

BEYOND COERCION: JUSTICE KENNEDY'S AVERSION TO ANIMUS

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Justice Kennedy has argued that a religious display or message on public ground is constitutional unless it is coercive in some way. He sharply distinguishes his approach from the endorsement test, which asks whether the display makes a reasonable observer feel like an outsider in the community. But in opinions outside the Establishment Clause area, Justice Kennedy has shown a strong aversion to government action that he finds motivated by animus. What would happen if he confronted a publicly supported religious display that was not coercive, but was motivated by animosity to members of the community? I suspect he would find a violation of the Establishment Clause; indeed, I suspect he would move a step in the direction of the endorsement test: he would say that a display cannot stand if it makes a reasonable observer feel like a pariah in the community.

Justice Kennedy's coercion test is set forth most fully in his opinion in *County of Allegheny v. ACLU*¹ where, unlike a majority of the Court, he would have upheld the display of a crèche on the Grand Staircase of the Allegheny County Courthouse.² The crèche was an openly religious display "of the scene in the manger in Bethlehem shortly after the birth of Jesus, as described in the Gospels of Luke and Matthew."³ Under Justice O'Connor's endorsement test, this was unacceptable because it sent "a message to nonadherents that they are outsiders, not full members of the political community."⁴

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¹ 492 U.S. 573 (1989).

² The Court in *Allegheny* also addressed a holiday display consisting of a Chanukah menorah, a Christmas tree, and a sign saluting liberty. With respect to this display, the majority of the Court found that the combined display of the tree, the sign, and the menorah did not have the effect of endorsing religion. *Allegheny*, 492 U.S. at 616.

³ *Id.* at 580.

⁴ *Id.* at 595 (citing *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)). The Court was divided as to the constitutionality of both displays. Three Justices (Stevens, Brennan, and Marshall) argued that both displays should be deemed unconstitutional. Four Justices (Kennedy, Rehnquist, Scalia, and White) argued that neither display should be deemed unconstitutional. Justices O'Connor and Blackmun came down on either side of the issue, finding that the menorah/Christmas tree display, given its "particular physical setting," did not have the effect of endorsing religion but that the crèche display was impermissible. Thus, the crèche display was found to be unconstitutional by a vote of five to four, and the menorah/Christmas tree display was found to be constitutional by a vote of six to three.

Justice Kennedy flatly rejected the endorsement test as “flawed in its fundamentals and unworkable in practice.”⁵ Because the endorsement test requires careful attention to the entire context of a display, including the presence of non-religious objects that may be included, Justice Kennedy found that it threatened to “trivialize constitutional adjudication”⁶ by embracing “a jurisprudence of minutiae.”⁷ More fundamentally, he rejected the idea that the government could not engage in recognizing religion if that made non-adherents feel like “outsiders.”⁸ He gave numerous examples of practices that he found acceptable but that, in his view, endorsed religion and made nonbelievers feel like outsiders: presidential proclamations in support of prayer, “under God” in the Pledge of Allegiance, “In God We Trust” on the coinage, and so on.⁹

Justice Kennedy offered instead the coercion test: the government “may not coerce anyone to support or participate in any religion or its exercise.”¹⁰ The government is free to “recognize and accommodate religion,”¹¹ particularly when the “act of recognition or accommodation is passive and symbolic.”¹² Justice Kennedy was quite explicit about how outsiders should react when confronted with a religious display on government property: “Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.”¹³

Justice Kennedy has continued to adhere to the coercion test and to criticize endorsement, arguing, for example, that a public high school “endorses” a religious club by allowing it to meet on school premises after hours, but because students are not coerced into participation, the Establishment Clause is not violated.¹⁴

Thus the coercion test stands in opposition to the endorsement approach. Of course, the contrast is not always as stark as it appears.

⁵ *Allegheny*, 492 U.S. at 669 (Kennedy, J., concurring in part and dissenting in part).

⁶ *Id.* at 674.

⁷ *Id.*

⁸ *Id.* at 670.

⁹ *Id.* at 671–73.

