undergraduate career, during which he earned a degree from Stanford, and a B.A. from the London School of Economics, Kennedy attended Harvard Law School.[18] After passing the bar, he returned to California and ultimately took over his father's law practice in Sacramento.[19] His father, Anthony J. Kennedy, was a well-established lawyer and lobbyist with a number of business connections, and the contacts and experience the young Kennedy gained there when he assumed his father's responsibilities helped to

[13] *See* discussion *infra* Parts II–III.

[14] *See* discussion *infra* Parts IV–VI.

[15] *See* discussion *infra* Part VI.E.

[16] *Supreme Court Biography*, *supra* note 6.

[17] Robert Reinhold, *Restrained Pragmatist: Anthony M. Kennedy*, N.Y. TIMES, Nov. 12, 1987, at A1.

[18] *Supreme Court Biography*, *supra* note 6.

[19] On his return to California, Kennedy originally settled in San Francisco where he worked as an associate at a private law firm called Thelen, Martin, Johnson, and Bridges. *See Associate Justice Anthony M. Kennedy*, COURTHISTORY.ORG: OFFICIAL HOMEPAGE OF THE HISTORICAL SOCIETY FOR THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, [hereinafter COURTHISTORY.ORG] http://courthistory.tripod.com/kennedy.html (last visited Dec. 19, 2012). But when Kennedy's father died only two years later in 1963 (the same year in which Kennedy was married), Kennedy returned to Sacramento to take over the family business. *See Anthony M. Kennedy*, OYEZ, [hereinafter OYEZ] http://www.oyez.org/justices/anthony_m_kennedy (last updated Dec. 18, 2012).

further his own legal career.[20] In 1965, while he was still working in private practice, Kennedy also took a position teaching Constitutional Law at the McGeorge School of Law of the University of the Pacific, a job he held until he took his seat on the United States Supreme Court in 1988.[21]

In 1973, Kennedy was recruited to work with then-Governor Ronald Reagan to draft a state constitutional amendment that would cut both taxes and spending in the State of California.[22] Although that particular proposal was not approved by the voters, it laid much of the groundwork for the success of a later, similar proposal.[23] Kennedy's efforts on the amendment impressed Reagan and prompted the Governor to recommend Kennedy to President Gerald Ford for a vacancy on the United States Court of Appeals for the Ninth Circuit, a recommendation that President Ford followed.[24]

At the time he was appointed to the Court of Appeals in 1975, Kennedy was the youngest federal court judge in the country.[25] When numerous appointments by President Carter began changing the political landscape of the courts, Kennedy became the head of a conservative minority in the Court of Appeals, where his method of addressing each issue in a narrow case-by-case manner won him the respect of many of his colleagues, and foreshadowed the approach he would later use on the Supreme Court.[26]

Upon the retirement of Justice Lewis Powell from the Supreme Court in 1987, Reagan, who was now nearing the end of his second term as United States President, nominated Kennedy to fill Powell's vacancy.[27] Following the Senate Judiciary Committee hearings in

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[20] *See* OYEZ, *supra* note 19.

[21] *See Supreme Court Biography*, *supra* note 6.

[22] *See* COURTHISTORY.ORG, *supra* note 19.

[23] *See id.*

[24] *Id.*

[25] *Id.*; OYEZ, *supra* note 19.

[26] *See* OYEZ, *supra* note 19.

[27] In spite of their previous connection, Kennedy was not President Reagan's initial pick for this position. Reagan first chose Robert Bork, and then Douglas H. Ginsburg to take Powell's place, but both of these nominations fell through—the first due to Bork's staunch political conservatism which raised strong opposition by many in the United States Senate, and the second due to a drug-related scandal in Ginsburg's past. *See, e.g.*, COURTHISTORY.ORG, *supra* note 19. This tumultuous preface to Kennedy's confirmation as Supreme Court Justice allowed him to join what Justice Blackmun called the "good old #3 club," a designation Blackmun gave to those Justices who share the unwonted honor of being the third nomination for a spot on the Court. *See* Artemus Ward, *The "Good Old #3 Club" Gets a New Member*, 33 J. SUP. CT. HIST. 110, 111 (2008); HELEN J. KNOWLES, THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY 6 (2009).

December 1987, Kennedy's appointment was unanimously confirmed on February 3, and he took his seat on the Supreme Court on February 18, 1988.[28]

III. CATHOLIC PERSPECTIVE: A MORAL READING OF THE CONSTITUTION

The constitutional philosophy Kennedy brought to the Supreme Court embraces a moral reading of the Constitution rather than an "originalist" or even a "textualist" reading, two approaches that are often taken by politically conservative jurists.[29] Commenting on the correct methods of interpreting the Constitution, Kennedy has said that "the words of the Constitution must be the beginning of our inquiry."[30] But if the inquiry starts with the text of the Constitution, there remains the question of where to go from there, and for Kennedy, this is dictated by overarching principles that are both more fundamental and more authoritative than even the Constitution itself.[31]

On the subject of liberty and unenumerated rights, for instance, Kennedy stated that when interpreting relevant passages of the Constitution, judges must keep in mind the larger concept that is "central to our American tradition . . . [and] the rule of law[, t]hat . . . 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."[32] Though he called this line "wavering," "amorphous," and "uncertain," Kennedy affirmed that this line does indeed exist.[33]

In listing a set of considerations that ought to be referenced when judges determine where this line should be drawn, Kennedy said that this list must include:

> [T]he essentials of the right to human dignity, the injury to the person, the harm to the person, the anguish to the

[28] COURTHISTORY.ORG, *supra* note 19; *Supreme Court Biography*, *supra* note 6.

[29] *See, e.g.*, COLUCCI, *supra* note 5, at 9 (discussing Kennedy's theory of constitutional interpretation). *See generally* KNOWLES, *supra* note 27, at 19–51 (discussing the various forms of libertarianism and constitutional thought that have been attributed to Kennedy).

[30] *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 85–86 (1987) [hereinafter *Nomination Hearings*] (statement of Judge Anthony M. Kennedy) (responding to a question about his "spacious" reading of constitutional phrases and the methods he used to construct proper standards of interpretation).

[31] *See id.* at 86 ("[T]he object of our inquiry is to use history, the case law, and our understanding of the American constitutional tradition in order to determine the intention of the document broadly expressed.").

[32] *Id.*

[33] *Id.*

> person, the inability of the person to manifest his or her own personality, the inability of a person to obtain his or her own self-fulfillment, the inability of a person to reach his or her own potential.[34]

But he noted that these factors must be weighed against "the rights of the State [which] are very strong."[35] And he also cautioned that throughout this balancing procedure, judges must remember "the deference that the Court owes to the legislative process . . . [and] to the role of the legislature . . . because [the legislature] knows the values of the people."[36]

In other words, for Kennedy, it is not a question of enumerated or 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[,]"[37] and whether these protections can be extended while still respecting the constitutionally mandated boundaries between the courts and the legislature.[38] Here, Kennedy is articulating his adherence to a transcendent moral principle, a principle that does not owe its existence to the Constitution, and is greater than that document.

