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Insult after Injury: The Nomination of Anthony Kennedy

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When it became clear that Robert Bork's nomination was in trouble, President Reagan told one audience: "If I have to appoint another one, I'll try to find one that they'll object to just as much as they did for this one." Well, less than a week after the Senate rejected Bork, the president announced the nomination of Bork's D.C. Circuit colleague Douglas Ginsburg. Judge Ginsburg, just 41 years old, the youngest nominee in half a century, was among several judges Reagan had considered. Senator Warren Rudman's (R., N.H.) suggestion of a judge from his state, David Souter, was rejected as being unknown and unremarkable.

The White House strategy was to find someone as conservative as Bork, but "less visible and controversial." Several Democratic senators had advised that Ginsburg might be the hardest to confirm, given his youth and conservative reputation — "Judge Bork without the paper trail," Senator Ted Kennedy (D., Mass.) called him, after having praised him as "open-minded" and compassionate the year before — but he was the favorite of Attorney General Meese. He had also been confirmed twice in recent years and was moderate in style and temperament.

Ginsburg was (and is) more of a libertarian than a social conservative, so while it's likely that progressive groups would've attacked him for being "extreme" on deregulation, there wouldn't have been the same purchase over the more politically salient issues of privacy and civil rights. Indeed, Ginsburg's jurisprudence turned out to be more in the judicial "engagement" school, skeptical of government power of all sorts, than Bork's judicial restraint.

But there'd be no chance to test Reagan's hypothesis, because it came out that Ginsburg had smoked marijuana as a law student and, more importantly, as a law professor. Although he'd passed several background checks, the FBI in those days didn't ask nominees whether they'd "used" drugs, just whether they'd ever abused them, to which Ginsburg could truthfully answer no. He withdrew his name a mere nine days after he was picked and before the White House formally submitted his name to the Senate.

Four days after Ginsburg withdrew, President Reagan nominated Judge Anthony Kennedy, who had been appointed to the Ninth Circuit by President Ford after having been in private practice in Sacramento. While engaged in local affairs in his hometown, Kennedy advised then-governor Reagan on a state tax-limitation proposal, leading Reagan to recommend him to Ford. Based on his moderately conservative judicial record, civic service, and affability, Kennedy was much more in the Powell model than either Bork or Ginsburg. There was nothing controversial or provocative in his background; he had literally been an altar boy and led a life of quiet excellence and community involvement. Combined with his talent at schmoozing senators, he seemed a shoo-in for confirmation. Senate Judiciary Committee chairman Joe Biden described the nominee as more "open-minded" and less of an ideologue than Bork.

Kennedy’s lack of overarching theories placed him in the “mainstream” of legal thought in the eyes of Democrats, contrary to how they viewed the previous nominees for this seat. Senator Howell Heflin (D., Ala.) would comment that Kennedy’s “conservatism, while pronounced, is not so severe as to prevent him from listening.” In his judiciary committee questionnaire, Kennedy had written that “life tenure is in part a constitutional mandate to the federal judiciary to proceed with caution, to avoid reaching issues not necessary to the resolution of the suit at hand, and to defer to the political process.” And that the “expanded role of the courts tends to erode the boundaries of judicial power and also threatens to permit the individual biases of the judge to operate.” This sort of homage to judicial restraint could have been written by Bork, but here it went over a lot better — showing both that the messenger matters and that successful nominees are savvy enough to know how to strike the right tone.

During his relatively uneventful confirmation hearings, Kennedy said of privacy rights that “I would like to draw the line and not talk about the *Griswold* case so far as its reasoning or its result.” He also discussed “a zone of liberty, a zone of protection, a line that’s drawn where the individual can tell the Government, ‘Beyond this line you may not go.’” The Senate confirmed him 97-0 on February 3, 1988, with Paul Simon (D., Ill.) and Al Gore (D., Tenn.) out campaigning for president and Joe Biden, whose own campaign had ended under a cloud during the Bork hearings, home with a pinched nerve.