¹⁰ *Id.* at 659. Justice Kennedy also discusses a second limiting principle: that the government may not, “in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree” that it establishes or tends to establish a state religion. *Id.* (citing *Lynch v. Donnelly*, 465 U.S. 668, 678(1984)). This second principle is not applicable here.

¹¹ *Id.*

¹² *Id.* at 662.

¹³ *Id.* at 664.

¹⁴ *Bd. of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 261 (1990) (Kennedy, J., concurring). Justice Kennedy’s coercion test does not always result in a victory for the government. See *Lee v. Weisman*, 505 U.S. 577, 593–95 (1992) (finding clergy-delivered prayer during a public school graduation ceremony to be in violation of the Establishment Clause as it has the effect of compelling a student to participate in a religious exercise).

While Justice Kennedy argues that endorsement requires too many case-by-case judgments, he says that his acceptance of passive displays might be called into question “in an extreme case” such as “the permanent erection of a large Latin cross on the roof of city hall,” because such an “obtrusive year-round religious display would place the government’s weight behind an obvious effort to proselytize on behalf of a particular religion.”¹⁵ Thus while the coercion and endorsement tests are “theoretically distinct,” lower courts at times have had trouble keeping them that way.¹⁶ Nonetheless, the coercion and endorsement tests are typically seen by scholars as rival approaches to the Establishment Clause.¹⁷

This standard characterization overlooks an important possibility. I believe that several opinions by Justice Kennedy outside of the Establishment Clause area call into question his commitment to allowing passive religious displays. In my view, it is not just displays that Justice Kennedy regards as “permanent” and “obtrusive” that would trouble him. I believe Justice Kennedy would strike down a passive display that makes the reasonable viewer feel not just like an outsider, but like a pariah. In other words, these opinions show that Justice Kennedy is deeply troubled by government action that is based on animus toward a group.

Of course, government decisions based on animus have always been subject to critical scrutiny under the Equal Protection Clause.¹⁸ But Justice Kennedy’s concerns, as we will see, are not limited to that Clause, and they are broader and deeper than usually supposed.

Consider the matter of free exercise. Justice Kennedy joined the Court’s controversial decision in *Employment Division v. Smith*, holding that a neutral law of general applicability overcomes a free exercise challenge.¹⁹ The law in question prevented Native Americans from consuming peyote, a controlled substance, in a religious observance.²⁰ Yet just a few years later, Justice Kennedy struck down a law that prevented adherents of the Santeria religion from sacrificing animals.²¹ His opinion for the Court found that the ordinance in question was not a law of general applicability under *Smith*, but rather reflected

¹⁵ *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part).

¹⁶ Emily M. Gallas, Comment, *Endorsing Religion: Drug Courts and the 12-Step Recovery Support Program*, 53 AM. U. L. REV. 1063, 1078 n.96 (2004).

¹⁷ *Id.*; see also Edward B. Foley, Comment, *Political Liberalism and Establishment Clause Jurisprudence*, 43 CASE W. RES. L. REV. 963, 968–72 (1993) (comparing the effects of the coercion and endorsement tests as applied to the hypothetical creation of a national religion).

¹⁸ Allison Moore, *Loving’s Legacy: The Other Antidiscrimination Principles*, 34 HARV. C.R.-C.L. L. REV. 163, 182–86 (1999) (discussing the Court’s treatment of laws enacted purely for the purpose of disadvantaging discrete groups).

¹⁹ *Employment Div. v. Smith*, 494 U.S. 872, 878–79 (1990).

²⁰ *Id.* at 874.

²¹ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

“improper targeting of Santeria,”²² because the statutory language was limited to Santeria religious practices, while excusing many other types of animal slaughter, such as hunting.²³ But a portion of Justice Kennedy’s opinion, joined only by Justice Stevens, went beyond the statute’s terms and argued that the legislation was unconstitutional because it reflected “significant hostility” by the community toward the adherents of the Santeria faith.²⁴ Justice Kennedy wrote that anti-Santeria speeches received “cheers” from the public, while remarks by the religion’s leader were met “with taunts.”²⁵ In sum, he found a “pattern” of “animosity to Santeria adherents.”²⁶ This approach is quite striking. It is one thing to cite statements by supporters of a bill in attempting to discern its legislative intent; it is another to recite the reaction of the crowd. Justice Kennedy is obviously troubled by the hatred directed by the community at the minority in its midst.

