

Dignity and Civility, Reconsidered

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I. INSTITUTIONALISM

People often talk about the Chief Justice, Justice Kagan, and Justice Breyer as the institutionalists on the modern Supreme Court.¹ And that's true, they are. Those Justices care about the Court as an institution and the Court's reputation. They do not want people to look at the Court as a set of politicians in robes; and they do not want people to see judges as having ideological or partisan agendas. That is how they think of themselves, and they are willing to make compromises to maintain that image of the Court, and to set aside their personal beliefs in order to preserve the legitimacy of the Court.

But several of Justice Kennedy's decisions about abortion show that he too has a commitment to institutionalism.

The first case is *Planned Parenthood of Southeastern Pennsylvania v. Casey*.² In that case, the Supreme Court was asked to overturn *Roe v. Wade*.³ The Court heard *Casey* on the heels of several presidential campaigns during which candidates promised to appoint Justices who would overturn *Roe v. Wade*.⁴ But by a narrow vote, the Supreme Court opted not to overturn *Roe*. Justice Kennedy joined the controlling plurality, which said that even if *Roe* was wrongly decided, the Court would not overturn the case and that doing so would be retreating "under fire."⁵

1. See, e.g., Josh Gerstein, *Justice Elena Kagan: Overlooked Turncoat on Health Care Law?*, POLITICO (July 5, 2012, 1:32 PM), <https://www.politico.com/blogs/under-the-radar/2012/07/justice-elena-kagan-overlooked-turncoat-on-health-care-law-128095>; Jeffrey Rosen, *Welcome to the Roberts Court: How the Chief Justice Used Obamacare to Reveal His True Identity*, NEW REPUBLIC (June 28, 2012), <https://newrepublic.com/article/104493/welcome-roberts-court-how-chief-justice-used-obamacare-reveal-his-true-identity> ("Roberts now faces similar attacks from the left and right over the health care case for the compromise he forged with the pragmatic liberals, Elena Kagan and Stephen Breyer, over the Medicaid expansion.").

2. 505 U.S. 833 (1992) (plurality opinion) (opinion of O'Connor, Kennedy & Souter, JJ.).

3. *Id.* at 844 (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

4. For work discussing the politics of abortion, see Cary Franklin, *Roe as We Know It*, 114 MICH. L. REV. 867 (2016) (reviewing MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* (2015)); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 381-430 (2007).

5. *Casey*, 505 U.S. at 867 ("So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question." (citing *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955) ("[I]t should go without saying that the vitality of th[e] constitutional principles [announced in *Brown I.*] cannot be allowed to yield simply because of disagreement with them."))).

How does that decision reveal the Justice's commitment to institutionalism? Embracing *stare decisis*, particularly on an issue like abortion which has a clear ideological valence, shows the Justice's commitment to the Court as an institution. It signals a willingness to uphold the decisions of the institution, and to make the institution bigger than any of the individual people who are part of it. And it is particularly notable that the Justice chose the institution over his own views about the law when his own views about the law likely coincided with his own personal policy preferences.⁶ That is, the institution outweighed not only the Justice's own beliefs about the law, but also the Justice's own beliefs about right and wrong.

Some people will say that a Justice's beliefs about right and wrong—or at least a Justice's sense about what is right and what is wrong—should never enter into constitutional analysis. But there are some instances where right and wrong can and probably should factor into legal analysis.⁷ For example, in *Bolling v. Sharpe*, the Court held that the Fifth Amendment prohibited the federal government from providing segregated education, even though the Fifth Amendment does not contain a guarantee of equal protection of the laws.⁸ The Court reasoned that “it would be unthinkable” that the Constitution would permit the federal government, but not the states, from imposing racial segregation in public education.⁹ It requires a real commitment to institutionalism to be able to know when one's views about substantive justice should enter into a case, and when they should not, or when they should be subordinated to the reputation of the institution of the Court.

The second case is *Whole Woman's Health v. Hellerstedt*.¹⁰ *Whole Woman's Health* was decided in one of the Justice's last terms on the Court. The case essentially asked the Court if it would honor the compromise that it had struck in *Casey*. *Casey* chose not to overturn *Roe*, and to affirm its central holding that women have a constitutional right to decide to end a pregnancy.¹¹ And *Casey* clarified that laws “that have the purpose or effect of presenting a

6. For example, in a passage in *Gonzales v. Carhart*, discussed *infra*, the Justice wrote this about abortion: “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.” 550 U.S. 124, 159 (2007) (citation omitted). The choice to highlight an argument that concededly has “no reliable data” to support it provides some indication about the Justice's own personal views or beliefs. See *Casey*, 505 U.S. at 853 (“[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.”).

7. Richard Fallon has discussed the role of substantive justice in constitutional interpretation. See, e.g., Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2291 (2017); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1797 & n.29 (2005); Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 562–72 (1999).