In his willingness to look at "situations . . . [and] protections not previously announced by the courts,"[39] note the Justice's confidence that it is possible for the protections of liberty to cover circumstances and areas not specifically cited by either the courts or by the Constitution, but that are rather contained within these legal authorities only by implication.[40] For Kennedy, the fact that these protections are not spelled out does not preclude their existence.[41] If the protection is "right" or "just" according to "our American Tradition . . . [and] the rule of law,"[42] not only must that protection be enforced by court rulings, but where the constitutional text allows for this protection, that document must be interpreted to include it, so that "the word liberty in the Constitution is given its full and necessary meaning, consistent with the purposes of the document as we understand it."[43]

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[34] *Id.* at 180.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 87.
[38] *See id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 86.
[43] *Id.* at 122 (explaining that the purpose of the judiciary's enforcement power is to

Kennedy is not alone in this thinking. Many legal scholars recognize supreme principles that transcend the Constitution, principles which remain true regardless of what the Constitution does or does not say, and who believe that those principles must be therefore followed.[44] As one writer put it: "[a] claim of right presupposes a moral argument and can be established in no other way."[45] These scholars generally also believe that any interpretation of the Constitution must bring that document into as close conformity with these principles as possible.[46] And as Kennedy said it himself, "I am searching, as I think many judges are, for the correct balance in constitutional interpretation."[47] This search, which he described as an "exploration,"[48] is a striving to understand and implement the overarching principles which are found outside the Constitution, and which are generally known as "morality," or "the moral law."[49]

Kennedy expounded on this briefly during his nomination hearings when he was asked to discuss the ways in which our values as a society have changed over time and the effect this has had on our laws.[50] He responded that although society may initially accept some practices it later eschews, this type of transformation in our country's thinking does not disprove the inherent good in a final decision.[51] He believes that "what the framers [of the

guarantee that principles embodied in the Constitution are interpreted and implemented fully); *see also id.* at 183–84 (discussing the ways in which it is possible for modern generations to have a better understanding of the Constitution and its meaning than even its framers did).

[44] *See, e.g.*, Connie S. Rosati, *Is There a "Higher Law"? Does it Matter?*, 36 PEPP. L. REV. 615, 624 (2009) ("Both [legal positivists and natural law theorists] can accept, as a contingent matter, that we would not be able to survive in a society that had a system of law that did not include among its legal rules certain basic moral requirements—rules regulating the use of force, rules regulating property, and so on; so any system of law will likely include some moral rules.") (footnote omitted); *see also* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 618 (1958) (noting the distinction between the question of whether a given law is valid and the question of whether or not the law ought to be obeyed).

[45] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 147 (3d prtg. 1977).

[46] *See generally* Evelyn Keyes, *Two Conceptions of Judicial Integrity: Traditional and Perfectionist Approaches to Issues of Morality and Social Justice*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 233, 247–48 (2008) (contending that the Constitution sets out fundamental enabling principles of society both substantively and procedurally).

[47] *Nomination Hearings*, *supra* note 30, at 154.

[48] *Id.*

[49] *See generally* Evelyn Keyes, *The Just Society and the Liberal State: Classical and Contemporary Liberalism and the Problem of Consent*, 9 GEO. J.L. & PUB. POL'Y 1 (2011) (discussing contemporary liberalism in relation to Rawlsian theory of justice); *see also* Rosati, *supra* note 44, at 624 ("[Both] legal positivists and natural law theorists . . . . can agree as to certain ways in which the law may be connected to morality . . . .") (footnotes omitted).

[50] *Nomination Hearings*, *supra* note 30, at 152–53.

[51] *Id.*

Constitution] had in mind was to rise above their own injustices,"[52] and he shares the founders' recognition that "it sometimes 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."[53]

These moral principles, then, are enduring values that are true regardless of the meaning attached to various clauses in the Constitution at any given time. These enduring values are also implicit to the Constitution despite the need for external sources to develop their full meaning within its context. Therefore lawmakers should not balk at referencing other documents where they are necessary to ensure a faithful implementation of those moral principles that provide the foundation for our laws and the Constitution.

Kennedy's approach to moral questions is very similar to the teaching of the Catholic Church which states that all members of the Christian community have an obligation to transform relationships for the better as they "respond[] to the demands of the Kingdom of God . . . ."[54] Christians receive divine help in this appointed task as they pursue "the common quest for the seeds of truth and freedom sown in the vast field of humanity."[55] In other words, Christians must live their daily lives as part of a pursuit of the truth found in the greater moral principles which adhere to God's commands.[56]

This is an iteration of a tenet common to all branches of the Christian faith as well as the Jewish scriptures, the writings that provided the foundation for Christianity.[57] In his Epistle to the

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[52] *Id.* at 152.

[53] *Id.* at 153.

[54] Pontifical Council for Justice & Peace, *Compendium of the Social Doctrine of the Church* ¶ 53 (Apr. 2005) [hereinafter *Compendium of Social Doctrine*], *available at* http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html.

[55] *Id.* See also John Paul II, Encyclical Letter, *Redemptor Hominis* ¶ 11 (March 1979) [hereinafter *Redemptor Hominis*] (footnote omitted), *available at* http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_04031979_redemptor-hominis_en.html, where the Pope states that: "[t]he Fathers of the Church rightly saw in the various religions as it were so many reflections of the one truth, 'seeds of the Word', attesting that, though the routes taken may be different, there is but a single goal to which is directed the deepest aspiration of the human spirit . . . ." This statement does not signify that the Catholic Church believes all world religions to be equally right, but merely represents the Church's recognition that all religions ultimately exist as a pursuit of the greater truth, and that this pursuit is instinctive to humanity.

[56] *Compendium of Social Doctrine*, *supra* note 54, ¶ 7.

[57] *Redemptor Hominis*, *supra* note 55, ¶ 11.

Romans, for instance, St. Paul, a Jewish scholar who had been extensively trained in the Mosaic Law and in the Hebrew scriptures, writes that God gave each person a conscience which acts as an internal guide and helps each one of us live according to God's moral law.[58]

This conscience was given to the godly (those who choose to trust God and obey his commands) as well as to the ungodly (those who reject God), so that anyone, either a believer or an unbeliever, is able to live according to the broader principles of God's moral law if he or she will obey the promptings of his or her internal moral compass.[59] St. Paul also writes that all persons have both the law of God and the awareness of that law written on their hearts, and that though the ungodly refuse to honor God as their creator, they are nevertheless unable to escape the knowledge of him.[60] This teaching was not new to the early church. David, who ruled as King in ancient Israel, wrote in the book of Psalms that nature itself testifies to God's greatness and to his law.[61]

Obedience to God's moral law is possible even by a person who has simultaneously chosen to disregard God's specific commands and has refused both a relationship with God and his offered redemption.[62] So even if a person is not consciously following the Mosaic Law or the teachings of Christianity, the basic moral principles still remain the same.[63] The scriptures further teach that the conscience is a standard higher than any man-made rule, and that if the two conflict, "[w]e must obey God rather than men."[64]

Kennedy also echoes the observations of the Catholic Church in his description of proper lawmaking as a "search[] . . . for the correct

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[58] *Romans* 2:14–16. Note that the conscience is not a trait unique to those who call themselves God's children. *See, e.g.*, *Genesis* 20 (recounting the steps taken by Abimelech, King of Gerar, to allay his troubled conscience when he found himself in danger of violating the moral law by inadvertently taking another man's wife).

[59] *See Romans* 2:14–16.

[60] *Id.* at 1:19–21.

[61] *See Psalm* 19:1–6.

[62] *See, e.g.*, *Romans* 1:19–23. *But see Ephesians* 2:1–10.

[63] *Romans* 2:14–15; s*ee also* 3 NORMAN GEISLER, SYSTEMATIC THEOLOGY, 269–70 (2004) ("That someone is not consciously or deliberately doing works according to the law of Moses does not mean the basic moral standard is different. Therefore, in this sense, *all* moral works are 'works of the law,' for they are in accord with the moral principles expressed in Mosaic law.").

[64] *Acts* 5:29 (English Standard) (internal quotation marks omitted); *see also Romans* 2:15, 13:5 (English Standard) ("[I]t is necessary to be subject [to higher authorities] not only because of the wrath but also because of conscience."); *cf. Daniel* 3:16–18 (condoning the actions of three Israelite men who upheld God's commands by refusing to comply with a law that required them to bow down in worship before an image of their captor-king).

balance in constitutional interpretation."[65] The Church has stated that "all men . . . [are] bound by a moral obligation to seek the truth,"[66] and that "[t]hey are also bound to adhere to the truth, once it is known, and to order their whole lives in accord with the demands of truth."[67]

Nor is the Catholic Church alone in this position. Both the Christian and the Hebrew scriptures admonish their followers to search for truth,[68] and emphasize that this search is instinctive to mankind.[69] The pursuit of truth, however, "must be firmly anchored in the unchangeable principles of the natural law, inscribed by God the Creator in each of his creatures . . . ."[70] The Catholic Church goes further in stating that a person's duty to follow truth is so much greater than his duty to obey a man-made law that unjust laws "do not bind in conscience."[71] Kennedy, who is a devout Catholic, seems to have incorporated these principles into his approach to law and his constitutional interpretation.[72]

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[65] *Nomination Hearings*, *supra* note 30, at 154.