Next came Justice Kennedy’s opinion for the Court in *Romer v. Evans*,²⁷ an Equal Protection Clause opinion. Here Justice Kennedy struck down a Colorado state constitutional amendment that limited the ability of state and local governments to protect gay rights.²⁸ Using rational basis review, Justice Kennedy found that the state had utterly failed to provide a rationale for its actions: “the amendment seems inexplicable by anything but animus toward the class it affects. . . .”²⁹ There were other grounds for striking down the Colorado enactment; it was Justice Kennedy’s use of animus that stood out.³⁰ As one commentator put it, the use of animus was “jurisprudentially unnecessary.”³¹ Just as with the animal sacrifice ordinance, Justice Kennedy was simply unwilling to accept government action fueled by animosity.

Finally, and most importantly, we have Justice Kennedy’s well-known opinion for the Court in *Lawrence v. Texas*.³² Here the Court

²² *Id.* at 538.

²³ *Id.* at 536–38.

²⁴ *Id.* at 541.

²⁵ *Id.*

²⁶ *Id.* at 542.

²⁷ 517 U.S. 620 (1996).

²⁸ *Id.*

²⁹ *Id.* at 632.

³⁰ See, e.g., Courtney G. Joslin, *Equal Protection and Anti-Gay Legislation: Dismantling the Legacy of Bowers v. Hardwick*, 32 HARV. C.R.-C.L. L. REV. 225, 243 (1997) (“A careful reading of the case reveals that the Court took pains to provide an alternative basis for invalidation of Amendment 2 that was jurisprudentially unnecessary—that animus and a ‘bare desire to harm’ a particular group is constitutionally impermissible.” (citing *Romer*, 517 U.S. at 634)). Alternate grounds that Joslin notes the Court could have used to invalidate the amendment include finding the amendment to be in violation of the Equal Protection Clause or to be an infringement upon a fundamental right. *Id.* at 237.

³¹ *Id.* at 243.

³² 539 U.S. 558 (2003).

found that a Texas law criminalizing sexual intimacy between same-sex couples violated the Due Process Clause.³³ Once again using rational basis review, Justice Kennedy relied on *Romer*,³⁴ attacked the “stigma”³⁵ imposed by the law, said the state “cannot demean”³⁶ gays, and concluded that the “Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”³⁷

Justice Kennedy’s *Lawrence* opinion goes to remarkable lengths to recognize the religious and moral bases of the Texas statute, before concluding that these rationales cannot justify criminalizing sexual behavior:

[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through the operation of the criminal law.³⁸

Once again, we have a striking approach. Justice Kennedy is conceding, indeed stressing, that the ban on gay sex was based on deeply held moral and religious views, yet he will not allow these views to be expressed when they amount to animus against fellow citizens.

There is one obvious way to understand *Lawrence* that side-steps the question of animus. Perhaps Justice Kennedy is implicitly adopting John Stuart Mill’s famous harm principle under which the only valid basis for making conduct criminal is if that conduct causes harm to parties other than the actor.³⁹ Since Texas showed no tangible harm stemming from gay sexual behavior, it cannot criminalize that behavior. Under this view, *Lawrence* would have little to do with *Romer*, which was not limited to the criminal law, or with the *Santeria* case, where the Court said the state could criminalize animal killing for health reasons;⁴⁰ the problem was that religious animal killing was being singled out.

³³ *Id.* at 578.

³⁴ *Id.* at 574.

³⁵ *Id.* at 575.

³⁶ *Id.* at 578.

³⁷ *Id.*

³⁸ *Id.* at 571.

³⁹ 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 11 (1984).

⁴⁰ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993).