8. 347 U.S. 497 (1954).

9. *Id.* at 500.

10. 136 S. Ct. 2292 (2016).

11. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992) (plurality opinion) (“Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding.”).

substantial obstacle to a woman seeking an abortion” are unconstitutional because they “impose an undue burden” on women’s right to decide to end their pregnancies.¹²

Whole Woman’s Health asked the Court if it was serious about that standard. That is, would the Court actually police laws that were “unnecessary health regulations,” where no evidence indicated that the laws would help the health or safety of any women seeking abortions?¹³ And would the Court police laws that shut down some number of clinics or abortion providers, making access to safe abortion more difficult?

The law at issue in *Whole Woman’s Health* would have required abortion providers to obtain admitting privileges at a hospital within thirty miles of where they perform abortions.¹⁴ It also would have required abortion clinics to comply with the requirements applicable to ambulatory surgical centers.¹⁵ There was no evidence that either requirement improves the health or safety of abortion, or helps any woman seeking an abortion. Literally. Justice Breyer asked the Solicitor General of Texas at oral argument if there was any such evidence, and the Solicitor General had to answer no.¹⁶ No district court could find any evidence that an admitting privileges requirement would have helped any woman.¹⁷ There was also no reason for abortion clinics to comply with the requirements for ambulatory surgical centers. Abortions are not surgeries; medication abortion does not even involve any medical devices; and surgical abortions rely on the body’s natural openings, rather than surgically made incisions. Some of the ambulatory surgical center requirements were also aesthetic or design-like requirements that had nothing to do with safety whatsoever.

The restrictions also would have closed over thirty of the forty clinics in Texas.¹⁸ The remaining clinics (about seven of them) all were concentrated in major metropolitan areas. The district court summarized its findings in this way:

[The] number of women of reproductive age living in a county . . . more than 150 miles from a provider increased from approximately 86,000 to 400,000 . . . and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000.¹⁹

The restrictions did not improve the safety of abortion, or the health or safety of women seeking abortions, but they did reduce access to abortion by

12. *Id.* at 878.

13. *See id.* at 879.

14. *Whole Woman’s Health*, 136 S. Ct. at 2296.

15. *Id.*

16. *Id.* at 2311–12.

17. *Id.* at 2312 (citing *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 953 (W.D. Wis. 2015); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1378 (M.D. Ala. 2014)).

18. *Id.* at 2316 (“The parties stipulated that the requirement would further reduce the number of abortion facilities available to seven or eight facilities, located in Houston, Austin, San Antonio, and Dallas/Fort Worth.”).

19. *Id.* at 2313 (alterations in original) (internal quotation marks omitted) (quoting *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 681 (W.D. Tex. 2014)).

shuttering clinics. And if the Court allowed Texas to enact those restrictions, then it would have rendered *Casey* largely toothless.²⁰ Upholding the restrictions would have meant that states could enact regulations on abortion that closed most, if not all, of the clinics in a state, without having to show that the regulations actually improved the health or safety of abortion.²¹

Upholding the restrictions also would have gone back on *Casey* in more formal ways as well as practical ones. *Casey* affirmed the core holding of *Roe* that women have a constitutionally protected, fundamental right to decide to end their pregnancies. Whereas the dissenters in *Roe* would have applied rational basis review to determine if the restrictions were valid,²² the plurality in *Casey* rejected rational basis review as the correct standard.²³

But upholding the regulations in *Whole Woman's Health* would have required the Court to apply rational basis review, since there was no evidence that the law actually furthered its purported purpose. In *Whole Woman's Health v. Cole*, the court of appeals upheld the Texas regulations on the ground that courts should not “substitute[] [their] own judgment[s] for that of the legislature” in part because “medical uncertainty underlying a statute is for resolution by legislatures, not the courts.”²⁴ In other words, the court of appeals said that a law was constitutional if “it is reasonably related to (or designed to further) a legitimate state interest.”²⁵ But that is the rational basis standard that the Court rejected in *Casey*. As the Supreme Court wrote in *Whole Woman's Health* when it rejected the courts of appeals’ “articulation of the relevant standard” as “incorrect”: “[It] is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue.”²⁶

Whole Woman's Health makes clear that it is not enough to speculate that a law might further some legitimate interest, or to say that the legislature

20. See Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When “Protecting Health” Obstructs Choice*, 125 YALE L.J. 1428, 1444–73 (2016).

21. See *id.*; Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman's Health*, 126 YALE L.J.F. 149 (2016); Leah M. Litman, *Unduly Burdening Women's Health: How Lower Courts Are Undermining Whole Woman's Health v. Hellerstedt*, 116 MICH. L. REV. ONLINE 50 (2017).