[66] Pope Paul VI, *Dignitatis Humanae: On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious* ¶ 2 (Dec. 7, 1965) [hereinafter *Dignitatis Humanae*], *available at* http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html.

[67] *Id.*

[68] *See, e.g.*, *Ecclesiastes* 12:1 (English Standard) ("Remember your Creator in the days of your youth, before the evil days come[.]"); *see also Proverbs* 23:23 (English Standard) ("Get the truth, and sell it not—wisdom, instruction and understanding.".

[69] *See, e.g.*, *Ecclesiastes* 3:11 (English Standard) ("He has made everything appropriate to its time, and has put the timeless into their hearts, without men's ever discovering, from beginning to end, the work which God has done."); *see also Redemptor Hominis*, *supra* note 55, ¶ 11 ("We must all share in this mission [for truth] and concentrate all our forces on it . . . .").

[70] *Compendium of Social Doctrine*, *supra* note 54, ¶ 53 (citations omitted).

[71] *Summa Theologica, Prima Secundæ Partis: The Power of Human Law*, NEW ADVENT, http://www.newadvent.org/summa/2096.htm#article4 (last visited Dec. 19, 2012).

[72] *See Religious Affiliation of the U.S. Supreme Court*, *supra* note 12. The Second Vatican Council (also known as Vatican II) was held from October 1962 to December 1965. JOSLYN OGDEN, DUKE UNIV. KENAN INST. FOR ETHICS, RELIGIOUS LIBERTY, VATICAN II, AND JOHN COURTNEY MURRAY 10, 14 (2009), *available at* http://kenan.ethics.duke.edu/wp-content/uploads/2012/07/Case-Study-Vatican-II.pdf. Kennedy, who had just graduated from law school and was beginning his career, would have known about the rulings of this council and of the effect these had on church doctrine and practices. *See Supreme Court Biography*, *supra* note 6. Admittedly, this fact alone is not dispositive. Justice Scalia, for instance, another member of the Supreme Court who frankly acknowledges his Catholic faith, and who, like Kennedy, was born in 1936, has a very different approach to interpreting the Constitution than the one that Kennedy has employed. *See id.*; *Religious Affiliation of the U.S. Supreme Court*, *supra* note 12. But the resemblance between Kennedy's philosophy and the teachings of his church are noteworthy. *See* discussion *supra* Part III. Even more striking, though, is the similarity between some of Kennedy's rhetoric and the language of the official Church publications, as I will discuss further in the next section of this piece. *See* discussion *infra* Parts IV–VI.

IV. RELIGIOUS FREEDOM—AN OBLIGATION OF THE GOVERNMENT

According to Kennedy, the government has an obligation to protect and care for the religious needs of its citizens by utilizing the constitutional "policies of accommodation, acknowledgment, and support for religion."[73]

A. The Test of Permissibility: Is It Coercion?

In *County of Allegheny v. ACLU*, a case that involved the public display of both a menorah and a crèche on government property, Kennedy filed a partially dissenting opinion in which he noted that if the Establishment Clause is not interpreted to demand that the government enact supporting policies toward religion, then it could only be interpreted to require "a relentless extirpation of all contact between government and religion."[74] Kennedy argues that this would itself be a form of religious discrimination since, in following this route, the government "would be preferring those who believe in no religion over those who do believe."[75]

Kennedy further promotes the ideal of "accommodation,

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[73] Cnty. of Allegheny v. ACLU, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

[74] *Id.*

[75] *Id.* at 658 (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)). In this context, Kennedy's perspective on freedom of religion and the proper role of government is similar to the official position taken by the courts of other countries. The most notable example of this is Germany, where the Federal Constitutional Court (*Bundesverfassungsgericht*) has held that true religious freedom requires total government neutrality, which, far from eliminating all expressions of religious faith, in fact requires toleration of all these expressions when they are made. *See, e.g.*, DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 464–65 (2d ed. 1997) (translating Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 16, 1979, 52 ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVERFGE] 223 (241) (Ger.)) ("[T]he state must balance this affirmative freedom to worship as expressed by permitting school prayer with the negative freedom of confession of other parents and pupils opposed to school prayer. Basically, [schools] may achieve this balance by guaranteeing that participating be voluntary for pupils and teachers. . . ."); *id.* at 469 (translating BVerfG Dec. 17, 1975, 41 BVERFGE 29 (50–51) (Ger.)) ("Because life in a pluralistic society makes it practically impossible to take into consideration the wishes of all parents in the ideological organization of compulsory state schools, [we] must assume that the individual cannot assert his right to freedom pursuant to Article 4 of the Basic Law free of any limitation at all. To this extent the individual is limited in the exercise of his basic right by the countervailing basic rights of persons with different views. In school matters the task of resolving the inevitable tension between negative and positive religious freedom falls to the democratic state legislature. . . . As a guideline for its regulation, it can consider, on the one hand, that Article 7 of the [German Constitution] permits ideological and religious influences in the area of school matters, and, on the other hand, that Article 4 mandates the elimination of ideological and religious coercion as far as possible in choosing a particular form of school.").

acknowledgment, and support for religion"[76] by stating that "[a]ny approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious."[77]

Kennedy noted, though, that this support from the government must be provided with "diligent observance of the border between accommodation and establishment."[78] This border rests on "two limiting principles": first, that "government may not coerce anyone to support or participate in any religion or its exercise,"[79] and second, that government "may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'"[80]

Kennedy disagreed with the majority who voted to allow the menorah to be displayed but to enjoin the crèche scene at the county courthouse.[81] The majority reached its opinion by performing a balancing test, finding that the scene containing the menorah was balanced in itself, but that the crèche, because of its separate placement, was not balanced and could not therefore be displayed on government property.[82] Kennedy, however, urging the principle of government support of religion, wrote in his dissent that allowing both the menorah and the crèche would be "within the realm of flexible accommodation" since neither display could be considered a form of coercion on non-believing citizens.[83] In his view, permitting both symbols would therefore have been the preferable position for the Court to take in this case.[84]

Nor was *Allegheny* to prove an exception to Kennedy's rule on religion; in *Board of Education of Westside Community Schools v. Mergens*,[85] Kennedy returned to his coercion test when he found that a federal law did not violate the Establishment Clause in requiring schools which received federal funding to allow student organizations to have equal access to the school facilities after hours

[76] *Allegheny*, 492 U.S. at 657.
[77] *Id.*
[78] *Id.* at 659.
[79] *Id.*
[80] *Id.* (alteration in original) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).
[81] *Allegheny*, 492 U.S. at 655.
[82] *Id.* at 592 (majority opinion)
[83] *Id.* at 662 (Kennedy, J., concurring in the judgment in part and dissenting in part).
[84] *See id.* at 663.
[85] Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226 (1990).

regardless of the subject matter of those student groups.[86] Kennedy reasoned that though some of these student organizations would be religious groups which might receive "incidental benefits"[87] from the enforcement of this law, these benefits would not amount to "an establishment of religion"[88] since they would simply guarantee that the religious organizations were getting the same treatment as the other groups.[89]