But this reading of *Lawrence* is implausible. As quoted above, Justice Kennedy emphasizes that the Texas law was based on “profound . . . moral principles.”⁴¹ Yet Mill’s harm principle is itself a moral principle. Why should it trump all others? Mill’s theory has philosophical rivals and his principle has often been criticized.⁴² Justice Kennedy nowhere launches an argument that somehow the harm principle and the harm principle alone is embodied in the United States Constitution as a limit on the criminal law. Moreover, in *Lawrence* itself, Justice Kennedy does not seem to be endorsing a Millian approach. Among the criminal laws called into question by the harm principle are those that target prostitution,⁴³ yet in *Lawrence*, Justice Kennedy goes out of his way to say that the case “does not involve . . . prostitution.”⁴⁴

Lawrence is not a philosophical treatise about the limits of the criminal law. It is a strong, almost visceral, statement that animus is not an acceptable basis for government action.⁴⁵ That is what ties Justice Kennedy’s due process opinion in *Lawrence* to his equal protection opinion in *Romer* and his free exercise opinion in the *Santeria* case.

So how might Justice Kennedy’s aversion to animus relate to the Establishment Clause and the coercion test? Does it suggest that he might find some passive religious displays on government property unconstitutional despite his strong language in *Allegheny County*?

Of course, any answer we might give to these questions is highly speculative. Supreme Court Justices rule on cases, and a case raising the point I am urging may never arise. But I believe considering a hypothetical situation might be illuminating, not only because it suggests that Justice Kennedy would strike down some passive displays, but because it suggests that in some respects the coercion test is closer to the endorsement test than is usually supposed.

Consider the following: The majority of the residents of a small town are outraged by the Supreme Court’s decision in *Lawrence*. This

⁴¹ *Lawrence*, 539 U.S. at 571.

⁴² Suzanne B. Goldberg argues that the Supreme Court has often rejected “morals-based” justifications for law as opposed to “empirical” showings of injury, but she notes that Mill’s harm principle is one moral theory that stands alongside others, such as the Aristotelian approach to the proper role of government. Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1301–04 (2004). Ernest Nagel has expressed skepticism about whether Mill’s approach yields determinate results. 1 FEINBERG, *supra* note 39, at 25–26.

⁴³ 2 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS* 46 (1985).

⁴⁴ *Lawrence*, 539 U.S. at 578.

⁴⁵ I have argued that this aspect of *Lawrence* has implications for government efforts to ban therapeutic cloning. Steven Goldberg, *Cloning Matters: How Lawrence v. Texas Protects Therapeutic Research*, 4 YALE J. HEALTH POL’Y L. & ETHICS 305 (2004).

majority harbors an animus toward gay sexual practices. Just as anti-abortion demonstrators turn out to protest on the anniversary of *Roe v. Wade* each year, this group organizes anti-*Lawrence* programs on the anniversary of that decision. One year, they persuade the local government to put up a plaque on a courthouse wall for a week during the period of anti-*Lawrence* activities. The only words on the plaque are those contained in Leviticus, Chapter 18, verse 22 as they appear in the King James version of the Bible: "Thou shalt not lie with mankind, as with womankind: it is abomination." A gay resident of the community sues, saying that the plaque on the courthouse wall violates the Establishment Clause.

Based on his opinion in *Allegheny County*, it would appear Justice Kennedy would have to reject the plaintiff's claim. No one is being coerced to support or participate in a religious practice. The display is no more permanent and no more obtrusive than the crèche Justice Kennedy allowed in *Allegheny County*. As Justice Kennedy said in that case, the plaintiff can simply ignore the plaque. The fact that it makes him feel like an outsider is irrelevant.

Yet I do not believe Justice Kennedy would view the plaque this way. But he would not reject it because he adopts some version of Mill's harm principle: the plaque, unlike the criminal statute in *Lawrence*, does not criminalize private behavior.

Justice Kennedy would reject the plaque because it is an expression of animus: it is like the crowd taunting the Santeria believers in Florida, the voters stigmatizing the equal rights aspirations of gays in Colorado, and the Texas legislators' animosity toward gay sexual practices. It is a community saying to some of its members: you are not only outsiders, you are pariahs, we abhor you.

There may not be doctrinal purity in the notion that aversion to animus animates opinions under the Free Exercise, Establishment, Equal Protection, and Due Process Clauses. But there may nonetheless be a key to Justice Kennedy's thinking.