22. See *Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting) (“The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective.”); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 966 (1992) (Rehnquist, C.J., concurring) (“[W]e think that the correct analysis is that set forth by the plurality opinion in *Webster*. A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest.”).

23. See *Casey*, 505 U.S. at 876 (opinion of O'Connor, Kennedy & Souter, JJ.) (“In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.”).

24. *Whole Woman's Health v. Cole*, 790 F.3d 563, 572, 587 (5th Cir. 2015), *rev'd*, *Hellerstedt*, 136 S. Ct. 2292.

25. *Id.* at 572.

26. *Hellerstedt*, 136 S. Ct. at 2309.

reasonably thought it would further some legitimate interest. Rather, a state has to show the law actually does so. And that makes a difference to the *Casey* standard because “if a law does not amount to an unconstitutional burden if courts can invent a justification for it, then laws would be upheld even when there is no evidence that they would help any woman, ever.”²⁷

In *Whole Woman’s Health*, Justice Kennedy joined the five-three majority invalidating the Texas restrictions.²⁸ And that vote honored the commitment to the institution of the Court and to the principles of stare decisis that he had made in *Casey*.

I don’t want to make too much of those decisions. The Justice certainly had a muscular commitment to judicial supremacy, and he was not shy about overturning cases.²⁹ His final majority opinion on the Court, *South Dakota v. Wayfair*, overturned a major Dormant Commerce Clause decision.³⁰ In that case, the Chief Justice wrote a strong dissent sounding in institutionalist concerns.³¹

And even the decisions I highlighted above show only a partial commitment to institutionalism. In *Casey*, even though the Court retained the core holding of *Roe*, the Court modified the controlling standard that is used to evaluate whether abortion restrictions are constitutional. *Casey* declared that it was no longer the case that regulations on abortion had to satisfy the strict scrutiny standard. Rather, they would only have to satisfy the lesser undue burden standard.³² The dissenters in *Casey*³³ called the Court’s decision a “Potemkin village” of stare decisis and *Roe*—picking and choosing what aspects of a prior ruling to retain, and which to jettison, and modifying the applicable law in the process.³⁴

27. Leah Litman, Opinion, *A So-Called Victory Shows How the Supreme Court Will Kill ‘Roe v. Wade,’* WASH. POST (Feb. 8, 2018), https://www.washingtonpost.com/opinions/a-so-called-victory-shows-how-the-supreme-court-will-kill-roe-v-wade/2019/02/08/9229852a-2bd3-11e9-b2fc-721718903bfc_story.html?utm_term=.03ee152b3c9f.

28. The case was decided during the term that Justice Scalia had passed away.

29. See *Janus v. Am. Fed’n of State, Cty. & Mun. Emps. Council 31*, 138 S. Ct. 2448, 2460 (2018) (“*Abood* is therefore overruled.”); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010) (“*Austin* . . . should be and now is overruled.”).

30. 138 S. Ct. 2080, 2099 (2018) (“For these reasons, the Court concludes that the physical presence rule of *Quill* is unsound and incorrect. The Court’s decisions in *Quill Corp. v. North Dakota* and *National Bellas Hess, Inc. v. Department of Revenue of Ill.* should be, and now are, overruled.” (citations omitted)).

31. See *Wayfair*, 138 S. Ct. at 2102 (Roberts, C.J., dissenting) (“This is neither the first, nor the second, but the third time this Court has been asked whether a State may obligate sellers with no physical presence within its borders to collect tax on sales to residents. Whatever salience the adage ‘third time’s a charm’ has in daily life, it is a poor guide to Supreme Court decisionmaking.”).

32. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992) (plurality opinion) (opinion of O’Connor, Kennedy & Souter, JJ.).

33. The opinions were formally concurrences, but would have upheld all of the requirements and adopted a different legal standard.

34. *Casey*, 505 U.S. at 966 (Rehnquist, C.J., concurring in part and dissent in part) (“The sum of the joint opinion’s labors in the name of stare decisis and “legitimacy” is this: *Roe v. Wade* stands as a sort of judicial Potemkin Village, which may be pointed out to passers-by as a monument to the importance of adhering to

There are also other counter-examples. In *Gonzales v. Carhart*, Justice Kennedy wrote an opinion upholding a federal restriction on abortion by applying what looked, in some ways, like rational basis review. The Partial-Birth Abortion Act of 2003 prohibited a particular dilation and evacuation procedure, and it did so, the law declared, in order to avoid the “further coarsen[ing] [of] society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life.”³⁵

Justice Kennedy’s opinion in *Carhart* did not meaningfully inquire into whether the law actually furthered its purported objectives.³⁶ And there was little evidence that the partial dilation and evacuation procedure led to physicians who were uncertain about or slippery with their ethical obligations. There was also little evidence that the availability of the procedure did coarsen society to humanity. The Court nonetheless upheld the law.³⁷ And it discounted the burdens that the law imposed on women (particularly women with certain medical conditions) on the ground that there was medical uncertainty about the effects the law would have.³⁸