Kennedy further found no reason to fear that "enforcement of the statute will result in the coercion of any student to participate in a religious activity,"[90] once again demonstrating his view that the ultimate test for the permissibility or impermissibility of any government involvement in religious activity or speech is whether or not the government action will effect a form of coercion on its citizens.[91] In the reasoning he lays out in this opinion, Kennedy also shows his belief that only by maintaining this supportively neutral role can the government fulfill its duty of protecting the religious freedom of its citizens.[92]

B. Catholicism and Freedom from Coercion

This position taken by Kennedy is very similar to statements made by the Roman Catholic Church on this subject. In *Dignitatis Humanae*, for instance, the Church states that a government has the obligation "to take account of the religious life of the citizenry and show it favor, since the function of government is to make provision for the common welfare."[93] The Church explains that:

> Since the common welfare of society consists in the entirety of those conditions of social life under which men [and women] enjoy the possibility of achieving their own perfection in a certain fullness of measure and also with some relative ease, it chiefly consists in the protection of the rights, and in the performance of the duties, of the human person.[94]

This document also notes that since human beings are spiritual

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[86] *Id.* at 261 (Kennedy, J., concurring in part and concurring in the judgment).
[87] *Id.* at 260.
[88] *Id.*
[89] *Id.*
[90] *Id.* at 261.
[91] *See id.*
[92] *See id.* at 260–62.
[93] *Dignitatis Humanae*, *supra* note 66, ¶ 3.
[94] *Id.* ¶ 6.

creatures and therefore cannot achieve "their own perfection"[95] without being able to attend to their own religious needs, a government must "assume the safeguard of the religious freedom of all its citizens, in an effective manner, by just laws and by other appropriate means,"[96] and then go a step further to "help create conditions favorable to the fostering of religious life."[97]

The Church has also taken the position that the right to this protective treatment belongs not just to the individual but also to communities, since part of true religious liberty is the ability of the individual to freely associate with groups whose teachings meet the requirements of his or her own conscience.[98] Since religious communities are necessary to the spiritual welfare of individual citizens, they are therefore to be afforded the same human dignity as their individual members are due, and their right to religious freedom is to be given the same level of protection.[99]

The Church does apply qualifications to this freedom of religion by noting that it must be exercised "within due limits,"[100] and that the prohibition on government interference with this exercise stands on the provision that "just public order be observed."[101] But these stipulations are limited and fairly narrow in light of the broad language that *Dignitatis Humanae* expounds in discussing the rights of individuals and of communities to be free from coercion,[102] and in its repeated admonition that "everyone ought at all times to refrain from any manner of action which might seem to carry a hint of coercion or of a kind of persuasion that would be dishonorable or unworthy . . . ."[103]

Kennedy has proved, in this respect, to be a true son of the Roman Catholic Church by incorporating the Church's philosophy into his own approach to religious liberty and adopting its emphasis on the need for freedom from compulsion of any kind. The resemblance between his reasoning and that of the Vatican is too close to be coincidental and it seems that Kennedy continually bears in mind the Church's promotion of "the right of [persons] to

95 *Id.*
96 *Id.*
97 *Id.*
98 *Id.* ¶¶ 1, 4.
99 *Id.*
100 *Id.* ¶ 2.
101 *Id.* ¶ 3.
102 *See id.* ¶ 4.
103 *Id.*

immunity from external coercion."[104]

V. HUMAN DIGNITY—THIS VALUE BELONGS TO ALL

Perhaps the primary area in which Anthony Kennedy's jurisprudence mirrors the teachings and even the language of the Catholic Church is in his opinions dealing with human dignity and personal liberty, two values that the Catholic Church views as firmly intertwined.[105]

A. Coercion: Fatal to Human Dignity

In *Lee v. Weisman*, for instance, Kennedy relied heavily on the concepts of human dignity and personal liberty in forming his decision in which he expanded his previously narrow concept of coercion.[106] This 1992 case involved a clergy-led prayer at a public school graduation, and arose when a student challenged the ceremonial prayer as a form of government sponsoring of religion and claimed that in allowing this prayer, the government-run school had violated the Establishment Clause of the First Amendment.[107] After much deliberation, Kennedy agreed with the student, finding that the peer pressure that can be brought to bear against a student reluctant to participate in, or even to attend a formal ceremony such as a graduation, can act as a form of coercion.[108]

His ruling in this case came as a surprise to those who expected him to follow the reasoning he held in *County of Allegheny v. ACLU*, where he had voted to uphold the public display of religious symbols.[109] In *Allegheny*, Kennedy had dismissed the idea that the type of display being questioned in that case could be considered

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[104] *Id.* ¶ 9.

[105] *See generally id.* (noting the Church's support of religious liberty and human dignity).

[106] *See generally* Lee v. Weisman, 505 U.S. 577, 592–94 (1992) ("One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people. To compromise that principle today would be to deny our own tradition and forfeit our standing to urge others to secure the protections of that tradition for themselves.").

[107] *See id.* at 580–81.

[108] *See id.* at 593. Initially, Justice Kennedy voted to uphold the clergy-led prayer in school, and was assigned to write the opinion for the five-four majority. As he was writing the opinion, however, he changed his position and voted to overturn it, giving the Court a new five-four majority, this time in favor of the student's position. Blackmun, who became the senior Justice for the new majority, reassigned to Kennedy the task of writing the Court's opinion, a job that Kennedy completed three months after the Court's initial conference and vote on this case. *See* COLUCCI, *supra* note 5, at 14, 16–17.

[109] *See* COLUCCI, *supra* note 5, at 14, 17.

coercion since the religious symbols were simply a passive reminder of the faiths represented in the community and that the presence of these symbols on public property did not force unbelieving citizens to actively take part in any religious activity.[110]

At first glance, *Lee v. Weisman* seemed to match precisely the same issues found in *Allegheny*, since the students at the school graduation ceremony were not being asked to actively take part if they did not wish to do so.[111] Supporters of allowing the prayer in school argued that non-believing students could simply not participate in the prayer, and it would then seem to have as little effect on those students as the crèche and menorah scenes did on the unbelieving citizens in *Allegheny*.[112]

But Kennedy concluded otherwise.[113] He made note of several differentiating circumstances in this case, including the fact that while attendance at the graduation was not technically mandatory as a condition for receiving a diploma, all circumstances surrounding the occasion may combine to make it mandatory in effect.[114] He pointed out that because a graduation is an important event in a person's life, non-attendance may not be a viable option for a student,[115] and when all factors are considered, a student's "attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory."[116]

Kennedy also found that the involvement of the school officials in the overall ceremony, including the prayer, was "pervasive[] to the point of creating a state-sponsored and state-directed religious exercise in a public school."[117] He expressed the concern that "in the hands of government what might begin as a tolerant expression of

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[110] Cnty. of Allegheny v. ACLU, 492 U.S. 573, 663–64 (1989) (Kennedy, J., concurring in part and concurring in the judgment).

[111] *See Lee*, 505 U.S. at 583; *see generally Allegheny*, 492 U.S. 573 (holding that the crèche display did not constitute coercion because the display did not force unbelieving citizens to actively take part in any religious activity).

[112] *See Lee*, 505 U.S. at 583. Justice Scalia, in his dissent, targeted Kennedy's change of position on this issue, citing Kennedy's opinion in *Allegheny*. He noted that Kennedy's *Lee v. Weisman* opinion was "conspicuously bereft of any reference to history," and expressed the concern that in its ruling the Court was "lay[ing] waste [to] a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally." *Id.* at 631–32 (Scalia, J., dissenting).

[113] *Id.* at 586 (majority opinion).

[114] *Id.* at 594.

[115] *Id.* at 595.

[116] *Id.* at 586.