Although initial reports called Justice Kennedy “as conservative as any justice nominated by President Ronald Reagan” and “a predictable conservative,” he quickly joined Justice Sandra Day O’Connor in the middle, particularly on divisive social issues like abortion, affirmative action, and gay rights. They would be met there temporarily by David Souter, as he transitioned from moderate right to definite left. The trio would come together in a rare co-authored plurality opinion in *Planned Parenthood v. Casey* (1992), reaffirming *Roe v. Wade* but replacing its trimester/viability rubric with an “undue burden” standard for evaluating abortion regulations.

Kennedy played the key role in applying this test in later cases, finding a right to end a pregnancy but recognizing that, as Helen Knowles put it in a book on his jurisprudence, “this is a liberty that is bounded by important state interests . . . that permit the state to require the woman to exercise her liberty in an informed and responsible manner.” Kennedy’s bounded-liberty rubric was even more on display in *Stenberg v. Carhart* (2000) and *Gonzales v. Carhart* (2007). In *Stenberg*, a 5-4 majority overturned Nebraska’s ban on partial-birth abortion because it wasn’t limited to late-term abortions and had no exception for maternal health. Kennedy dissented. In *Gonzales*, Kennedy wrote the opinion for a different five-justice majority, upholding a federal partial-birth abortion ban that likewise lacked a maternal-health exception.

After taking heat from conservatives for *Casey*, Kennedy now took heat from liberals for seeming to contradict *Casey* and for not recognizing that he would have to overrule *Stenberg* to achieve his desired result, rather than creating a contradiction. In *Whole Women’s Health v. Hellerstedt* (2016), Kennedy voted to strike down an abortion law for the first time since *Casey*, in a case where Texas required clinics to meet the safety standards of surgical centers and have physicians with nearby hospital-admitting privileges. Thus we’re left with an outcome whereby abortion rights are now both stronger and narrower than before Kennedy got his hands on them — and an “undue burden” was whatever gave him a headache.

Justice Kennedy accepted racial diversity as a legitimate goal but, until the quixotic *Fisher v. UT-Austin II* (2016), had never voted to uphold a policy trying to achieve that goal. In the 2003

University of Michigan cases, Kennedy labeled the concept of critical mass a "delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."

As important as Kennedy's role in the abortion and affirmative action fights were, he's now most identified with 2015's landmark ruling on gay marriage. *Obergefell v. Hodges* was the fourth sexual-orientation case in which Kennedy not only voted against a restriction but wrote the majority opinion. In *Lawrence v. Texas* (2003), Kennedy led the majority striking down a Texas anti-sodomy law, a result he found so obvious that he wrote the opinion in one weekend. Georgetown law professor Randy Barnett — the intellectual godfather of the challenge to Obamacare's individual mandate — called it Kennedy's "libertarian revolution" because the opinion was grounded in "personal liberty" rather than "privacy."

Alas Kennedy's *Obergefell* opinion was a doctrinal mess. What should've been a case about justifications for certain marriage-licensing schemes and the equality of gays and lesbians in the eyes of the law instead became a purple disquisition on how the Constitution protects "a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." The rule of *Obergefell* seems to be that you take a scoop of due process and a cup of equal protection, wrap them in dignity, and away you go. That's poetic, but it's not law. For one thing, the due process clause should've had nothing to do with the case because the right to "due process of law" means that the government can't take away your life, liberty, or property for no good reason. It's the equal protection clause that says the government can't treat people differently without reason. While the clauses can overlap, they often don't, because the discrimination might concern something that's not life, liberty, or property.

Such is the case here: There's no natural right to the state recognition of marriage. Marriage — the civil institution, not the religious rite — is a kind of government benefit. To put it in the context of injustices perpetrated against gay people, marriage is not like the right to have sex with a consenting partner. *Obergefell* thus differed from *Lawrence*, but also from *Loving v. Virginia* (1967), which overturned a law that banned interracial cohabitation.

Perhaps Kennedy's synthesis can best be called "equal liberty": a rejection of the idea that people seeking protection for their intimate conduct must seek it politically. Regardless, these rulings led some to call Kennedy the "first gay justice." It's an odd appellation for the genteel country-club Republican, but it'll stick until someone who's openly gay joins the Court.