In a passage the court of appeals in *Whole Woman’s Health* relied on, Justice Kennedy wrote: “The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.”³⁹ And he offered completely unsubstantiated speculation to support the conclusion that the law furthered a valid purpose, which is inconsistent with the standard *Casey* articulated.⁴⁰ *Whole Woman’s Health* later pointedly recognized that courts and legislatures cannot offer unsupported speculation as a basis for upholding a law that restricts in abortion.⁴¹ Yet in *Carhart*, Justice Kennedy wrote:

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. *While we find no reliable data to measure the phenomenon*, it seems unexceptionable to conclude

precedent. But behind the facade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion.”)

35. *Gonzalez v. Carhart*, 550 U.S. 124, 157 (2007) (internal quotation marks omitted) (quoting Partial-Birth Abortion Act of 2003, Pub. L. 108-105, § 2, 117 Stat. 1201, 1206).

36. *See id.* at 132–68.

37. For an article exploring how this rationale is being used to and will likely continue to be used to undermine access to abortion, see Leah M. Litman, *Potential Life in the Doctrine*, 95 TEX. L. REV. 204 (2017).

38. *Carhart*, 550 U.S. at 177–81 (Ginsburg, J., dissenting).

39. *Id.* at 163 (majority opinion).

40. The legislative findings in *Carhart* also contained factual errors. *See* 550 U.S. at 175–76 (Ginsburg, J., dissenting). And upholding the law under those circumstances is also an indicia of rational basis review. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938) (explaining that the Court will uphold a statute under rational basis review so long as “the question is at least debatable”).

41. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309–13 (2016).

some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.⁴²

II. DIGNITY

The Justice's decisions on abortion also reflect the two sides of the Justice's commitment to dignity. We often think about the Justice's writings on dignity in the context of his decisions on LGBT rights⁴³ as Matt Coles mentioned,⁴⁴ or in the context of decisions about the Eighth Amendment's prohibition on cruel and unusual punishments.⁴⁵ But the Justice's commitment to dignity appears in the Justice's writings on abortion as well.

There's a famous passage in *Planned Parenthood of Southeastern Pennsylvania v. Casey* in which the Court explains why it was not overturning the core holding of *Roe*. The controlling plurality said that every human being has the capacity to define their own concept of existence and the mysteries of life:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

These considerations begin our analysis of the woman's interest in terminating her pregnancy . . .⁴⁶

That passage reflects the idea that each woman has the autonomy and dignity to decide when and whether to bring a child into existence, even if she chooses to have sex with a man. The Court made this explicit later on when it said:

Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; . . . Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child

42. *Carhart*, 550 U.S. 159 (emphasis added) (citations omitted); *see also id.* at 183 (Ginsburg, J., dissenting) ("Revealing in this regard, the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence . . .").

43. *E.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) ("They ask for equal dignity in the eyes of the law. The Constitution grants them that right."); *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) ("It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.").

44. Matt Coles, *The Profound Political but Elusive Legal Legacy of Justice Anthony Kennedy's LGBT Decisions*, 70 HASTINGS L.J. 1199 (2019).

45. *E.g.*, *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) ("The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be."); *Brown v. Plata*, 563 U.S. 493, 510 (2011) ("Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.").

46. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851–52 (1992) (plurality opinion).

to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.⁴⁷

It is that concept of dignity that is often overlooked in the abortion cases because it appears more clearly in the LGBTQ cases or the Eighth Amendment cases.

Indeed, in one of the cases upholding LGBTQ rights, *Lawrence v. Texas*, the Court specifically relied on *Casey* as a basis to overturn the Court's prior decision in *Bowers v. Hardwick*,⁴⁸ which had allowed states to prohibit sodomy.⁴⁹ As *Lawrence* explained, the passage in *Casey* that declared "[a]t the heart of liberty is the right to define one's own concept of existence" made clear that "[t]he decision in *Bowers* would deny" "[p]ersons in a homosexual relationship" the right to "seek autonomy for these purposes."⁵⁰ *Lawrence* further explained that *Casey* had made clear why *Bowers* "fail[ed] to appreciate the extent of the liberty at stake" in the case: "To say," as the Court did in *Bowers*, "that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward," because it fails to recognize how the statute "touche[s] upon the most private human conduct, sexual behavior."⁵¹

In *Whole Woman's Health*, there is another passage that reflects a similar idea about dignity. In explaining why the Texas regulations on abortion were unconstitutional, Justice Breyer wrote, and Justice Kennedy agreed, that the Texas regulations would have meant that women faced much longer waiting times in clinics, that they would have been forced to see doctors who have to see many, many, many more patients, and they would have been forced to travel great distances to clinics. *Whole Woman's Health* reasoned:

[I]n the face of no threat to women's health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered. Healthcare facilities and medical professionals are not fungible commodities. Surgical centers attempting to accommodate sudden, vastly increased demand may find that quality of care declines.⁵²

47. *Id.* at 852.