[117] *Id.* at 587.

religious views may end in a policy to indoctrinate and coerce,"[118] which "puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."[119] These factors, in Kennedy's mind, were sufficient not only to differentiate the case from *Allegheny*, but to find that in allowing this prayer to be held at a government-sponsored event, the school officials had engaged in coercion—the very quality which is anathema to true liberty and human dignity.[120]

Kennedy's concern that a faith not be "imposed" is reminiscent of the Catholic Church's statements that though all persons have an obligation to seek the truth, "[t]he inquiry is to be free,"[121] and that "as the truth is discovered, it is by a personal assent that men are to adhere to it."[122] So even though Kennedy, and many of the students who were present at this graduation ceremony, may not have objected to the prayer and might even have been personally supportive of it, these factors were outweighed by the need to guarantee that all citizens be able to fully exercise their liberty and be free from any form of coercion.[123]

B. Human Dignity: The Heart of Liberty

Lee v. Weisman is not the only case in which Kennedy took an unexpected position on a controversial issue solely because he feared that the value of human dignity would be endangered by any other ruling.[124]

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, for instance, Kennedy surprised his supporters and critics alike when he joined with the majority in upholding as constitutional a woman's right to have an abortion.[125] In the opinion, which he co-authored with Justices O'Connor and Souter, he stated that "[t]he controlling word in the cases before us is 'liberty.'"[126] In fact, the opinion itself begins and ends with the word "liberty,"[127] and focuses

[118] *Id.* at 591–92

[119] *Id.* at 592.

[120] *Id.* at 586–87.

[121] *Dignitatis Humanae*, *supra* note 66, ¶ 3.

[122] *Id.*

[123] *Lee*, 505 U.S. at 595–96.

[124] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (delivering the opinion of the Court that certain amendments to Pennsylvania's abortion statute, which required preconditions to receiving an abortion, were valid).

[125] *Id.* at 846.

[126] *Id.*

[127] *Id.* at 844, 901.

heavily on the importance of "personal dignity and autonomy"[128] as "the heart of liberty."[129]

But, though Kennedy conceded a woman's constitutional right to have an abortion, he did not find that this right is unbounded.[130] He qualified the admission to this right by observing that though this decision is a personal one, it is not entirely private.[131] He noted that "[w]hat is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so."[132] He further tempered the Court's ruling with the admonitions that government need not abstain from indications of moral value and that "[t]he woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn."[133]

C. Human Dignity and the Value of All Human Life

In highlighting the interest and worth of the unborn child, Kennedy mirrors the stance taken by the Catholic Church in its publication, *Dignitas Personae*, in which the Church announced its position on bioethical questions.[134] In that document, the Church reaffirmed that "[t]he dignity of a person must be recognized in every human being from conception to natural death."[135] It further states that "[t]his value belongs to all without distinction. By virtue of the simple fact of existing, every human being must be fully respected."[136] This is the same position put forward by the Church

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[128] *Id.* at 851.

[129] *Id.*

[130] *Id.* at 877.

[131] *See id.*

[132] *Id.*

[133] *Id.* at 869.

[134] *See* Congregation for the Doctrine of the Faith, *Instruction Dignitas Personae on Certain Bioethical Questions* ¶ 1 (Sept. 8, 2008), [hereinafter *Dignitas Personae*], *available at* http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20081208_dignitas-personae_en.html.

[135] *Id.*

[136] *Id.* ¶ 8. This is another belief common to the Jewish and Christian faiths, and many groups from both religions join the Catholic Church in valuing an unborn child (beginning at the moment of conception) with same worth as is given to an adult human being, a position that is based on principles set out in the Bible. The value and dignity of each person is taught from the beginning of the Scriptures that both Christianity and Judaism have in common, a group of writings known to the Christians as the Old Testament, and to the Jews as the Tanakh. In the first book of the Bible, Moses wrote that "God created man[kind] in his own image, in the image of God he created him; male and female he created them." *Genesis* 1:27 (English Standard). Of all the creatures God created, only mankind is described as bearing his image, and this distinction sets humans apart from the rest of nature. Though this image was marred in the fall of man, it was not removed. *See* GEISLER, *supra* note 63, at

in *Dignitatis Humanae*, in which the Vatican explained that all human beings have dignity because they are "persons—that is, beings endowed with reason and free will and therefore privileged to bear personal responsibility."[137]

In *Casey*, Kennedy recognized a prime example of the conflicting interests that arise from our society's resolve to protect human dignity.[138] On the one hand, the Court cannot overlook or dismiss the value of the life of the unborn, a value that the child has simply because he or she is an existing human being,[139] but the Court must also acknowledge that the mother, as a person "endowed with reason and free will,"[140] is able to exercise her free will and make a decision for her own life, while "bear[ing the] personal responsibility."[141] For Kennedy, this conflict could only be resolved by reaffirming a woman's right to have an abortion, but by doing so in as cautionary a tone as his respect for liberty would allow.[142]

Although Kennedy's conclusion in *Casey* is, on the surface, precisely opposed to the declarations of the Catholic Church,[143] at

146. This is the reason, the Bible teaches, that murder is wrong: "[w]hoever sheds the blood of man, by man shall his blood be shed, for God made man in his own image." *See Genesis* 9:6 (English Standard). Many other passages in the Bible uphold this theme. Six of the Ten Commandments, for instance, are dedicated to setting out the parameters of proper conduct among people, but these six are based on the principles put forward in the first four commandments, which govern the relationship that people are to have with God. A proper relationship with God, then, leads to proper relationships with others, based on the recognition of the value God places on each of our fellow human beings. *See Exodus* 20:1–21. This teaching is carried through to the New Testament as well, where St. James admonished the early Christian believers to be careful not only that they never physically injure a fellow man, but he further commanded that they not even curse one another. *James* 3:9–10. Because mankind is made in God's image, any harm to our fellow man is harm to God's image. So to curse another person is to curse God indirectly. This is true regardless of whether or not the target of the curse is a righteous or good person, since "[e]ven the most vile of human beings retain God's likeness, be it oh so vitiated within." GEISLER, *supra* note 63, at 146.

137 *Dignitatis Humanae*, *supra* note 66, ¶ 2.

138 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992) ("[I]t is a constitutional liberty of the woman to have some freedom to terminate her pregnancy. . . . The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn.").

139 *See Dignitas Personae*, *supra* note 134, ¶ 8.

140 *Dignitatis Humanae*, *supra* note 66, ¶ 2.

141 *Id.*

142 COLUCCI, *supra* note 5, at 39. In response to comments from a fellow Justice that Kennedy seemed to be wavering in his opinion on *Casey*, Kennedy wrote to him explaining that this appearance of indecision was intentional. "I am still struggling," he admitted, "with the whole abortion issue and thought it proper to convey this in what I wrote." *Id.* at 38 (quoting a handwritten note by Kennedy addressed to Blackmun, dated June 21, 1990).

143 The Catholic Church does not equivocate on the issue of abortion, but has stated repeatedly that "abortion willed as an end or as a means, always constitutes a grave moral disorder, since it is the deliberate killing of an innocent human being." *See* John Paul II,

its core, it is also in harmony with an understanding of other fundamental philosophies expounded by the Church, philosophies which lead to seemingly contradictory, though no less inevitable conclusions.[144] For Kennedy, the most fundamental of these philosophies is found in the Church's assertion of individual liberty and the natural freedom of each human being to make his or her own choices.[145] The Church teaches the importance of this freedom even while acknowledging the inherent possibility that a person may use it to make the wrong choice and thus "fail[] and sin[]."[146]

In *Gaudium et Spes*, for example, the Church states that "[o]nly in freedom can man direct himself toward goodness,"[147] and that "God has willed that man remain 'under the control of his own decisions.'"[148] "Freedom," the Church clarifies, "is the power, rooted in reason and will, to act or not to act, to do this or that, and so to perform deliberate actions on one's own responsibility."[149] This is a right that God has given to man, a right that cannot be infringed upon without violating the person's God-given human dignity, and a right without which no person can truly fulfill God's purpose, for it is God's will that each person "might of his own accord seek his Creator and freely attain his full and blessed perfection by cleaving to him."[150]

But, as noted above, this freedom is doubled-edged. If a human being is free to seek God, he or she is also free to reject God, since the ability to voluntarily choose one option implies the ability to choose an alternative option. The Church notes this reality in its statement that "[a]s long as freedom has not bound itself definitively to its ultimate good which is God, there is the possibility

Evangelium Vitae ¶ 62 (Mar. 25, 1995) [hereinafter *Evangelium Vitae*], *available at* http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html.