Justice Kennedy was a leader of a very pro-speech Court. While no absolutist like Justice Hugo Black, he more than anyone else had no tolerance for content-based restrictions. According to First Amendment scholar Eugene Volokh, in the latter half of the Rehnquist Court, Kennedy took the pro-speech position three-quarters of the time, by far the most. In case after free-speech case, Kennedy showed the importance of tolerance in the free market of ideas.

An underappreciated part of Justice Kennedy's legacy is his relatively solid record on the Constitution's structural protections for liberty. Separating powers vertically, not just horizontally, is a key part of the Founding project, as is the principle of dual sovereignty — the idea that the state and federal governments shouldn't interfere in each other's respective spheres.

The clearest exposition of Kennedy's federalism came in *United States v. Bond* (2011), where the government prosecuted a woman who used a household chemical against a romantic rival for

violating the federal law that implements the international Chemical Weapons Convention. “Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity,” he wrote for a *unanimous* court; it “protects the liberty of the individual from arbitrary power.”

Using the judicial power to stop government abuse was the theme of Justice Kennedy’s magnum opus in this area, the joint dissent he co-authored with Justices Antonin Scalia, Clarence Thomas, and Samuel Alito in *NFIB v. Sebelius* (2012), otherwise known as the first Obamacare case, which concludes:

The values that should have determined our course today are caution, minimalism, and the understanding that the Federal Government is one of limited powers. But the Court’s ruling undermines those values at every turn. In the name of restraint, it overreaches. In the name of constitutional avoidance, it creates new constitutional questions. In the name of cooperative federalism, it undermines state sovereignty.

I was in the courtroom when the ruling was announced from the bench, including Kennedy’s dramatic summary of that dissent. The starkness of his language and passion in his voice could have made you mistake him for Scalia. It was his finest hour — and really makes you wonder how the same jurist could have signed onto *Gonzales v. Raich* (2005), which ratified the federal government’s power to regulate plants you grow in your backyard for your own use.

Although Justice Kennedy hated being called a swing vote — “The cases swing, I don’t,” he protested during an appearance at Harvard Law School in October 2015 — anyone with even a passing interest in the Supreme Court knows that for more than a decade he provided the deciding vote in nearly all the controversial cases that rile the nation. The statistics bear this out: In every term but three from Alito’s replacement of O’Connor in January 2006 until Kennedy’s retirement in June 2018, Kennedy was the “winningest” justice, typically in the majority over 90 percent of the time. In 2006-07, the first full post-O’Connor term, Kennedy was in the majority in all 24 of the 5-4 cases and dissented but twice out of 72 cases overall. And in the seven terms from Justice Elena Kagan’s arrival until Justice Gorsuch, Kennedy was on the winning side of 85 percent of 5-4 splits, while his colleagues were clustered between 48 and 57 percent. As SCOTUSblog founder and frequent Supreme Court advocate Tom Goldstein put it, “it’s Justice Kennedy’s world, and you just live in it.”

The problem with Kennedy in the contemporary account of our politics isn’t that he sometimes agreed with progressives and sometimes with conservatives. It’s that, even if he had a coherent view of the Constitution, his jurisprudence was often inscrutable. Decisions that come from such special access to legal truth undermine the rule of law, which values predictability and transparency. Regardless of how convincing anyone’s explanation of his methods may be, if the perception is that he decided cases like a magic eight-ball, whether based on a unique legal theory or personal predilections, that doesn’t instill faith in the system.

But even apart from what Justice Kennedy did on the Court, the way he got on the Court affected how all future nominees would be treated. When he was confirmed, Senator Howard Metzenbaum (D., Ohio), who had been one of Bork’s leading opponents, called it “a triumph of process as well as justice,” adding that Kennedy “would not have been my nominee” but his views were “well within the constitutional mainstream.” Senator Arlen Specter (R., Pa.),

meanwhile, said that the confirmation process was “a growing experience for the Senate and for the country.” Senator Patrick Leahy (D., Vt.) called it “a turning point in Senate history.”

Indeed, the Bork-to-Kennedy confirmation established for modern times that, in Specter’s words, “judicial philosophy is relevant and important.” While some Republicans criticized the Democrats for imposing what Senator Alan Simpson (R.,Wyo.) called a “political litmus test,” this was hardly something new. But the fights to come were spectacles of a kind we didn’t have when you had to read about Senate debates several days after they took place.

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