48. 478 U.S. 186 (1986).

49. *Lawrence*, 539 U.S. at 577–78.

50. *Id.* at 574 (internal quotation marks omitted) (quoting *Casey*, 505 U.S. at 851 (plurality opinion)).

51. *Id.* at 566–67.

52. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2318 (2016) (citation omitted).

For all of these reasons, the women would have been forced to accept a lower quality of care. That is, they would not have had the dignity of retaining and obtaining quality health care in making an important medical decision that would affect the remainder of their lives.⁵³ That reasoning in *Whole Woman's Health* reflects a capacity to see dignity in other people, including people who don't look like us or belong to the same groups as we do or live their lives in the way we do. And it is emblematic of one of the great capacities of a Justice—and really of a human being—and one of the bright spots of Justice Kennedy's jurisprudence and his career.

Matt Coles mentioned, for example, that in the LGBTQ cases, the Justice recognized that the laws at issue in *Romer*,⁵⁴ *Obergefell*,⁵⁵ and *Windsor*⁵⁶ all explicitly singled out LGBT individuals. Of course, in those cases, the states argued that those laws actually didn't explicitly single out LGBT individuals. The states argued that the laws apply to any man—gay or straight—and said that any man could not marry another man and that any woman—gay or straight—could not marry another woman.⁵⁷

Rejecting that argument required the judgment of a Justice who understood these laws are deeply, inextricably intertwined with LGBTQ identity and do not allow LGBTQ individuals to obtain the same recognition of the relationships of straight individuals. I think that that same capacity, the ability to recognize how laws burden some groups more than others even when you are not a member of that group, was also reflected in the words that the Justice used in *Casey* and in the opinion he joined in *Whole Woman's Health*.

Even though those ideas are sometimes present in the Justice's opinions on abortion, I don't know that anyone is capable of following through with that idea or ideal all of the time. In one of his later writings on the Court in *Young v. United Parcel Service, Inc.*, the Justice addressed a case of alleged pregnancy discrimination in which a UPS employee was not given an accommodation after she became pregnant and was unable to perform the physical labor that was usually required at her job.⁵⁸ Her employer refused to find duties that she could perform that would allow her to continue her pregnancy without risk of medical harm.

53. For articles elaborating on this argument, see Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189 (2017), and Greenhouse & Siegel, *supra* note 21, at 162.

54. *Romer v. Evans*, 517 U.S. 620 (1996).

55. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

56. *United States v. Windsor*, 570 U.S. 744 (2013).

57. See Transcript of Oral Argument at 80–81, *Obergefell*, 135 S. Ct. 2584 (No. 14-556) (“Absolutely. But that’s the State’s whole point, is that we’re not drawing distinctions based on the identity, the orientation, or the choices of anyone.”); *id.* at 81 (“Oh, gosh, no, because the State doesn’t care about your sexual orientation. What the State cares about is that biological reality.”); *id.* (“A statute that facially classified based on sexual orientation would look very different. What these statutes do is they have disparate impact . . .”).

58. 135 S. Ct. 1338 (2015).

The Justice wrote that there was no showing “of animus or hostility to pregnant women,” but that there still could be a concern about indifference though he suggested that indifference was “quite another matter” “as a matter of societal concern” from animus or hostility.⁵⁹ That kind of indifference arguably exists, for example, when an individual is unable to understand the burdens that befall another group or is unable to appreciate how a governmental policy or law can exacerbate or reflect societal prejudices, networks of private discrimination, or legacies of governmental discrimination.

Sometimes, that indifference was on display in the abortion cases the Justice decided. In *Gonzalez v. Carhart*, Justice Kennedy speculated that even though there was no evidence to support this claim, he thought it reasonable to believe that some number of women come to regret their abortions and that states could possibly restrict abortion on that basis.⁶⁰ More recently, in *National Institute of Family & Life Advocates v. Becerra (NIFLA)*, the Justice joined an opinion that offered a questionable distinction between informed-consent requirements on abortion and informed-consent requirements on pregnancy counseling.⁶¹ The distinction he embraced suggested a lack of understanding about the two procedures, or at least a lack of understanding about the perspectives of people who would undergo those procedures. In *Casey*, the Court had upheld a law that required doctors to disclose alternative options to patients seeking abortions (and also to disclose information related to the abortion). *NIFLA* distinguished that law, which the Court had upheld, from the California law that the Court invalidated. The California law required pregnancy crisis centers, which do not perform abortions, to disclose to their patients other options besides carrying a pregnancy to term, and specifically to advise them about the option of having an abortion with the assistance of public funding. And *NIFLA* did so on this basis: “The licensed notice at issue here is not an informed-consent requirement or any other regulation of professional conduct. The notice does not facilitate informed consent to a medical procedure. In fact, it is not tied to a procedure at all.”⁶²