144 *Cf. Dignitatis Humanae*, *supra* note 66, ¶ 2 ("[A]ll men are to be immune from coercion on the part of individual or of social groups and of any human power, in such wise that no one is to be forced to act in a manner contrary to his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits.").

145 *Catechism of the Catholic Church* pt. 3, ¶ 1730 (1993) (English translation published online Nov. 4, 2003), *available at* http://www.vatican.va/archive/ccc_css/archive/catechism/p3s1c1a3.htm.

146 *Id.* pt. 3, ¶ 1732.

147 Paul VI, Pastoral Constitution on the Church in the Modern World, *Gaudium et Spes* (Dec. 7, 1965) ¶ 17 [hereinafter *Gaudium et Spes*], *available at* http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html.

148 *Id.*

149 *Catechism of the Catholic Church*, *supra* note 145, pt. 3, ¶ 1731.

150 *Id.* pt. 3, ¶ 1730.

of *choosing between good and evil*, and thus of growing in perfection or of failing and sinning."[151]

The Church teaches that God foresaw mankind's ability to misuse this freedom of choice and thereby to sin, and that he gave us free will in spite of this potential.[152] He encourages mankind to do right, but does not prevent us from doing wrong.[153] As one Christian philosopher has explained:

> God created things which had free will. That means creatures which can go either wrong or right. . . . If a thing is free to be good it is also free to be bad. And free will is what has made evil possible. Why, then, did God give them free will? Because free will, though it makes evil possible, is also the only thing that makes possible any love or goodness or joy worth having. A world of automata—of creatures that worked like machines—would hardly be worth creating. The happiness which God designs for . . . [mankind] is the happiness of being freely, voluntarily united to Him and to each other in an ecstasy of love and delight . . . . And for that they must be free.[154]

Here, then we can catch a glimpse of the deeply held reasons for Kennedy's dilemma on the question of abortion. Abortion ends the life of an unborn human being, one who is innocent of any wrong, and is consequently deserving of legal protection. Therefore abortion is a "grave moral disorder."[155] But God has also created the mother with a free will, which implies that she should be able to make decisions voluntarily for good or for ill. Though Christians are admonished to avoid not only sin, but even the appearance of sin,[156] and are further told to help others keep from sin,[157] such an intervention might infringe on the other's right to make his or her own choices.

Ultimately, Kennedy determined that the mother's right to freedom of choice could not be encroached upon.[158] He believed that

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[151] *Id.* pt. 3, ¶ 1732.

[152] *See* C.S. LEWIS, MERE CHRISTIANITY 37–38 (21st prtg. 1975).

[153] *See id.*

[154] *Id.*

[155] *Evangelium Vitae*, *supra* note 143, ¶ 61.

[156] 1 *Thessalonians* 5:22.

[157] *James* 5:19–20.

[158] Note that this is hardly a consensus view among Christian believers. Many disagree with Kennedy's conclusion that the mother's right to freedom of choice trumps the child's right to life, and will point to instances recorded in the Bible in which God himself miraculously intervened in a person's freely chosen acts to prevent a wrong, especially where it was necessary to protect innocent lives. *See, e.g.*, *Numbers* 22:22–35 (recounting that God

the Court's "obligation is to define the liberty of all, not to mandate . . . [a] moral code."[159] He further said that "[a]t 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."[160] Seen from this perspective, it is perhaps inevitable that Kennedy voted as he did in this historic case, since he was attempting to ensure that "the word liberty in the Constitution is given its full and necessary meaning, consistent with the purposes of the document as we understand it."[161]

Kennedy's firm defense of human dignity may have caused him, on some issues, to take sides that his commentators did not expect, but his stance is very much in keeping with the tenets of his faith and with the teachings of the Catholic Church. In fact, an understanding of the significance that human dignity holds for Justice Kennedy is essential to an understanding of his jurisprudence, and his otherwise inexplicable positions on socially controversial issues.

VI. FREE SPEECH—NECESSARY TO THE DEMOCRATIC PROCESS

Freedom of speech is a right highly prized in our society, and of all areas of individual liberty, to Justice Kennedy, this right is preeminent.[162] Of the current Justices, it is Anthony Kennedy who most consistently votes against restrictions on free speech.[163] In

used a donkey to speak with a man named Balaam in order to prevent Balaam from following through on the conspiracy which would have resulted in thousands of lives lost); *see also Daniel* 6:19–22 (explaining that God sent an angel to protect his servant Daniel who had been unjustly thrown into a den of lions). The stories of Balaam and Daniel involve people who had exercised their freedom of choice to commit a wrong: Balaam used his free will to choose wrong when he plotted the destruction of innocent people. Envious officials in King Darius' court used their free will to choose wrong when they arranged for Daniel's death. Yet even though God gave each of these people the freedom of choice that made these wrongs possible, he still acted to avert the results. So God values free will enough to give it to mankind in spite of the inevitable possibility of wrong choices, but does not value it more than the lives of his servants. Legitimate reasoning can obviously be applied to reach either result in socially controversial issues, but it seems apparent that in Kennedy's mind, individual liberty and the inviolability of the person paired with his or her right to make free choices constitute a superior value.

[159] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992).

[160] *Id.* at 851.

[161] *Nomination Hearings*, *supra* note 30, at 122.

[162] *Id.* at 111.

[163] *See* COLUCCI, *supra* note 5, at 75 ("Anthony Kennedy . . . is the current justice most likely to strike government action for violating freedom of speech and association, and he has

fact, of those now sitting on the Supreme Court, Kennedy is the Justice most likely to overturn an action by the government on the grounds that it violates freedom of speech and association.[164]

A. The Most Important Constitutional Right

Kennedy's position on freedom of speech should come as no surprise. From the very beginning, he promised to strike any government action that causes "the inability of the person to manifest his or her own personality, the inability of the person to obtain his or her own self-fulfillment, the inability of a person to reach his or her own potential."[165] Furthermore, when asked about his understanding of the First Amendment and the role it plays in American society, Kennedy responded that of all the rights accorded us in our Constitution, in order of priority, the freedom of speech "may be first."[166] One reason for its importance, in his view, is that the First Amendment "ensures the dialogue that is necessary for the continuance of the democratic process,"[167] and that it provides all citizens with protections that "appl[y] not just to . . . speech,"[168] but "really, to all ways in which we express ourselves as persons."[169]

This thought process echoes the position of the Catholic Church, which has stated that "every man has the duty, and therefore the right, to seek the truth . . . . [and it] is to be sought after in a manner proper to the dignity of the human person."[170] Furthermore, "[t]he inquiry is to be free, carried on with the aid of . . . communication and dialogue,"[171] through which people can "explain to one another the truth they have discovered, or think they have discovered, in order thus to assist one another in the quest for truth."[172]

The Church bases these assertions on the proposition that free speech is necessary to true personal freedom and that:

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joined every majority that has found a federal statute unconstitutional on free-speech grounds."); Volokh, *supra* note 5, at 1191, 1193 (showing that of the thirty-three free speech cases heard by the Court from 1994–2000, Justice Kennedy voted to protect free speech 73.7% of the time, the highest percentage among the Justices).

164 *See* COLUCCI, *supra* note 5, at 75; Volokh, *supra* note 5, at 1193.

165 *Nomination Hearings*, *supra* note 30, at 180.

166 *Id.* at 111.

167 *Id.*

168 *Id.*

169 *Id.*

170 *Dignitatis Humanae*, *supra* note 66, ¶ 3.

171 *Id.*

172 *Id.*

> *Freedom is the highest sign in man of his being made in the divine image and, consequently, is a sign of the sublime dignity of every human person*. "Freedom is exercised in relationships between human beings. Every human person, created in the image of God, has the natural right to be recognized as a free and responsible being. All owe to each other this duty of respect. The *right to the exercise of freedom*, especially in moral and religious matters, is an inalienable requirement of the dignity of the human person." The meaning of freedom must not be restricted . . . .[173]

Kennedy clearly evidences this reasoning in his opinions on questions of freedom of expression.[174] In one free speech case, Kennedy stated frankly that "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."[175]

B. Free Expression in All Forms

For Kennedy the principle of protecting free speech holds true regardless of the form a person's expression may take.[176] *Texas v. Johnson*, for example, concerned the question of whether the First Amendment protects a person's actions when he violates a state statute that prohibited him from burning the American flag.[177] In this case, Kennedy determined that "whether or not [the flag-burner] could appreciate the enormity of the offense he gave, the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution,"[178] and were therefore protected under the First Amendment.[179]

Kennedy made clear in his concurrence that he did not condone the speaker's acts.[180] He explained "that the flag holds a lonely place of honor . . . constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the

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[173] *Compendium of Social Doctrine*, *supra* note 54, ¶ 199 (quoting *Catechism of the Catholic Church*, *supra* note 145, pt. 3, ¶ 1738).

[174] *See, e.g.*, Turner Broad. Sys. v. FCC, 512 U.S. 622, 641 (1994) (emphasizing the freedom of every individual to choose the form, manner, and content of his or her expression).

[175] *Id.*

[176] *See* Texas v. Johnson, 491 U.S. 397, 420–21 (1989) (Kennedy, J., concurring).

[177] *Id.* at 399 (majority opinion).

[178] *Id.* at 421 (Kennedy, J., concurring).

[179] *Id.*

[180] *Id.*

human spirit."[181] But, he cautioned, these same beliefs "force[] recognition of the costs to which those beliefs commit us,"[182] including the "poignant but fundamental [fact] that the flag protects those who hold it in contempt."[183]

For Kennedy, upholding the First Amendment means extending its constitutional protections to all citizens indiscriminately, and "subject to *rare* exceptions."[184] Though there may be fundamental flaws in the logic of a speaker's position or even gross offensiveness in his or her actions, these factors do not diminish the speaker's power to invoke the First Amendment, nor do they create for the law a special caveat that would exempt the speaker from the liberty of self-expression.[185] Factors such as offensiveness are simply some of "the costs to which [our American] beliefs commit us,"[186] since the law cannot truly guarantee protection for any citizen's speech until it is able and willing to protect the speech of all citizens.[187]

C. Free Expression on All Subjects

This protection does not apply only to speech against the federal government, but also covers the attempt of any citizen to express his or her views.[188] In *Gentile v. State Bar of Nevada*, for instance, Kennedy voted to overturn the act of a state bar association when it officially censured a lawyer for publicly accusing the local police of corruption.[189] In this case, Kennedy found that "speech critical of the exercise of the State's power lies at the very center of the First Amendment,"[190] and so must be protected.[191]

Public protests on social issues also deserve protection.[192] In *Hill v. Colorado*, the Court found that protestors were correctly barred

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[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] Hill v. Colorado, 530 U.S. 703, 781 (2000) (Kennedy, J., dissenting) (emphasis added).

[185] *See Johnson*, 491 U.S. at 414 (stating that the foundational principle of the First Amendment is one that does not allow the government to prohibit expression of an idea just because society may find it to be offensive or disagreeable).

[186] *Id.* at 421 (Kennedy, J., concurring).

[187] *Id.*

[188] *See generally* Gentile v. State Bar of Nev., 501 U.S. 1030 (1991) (facing the issue of whether it is protected speech for a lawyer to make extrajudicial statements to the public).

[189] *Id.* at 1030.

[190] *Id.* at 1034.

[191] *See id.*

[192] *See generally Hill*, 530 U.S. at 781 (Kennedy, J., dissenting) (facing the issue of whether a Colorado statute barred demonstrators from engaging in the activity in front of an abortion clinic).

from demonstrating in front of an abortion facility when the Court upheld a statute that made it illegal to "engag[e] in oral protest, education or counseling"[193] within one hundred feet of the entrance of an abortion facility.[194] Kennedy disagreed with the ruling and wrote a strongly-worded dissent in which he accused the Court of acting "to deny the neutrality that must be the first principle of the First Amendment."[195]

"We would close our eyes to reality," he wrote, "were we to deny that 'oral protest, education or counseling' . . . concern a narrow range of topics—indeed, one topic in particular."[196] Here was an example, he feared, of the government using its own power to silence any effective means of opposition to a law that it had made.[197] He stated that "[l]aws punishing speech which protests the lawfulness or morality of the government's own policy are the essence of the tyrannical power the First Amendment guards against."[198]

Not only did the decision violate the First Amendment, according to Kennedy it also violated basic logic.[199]

> To say that one citizen can approach another to ask the time or the weather forecast or the directions to Main Street but not to initiate discussion on one of the most basic moral and political issues in all of contemporary discourse, a question touching profound ideas in philosophy and theology, is an astonishing view of the First Amendment.[200]

He accused the Colorado legislature of, through this law, "seek[ing] to eliminate public discourse on an entire subject and topic,"[201] and he believed that the Supreme Court showed a "disregard of the importance of free discourse and the exchange of ideas in a traditional public forum."[202] He was convinced that, in its decision, the Court overlooked the fundamental fact that:

> Our foundational First Amendment cases are based on the

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[193] *Id.* at 707 (majority opinion) (quoting COLO. REV. STAT. § 18-9-122(3) (2012)) (internal quotation marks omitted).

[194] *See Hill*, 530 U.S. at 707 (citing COLO. REV. STAT. § 18-9-122(3) (2012)).

[195] *See Hill*, 530 U.S. at 789 (Kennedy, J., dissenting).

[196] *Id.* at 767.

[197] *See id.* at 788–89 (discussing the importance of this specific means of expression due to the limited resources available to citizens who wish to portray their ideas that may in fact make a difference).

[198] *Id.* at 787.

[199] *See id.* at 766–67 (writing that the parallel found by the majority was non-existent).

[200] *Id.* at 768.

[201] *Id.* at 770.

[202] *Id.* at 778.

> 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.[203]

In other words, as Kennedy noted in *Texas v. Johnson*, we are only true to the Constitution and to our society's values if we fully respect every citizen's right to freedom of speech, a right that comes with a price.[204] If people are genuinely free to speak as they find, someone is likely to be upset at some point in the conversation, but the government should not take it upon itself to decide which groups to protect from this unavoidable offense.[205]

D. Free Expression for All Speakers

In Kennedy's view, this protection of free expression is not only owed to individual citizens when they perform speech acts on their own, but is also owed both to citizens and to corporations when they support another person who takes a position with which the citizen or corporation agrees.[206] In *Austin v. Michigan Chamber of Commerce*, for example, Kennedy dissented from the majority opinion that upheld a Michigan law preventing corporations from spending their own money directly to support candidates.[207]

In this case, Kennedy found that the law at issue "allows Michigan to stifle the voices of some of the most respected groups in public life on subjects central to the integrity of our democratic system."[208] In denying corporations the freedom to have this type of participation in political discourse, Michigan was restricting the corporation's speech based on content, which is "the essence of censorial power."[209] By allowing this law to stand, Kennedy said, the Supreme Court "contravene[d] fundamental principles of

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[203] *Id.* at 781.

[204] *See* Texas v. Johnson, 491 U.S. 397, 420–21 (1989) (Kennedy, J., concurring) ("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.").

[205] *See id.* at 421 (invalidating the Texas state flag burning statute, despite the "repellent" nature of the demonstrations).

[206] *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 695–96 (1990) (Kennedy, J., dissenting) (insisting that a Chamber of Commerce should be able to engage in political free speech to support a particular congressional candidate through the use of advertisements).