Given the shockingly high rate of maternal mortalities in the United States, and the relative safety of the abortion procedure, it is odd that the Court suggested states could require abortion providers to offer medical disclosures, but could not require medical providers intending to promote childbirth to do the same.⁶³

59. *Id.* at 1366–67 (Kennedy, J., dissenting).

60. *See supra* text accompanying note 6.

61. 138 S. Ct. 2361 (2018).

62. *Id.* at 2373.

63. *See* Michael Ollove, *A Shocking Number of U.S. Women Still Die of Childbirth. California Is Doing Something About That.*, WASH. POST (Nov. 4, 2018), https://www.washingtonpost.com/national/health-science/a-shocking-number-of-us-women-still-die-from-childbirth-california-is-doing-something-about-that/2018/11/02/11042036-d7af-11e8-a10f-b51546b10756_story.html?noredirect=on&utm_term=.e1416c88b3fe. And the maternal mortality rates for black women are significantly higher than maternal

Or think of the cases involving the Hyde Amendment or the cases blessing states' ability to refuse to cover abortions as part of Medicaid insurance programs.⁶⁴ In those cases, the Court relied on reasoning along the lines of "the state actually didn't cause an individual woman to become poor. Therefore, it doesn't have to fund her ability to obtain an abortion."⁶⁵

That logic suggests the Justices were unable to put themselves in the position of women who might rely on Medicaid as their primary health insurance and to understand how women, through a combination of lack of access to birth control, sex education, contraceptives, and economic opportunities, together with institutional and cultural sexism and private discrimination, might find themselves in a position of not feeling ready or equipped to have or support a child.⁶⁶

That same inability to understand the prejudice and effects of a governmental policy when that prejudice or those effects do not fall on you comes up in other areas as well, such as voting rights cases. You can imagine taking some of the same language that Matt Coles was quoting from the Justices' writings on LGBTQ equality and applying it to, for example, voting discrimination.⁶⁷

That is, if we want to ask whether a voting restriction burdens a particular group, why don't we think of that in terms of dignity? Why don't we think of voting restrictions as denying someone equal participation in society, particularly voting restrictions that fall disproportionately on particular groups?⁶⁸

The inability to recognize how some governmental policies or laws disproportionately affect certain groups is, in part, a consequence of the fact that

mortality rates in the United States in general. See Nina Martin, *Black Mothers Keep Dying After Giving Birth. Shalon Irvin's Story Explains Why*, NPR (Dec. 7, 2017, 7:51 PM), <https://www.npr.org/2017/12/07/568948782/black-mothers-keep-dying-after-giving-birth-shalon-irvins-story-explains-why>.

64. *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977).

65. See, e.g., *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 507 (1989) ("[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." (alteration in original) (internal quotation marks omitted) (quoting *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989))); *Harris*, 448 U.S. at 318; *Maher*, 432 U.S. at 474 ("An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth . . .").

66. For articles expanding on this argument, see Chemerinsky & Goodwin, *supra* note 53, at 1238–44, and Michele Goodwin & Erwin Chemerinsky, *Pregnancy, Poverty, and the State*, 127 YALE L.J. 1270 (2018) (reviewing KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017)).

67. For an article expanding on this analogy, see Ellen D. Katz, *What the Marriage Equality Cases Tell Us About Voter ID*, 2015 U. CHI. LEGAL F. 211 (2015).

68. Compare, e.g., *Abbott v. Perez*, 138 S. Ct. 2305 (2018), with *id.* at 2335–60 (Sotomayor, J., dissenting), and *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016). In *Heart of Atlanta Motel, Inc. v. United States*, the Court stated that a "deprivation of personal dignity . . . surely accompanies denials of equal access to public establishments." 379 U.S. 241, 250 (1964) (internal quotation marks omitted).

dignity is amorphous. So a jurisprudence of dignity necessarily depends on who the decisionmakers are, and how they conceive of dignity. Dignity is, in some sense, in the eye of the beholder—whether they can see other people’s dignity, and understanding how other peoples’ dignity might be affected. A jurisprudence of dignity means that we rely on individual judges or justices to recognize the dignity of other people and to understand how their dignity might be implicated or affected by a particular law. But different decisionmakers’ different conceptions of dignity might be more or less problematic, and different decisionmakers might have different capacities to see the dignity in others who are not like them.