[207] *Id.*

[208] *Id.* at 696.

[209] *Id.* at 699 (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784–85 (1978)).

neutrality for all political speech."[210]

Kennedy further noted that the law "is aimed at reducing the quantity of political speech," but that "[t]he First Amendment rests on quite the opposite theory."[211] He concluded that corporate speech is "of importance and value to the self-fulfillment and self-expression of [the corporation's] members, and to the rich public dialogue that must be the mark of any free society."[212]

In a similar case involving restrictions on contributions to candidates by Political Action Committees (PACs), Kennedy acknowledged the crisis of public confidence in face of the continued perception of corruption.[213] While he conceded that "[t]here are no easy answers" to this challenge, he noted that "the Constitution relies on one: open, robust, honest, unfettered speech that the voters can examine and assess in an ever-changing and more complex environment."[214] He reasoned that in preventing the PACs from supporting their candidate of choice, the government denied them the opportunity to express their views in the political arena and to contribute to the "open, robust, honest, unfettered speech" that is necessary to a full and free debate.[215]

In *McConnell v. Federal Election Commission*,[216] Kennedy once again expressed his belief in the necessity for genuine freedom of speech in his statement that "[t]he First Amendment guarantees our citizens the right to judge for themselves the most effective means for the expression of political views and to decide for themselves which entities to trust as reliable speakers."[217] He also reiterated his concerns about government control over citizen speech in his caution that the law in question was an attempt to force political conversations to conform to government rules, and he noted "that Government cannot be trusted to moderate its own rules for suppression of speech."[218] The opinion he wrote in this case is another effort by Kennedy to "ensure[] the dialogue that is necessary for the continuance of the democratic process."[219]

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[210] *Austin*, 494 U.S. at 701 (Kennedy, J., dissenting).
[211] *Id.* at 704.
[212] *Id.* at 710.
[213] *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 406, 408 (2000) (Kennedy, J., dissenting).
[214] *Id.* at 409.
[215] *See id.* at 407–09.
[216] McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).
[217] *Id.* at 286 (Kennedy, J., concurring in the judgment in part, dissenting in part).
[218] *Id.* at 288.
[219] *Nomination Hearings*, *supra* note 30, at 111.

E. The Catholic Church and Freedom of Expression

Once again, Kennedy's opinions are reminiscent of the positions espoused by the Catholic Church in its advocacy of the right of all mankind to freely seek the truth.[220] *Dignitatis Humanae* states that:

> Truth . . . is to be sought after in a manner proper to the dignity of the human person and his social nature. The inquiry is to be free, carried on with the aid of teaching or instruction, communication and dialogue, in the course of which men explain to one another the truth they have discovered, or think they have discovered, in order thus to assist one another in the quest for truth.[221]

As Kennedy noted, the views expressed by citizens when they exercise their First Amendment rights often involve questions "touching profound ideas in philosophy and theology,"[222] and as the Church's position paper states, it is contrary to the principle of human dignity to deny a person the ability to "give external expression to his . . . religion."[223] Each person "should share with others in matters religious . . . [and] should profess his religion in community."[224]

The Church goes even further in admonishing believers that although they should obey their government as respectful citizens, it is their duty to speak out against wrongs when they are found, and that if the laws of a government conflict with God's laws, it God's laws that must be kept "inviolate."[225] The Church also states that the government "would clearly transgress the limits set to its power, were it to presume to command or inhibit acts that are

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[220] *See, e.g.*, *Dignitatis Humanae*, *supra* note 66, ¶ 3.

[221] *Id.*

[222] Hill v. Colorado, 530 U.S. 703, 768 (2000) (Kennedy, J., dissenting).

[223] *Dignitatis Humanae*, *supra* note 66, ¶ 3.

[224] *Id.*

[225] *Id.* ¶ 11. This is another Christian belief supported by numerous texts in the Bible. For example, when Jesus Christ was asked whether the Jews should pay taxes to Caesar, the ruler of a country that was oppressing their people, Christ's answer was that they should "render to Caesar the things that are Caesar's and to God the things that are God's." *See Matthew* 22:15–22 (English Standard). St. Paul also admonished the early church believers to "be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God. Therefore whoever resists the authorities resists what God has appointed . . . ." *Romans* 13:1–2 (English Standard). However, this obedience is not to be blind. Believers are also told to "obey God rather than men," *Acts* 5:29 (English Standard), and are reminded that "each of us will give an account of himself to God," *Romans* 14:12 (English Standard). Christians are therefore to speak the truth boldly, and to "speak[] the truth in love." *Acts* 4:31(English Standard); *Ephesians* 4:15.

religious,"[226] and this would include acts such as speaking out against conduct or policies that the speaker believes are wrong.[227]

Seen from this perspective, the Texas statute that banned flag burning by a citizen making a political statement,[228] the Nevada State Bar Association's official censure of a lawyer who used the media to expose corruption,[229] and the Colorado statute preventing anti-abortion protests,[230] are each examples of a governing body denying citizens the ability to express their views and to share the truth as they have found it, a right that is due to all citizens on the basis of their dignity as human beings.

Freedom of speech is not just necessary for "the rich public dialogue that must be the mark of any free society,"[231] it is also necessary to ensure that both the law and our society accords each person the respect he or she is owed as a fellow human being, since the ability to express oneself is a basic need of each person in his or her pursuit of truth. So, although Kennedy's strong and consistent pro-free speech stance may seem incongruous to some commentators, given his positions on other issues, the zealous protection of free speech is an inescapable conclusion to Kennedy, for whom each ruling on free speech cases was determined both by the text of the Constitution and by his own personal convictions.

VII. CONCLUSION

Justice Kennedy's opinions, especially in areas of intense social controversy, may not fall directly in line with the predetermined positions of those on either side of the political aisle. But when seen in light of his personal convictions, they are the most natural result of the philosophy he embraces of interpreting all law in light of greater moral principles and "our American tradition,"[232] principles that are centered on the value of human dignity and find their basis in the moral law.[233]

Kennedy believes that the value of human dignity may never be infringed, and that its full protection exists only when "the word

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[226] *Dignitatis Humanae*, *supra* note 66, ¶ 3.

[227] *See id.* ¶ 2.

[228] TEX. PENAL CODE ANN. § 42.09(a)(3) (1973); *see also* Texas v. Johnson, 491 U.S. 397, 399 (1989) (holding that a conviction for violating a state statute criminalizing flag burning was inconsistent with the First Amendment).

[229] *See* Gentile v. State Bar of Nev., 501 U.S. 1030 (1991).

[230] COLO. REV. STAT. § 18-9-122(3) (2012); *see also* Hill v. Colorado, 530 U.S. 703 (2000).

[231] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 710 (1990).

[232] *Nomination Hearings*, *supra* note 30, at 86.

[233] *See id.* at 180.

liberty in the Constitution is given its full and necessary meaning, consistent with the purposes of the document as we understand it."[234] Toward this end, Kennedy has strongly encouraged the implementation of "policies of accommodation, acknowledgement, and support for religion,"[235] which would require courts to strike government involvement in religious expression only if it fails his "coercion test."[236]

Justice Kennedy has been adamant about the need for government to allow its citizens to speak and to judge the speech of others for themselves with as much freedom as possible. Where the interests of more than one party are at stake, as in *Casey*,[237] he has allowed his respect for the free will of each person (and his or her right to exercise this will) to be the deciding factor, even when this free exercise might lead to a controversial result. And Kennedy, consistent with his high regard for the value of human dignity and autonomy, has found that where there is "at best a draw"[238] between conflicting interests, "the tie goes to free expression."[239]

[234] *Id.* at 122.

[235] Cnty. of Allegheny v. ACLU, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

[236] *See id.* at 659.

[237] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[238] United States v. Playboy Entm't, 529 U.S. 803, 819 (2000).

[239] *Id.*