In the last five to ten to fifteen years, we have increasingly seen calls to recognize the dignity of fetuses or to recognize claims of personhood or the dignity of potential life.⁶⁹ Borrowing on that conception of dignity, states are increasingly justifying laws that would restrict abortion in the name of potential life and fetal personhood.⁷⁰ Is that conception of dignity going to be one that the current members of the Supreme Court or new appointments to the federal courts are going to recognize? Is that the concept of dignity that they are going to sign off on?

III. CIVILITY

Those are some of the limits to and promises of the Justice’s commitment to dignity. There are also promise and limits to the Justice’s commitment to civility.

When I say civility, I mean the notion that when we talk about a difficult issue, we do so respectfully and we ensure that both sides feel heard and acknowledged. This was, as Judge Feinerman suggested, one of the great gifts that Justice Kennedy gave to litigants, to the Court, and to the lawyerly community. It really felt as though it was the case, and I think it was the case, that everyone had a chance of having their argument prevail when they made an argument before him at the Supreme Court.⁷¹ Some people may question whether that is still the case today.

69. See Joshua J. Craddock, Note, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL’Y 539 (2017); Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13 (2013); Adrian Vermuele (@Vermeullarmine), TWITTER (Jan. 22, 2019, 2:29 PM), <https://twitter.com/Vermeullarmine/status/1087839616504397824> (“Which is why SCOTUS should not merely overturn Roe and Casey, but declare that the unborn child is a person protected by the 5th and 14th Amendments. (Justice Brennan’s opinions, and the ‘human dignity’ principle of Obergefell, will be particularly useful here.)”); Adrian Vermuele (@Vermeullarmine), TWITTER (Jan. 23, 2019, 3:44 PM), <https://twitter.com/Vermeullarmine/status/1088221059319545857> (“All the dark tools of Romer/Obergefell etc. will be pressed into service. It’s heightened-rational-basis irrational to extend homicide statutes so far and no farther, and/or the unborn are a suspect class, and/or fundamental rights talk, and/or outlawry, and/or human dignity.”).

70. See Litman, *supra* note 37.

71. This is also not necessarily a universally good thing. Some arguments probably should not have any chance of prevailing at the Supreme Court, including some of the arguments that Justice Kennedy voted for.

Even as Justice Kennedy would rule against both sides (since he would inevitably rule for both of them too), he would attempt to do so in a way that made both sides feel heard.

There were, of course, arguably some exceptions. In *Gonzalez v. Carhart*, he infamously had a throwaway line in which he suggested that even though there was no evidence to support this proposition, he surmised that some number of women would regret their abortions.⁷² All reliable medical evidence suggests that is not actually true.

But when Justice Kennedy would rule on matters of LGBT rights or abortion, he would generally do so by recognizing the good faith arguments on the other side. For example, in *Obergefell v. Hodges*, he explained that even though the Court held that states could not refuse to recognize same-sex marriages, disagreement with same-sex marriage occasionally reflected good faith religious views.⁷³ So too, in his abortion cases: He would recognize that the matter of abortion implicated good faith, sincerely held views about when life begins.⁷⁴

On the one hand, this is a good thing. After all, we like the idea of civility, and of recognizing and acknowledging both sides. There are, however, risks to this approach. What do I mean by that? Those lines can sometimes be picked up on and seized on in order to chip away at the relevant constitutional protections and constitutional rights. After *Obergefell*, of course, came *Masterpiece Cake Shop*, when several Justices seized on the idea that there can be good faith religious objections to same-sex marriage as a way to conclude that individuals cannot be forced to comply with generally applicable civil rights requirements when the individuals have religious objections to LGBTQ relationships or same-sex marriage.⁷⁵

That same idea is also used to justify restrictions on reproductive justice. For example, pharmacists argue that they have a right to not be compelled to

72. See *supra* text accompanying note 6.

73. See 135 S. Ct. 2584, 2602 (2015) (“Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.”).

74. See Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring) (“It does appear that viewpoint discrimination is inherent in the design and structure of this Act. This law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression. For here the State requires primarily pro-life pregnancy centers to promote the State’s own preferred message advertising abortions. This compels individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these. And the history of the Act’s passage and its underinclusive application suggest a real possibility that these individuals were targeted because of their beliefs.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (plurality opinion) (“Abortion is a unique act. It is an act fraught with consequences for others . . . depending on one’s beliefs, for the life or potential life that is aborted.”).

75. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring); *id.* at 1740 (Thomas, J., concurring).

fulfill prescriptions either for Plan B or other forms of contraception because it is contrary to their religious beliefs. This was also the argument on behalf of the individuals and entities that claimed they should be exempt from the Affordable Care Act's requirement for insurance to cover contraception access.⁷⁶

This is also an argument that government officials, such as the former Office of Refugee Resettlement director, Scott Lloyd, have relied on. Lloyd invoked this line of reasoning to argue that he does not have to temporarily release women from government custody so that they can obtain abortions.⁷⁷ He argued that his religious beliefs include the belief that abortion is immoral and that he therefore does not have to allow women in his custody (government custody) to be able to obtain abortions.

Justice Kennedy's civility-focused approach to deciding issues thus can be used as a way to undermine protections for certain groups.

And that is a problem if we think there is a limit to how much the civility of our words can do. I mentioned the example of Scott Lloyd, the director of the Office of Refugee Resettlement, who was not allowing undocumented minor women in his custody to obtain abortions. He was arguing that he, as their guardian, had the authority to conclude that it is in their best interest not to get an abortion even when they are victims of rape.⁷⁸

Are there any words he could use—civil, polite, respectful discourse—to justify those actions? Would civil language be sufficient to make his actions legitimate? Is civil discourse enough, or is there some limit to what we can say is civil based only on the words that are used, rather than the actions that are taken?⁷⁹

We can make the same point by focusing on the Justice's final writings on the Court, or even about the Justice's decision to retire. As I wrote in a tribute shortly after the Justice retired:

[T]he Justice's concurrence in *Trump v. Hawaii* . . . offered a gentle reminder that it is "imperative" and an "urgent necessity" that officials "adhere to the Constitution." The Justice voted to reverse the lower courts' injunction against President Trump's ban on entry into the United States by nationals of several Muslim-majority countries. The ban came after the President's campaign promise of a "total and complete shutdown of Muslims entering the United States."

76. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). For a longer discussion of such claims, see Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516 (2015); Douglas NeJaime & Reva B. Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 *YALE L.J.F.* 201 (2018).

77. See Motion for Preliminary Injunction at Exhibit C, *Garza v. Hargan*, 304 F. Supp. 3d 145 (D.D.C. 2018) (No. 1:17-cv-02122); Notice of Filing Redacted ORR Pursuant to Order, *Garza*, 304 F. Supp. 3d 145 (No. 1:17-cv-02122); see also Application for a Stay Pending Appeal, *Hargan v. Garza*, No. 17-A655 (U.S. Sept. 18, 2018); Emergency Motion to Stay, *Garza v. Hargan*, No. 17-5276 (D.C. Cir. Dec. 18, 2017).

78. See Notice of Filing Redacted ORR Pursuant to Order, *supra* note 77.

79. For the argument that civility and etiquette must include some judgment about the underlying actions themselves, see Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 *HARV. L. REV.* 133 (2018).

The Justice's concurrence in *Trump v. Hawaii* contained his last words on the Court, and in some ways, it is fitting that he went out on his unshakeable faith in the power of words—in this case, his words—to redeem us. It's a belief that he's held for a long time, and it very much represents who he is. In a speech fifteen years ago to the American Bar Association, for example, the Justice implored the legal profession that “[n]o public official should echo the sentiments of the Arizona sheriff who once said with great pride that he ‘runs a very bad jail.’”

That sheriff, of course, was Joe Arpaio, the man who was convicted of violating a federal court order that directed him to stop systematically violating the Fourth Amendment. In August 2017, President Trump pardoned Mr. Arpaio. Other members of the Trump Administration have similarly championed the former sheriff, a man who used state power in brutal and coercive ways that often fell on the Latinx community, as a defender of the rule of law.

Perhaps there is something of a sad irony to how this all played out. A man who valued decorum so much he practically apologized for every one of his dissents retired during the administration of, and thus solidified the power of, a man who began his presidential campaign by referring to Mexicans as criminals and rapists, and who bragged, on tape, about grabbing women by the pussy.

But perhaps there are some lessons here as well as some ironies. If the real threat to civil society is having the audacity to call a racist a racist or a fascist a fascist, perhaps the “civil” thing to do is to hand that person the keys to the kingdom and ask them to play nice. It's a relatable decision, if nothing else; I've come to appreciate the difficulty of calling out someone you know and perhaps like, or someone you worked with (or perhaps someone you worked for), for doing something that may enable evil, even if unintentionally, and even though they may have had (otherwise) legitimate reasons for doing so.⁸⁰

CONCLUSION

What I wanted to note is how the Justice's abortion jurisprudence illustrates his commitment to civility, his commitment to dignity, and his commitment to institutional integrity. All of those commitments are worth celebrating, though they also all have their limits and can be used, in some cases, to the detriment of themselves.

80. Leah M. Litman, *In Tribute: Justice Anthony M. Kennedy*, 132 HARV. L. REV. 17, 20–22 (2018) (footnotes omitted) (first quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring); then quoting *id.* at 2423; and then quoting Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-09-03).
