

Case Western Reserve Law Review

Volume 64

Spring 2014

Issue 3

SAME-SEX MARRIAGE, FEDERALISM, AND JUDICIAL SUPREMACY

Robert F. Nagel

SAME-SEX MARRIAGE, FEDERALISM, AND JUDICIAL SUPREMACY

Robert F. Nagel[†]

ABSTRACT

Justice Kennedy's opinion in *United States v. Windsor* is characterized by a number of strained and wavering constitutional claims. Prominent among these is the argument that the principle of federalism calls into question the congressional decision to adopt the traditional definition of marriage, which the state of New York rejected. An examination of earlier federalism cases demonstrates that Kennedy's appreciation for federalism is in fact severely limited and suggests and that his lax use of legal authority is directly—if perversely—related to this limited appreciation.

Federalism cases prior to *Windsor* show that Justice Kennedy supports state authority only when it presents no serious challenge to national authority. Indeed, the cases indicate that he is deeply fearful that a robust system of federalism would be dangerous to nationhood. Furthermore, he sees national authority as fragile in part because he has long understood the Court's constitutional decisions, a principal symbol of nationhood, as being based only loosely in conventional legal authority and, therefore, to be highly contestable. The *Windsor* opinion's imprecise argumentation reflects this skepticism about the conclusiveness of conventional legal authority.

Perversely, it is this same skepticism that has led Justice Kennedy to support a strong version of judicial supremacy in cases like *Casey v. Planned Parenthood*, where a state contested the Court's interpretative power, and *Brown v. Plata*, where a state undermined a federal court's remedial authority. Thus, *Windsor* cannot realistically be viewed as being based on respect for state authority over the issue of marriage; rather, Justice Kennedy's opinion in *Windsor* insists that Congress should have deferred to New York's definition of marriage because that definition reinforced, rather than challenged, the Court's earlier pronouncements on gay rights in *Romer v. Evans* and *Lawrence v. Texas*. In short, *Windsor* rests on an exalted view of the need for the Supreme Court's supremacy and at the same time exhibits the reasons for self-doubt that underlie this exalted view.

CONTENTS

INTRODUCTION.....	1120
-------------------	------

[†] Rothgerber Professor of Constitutional Law, University of Colorado Law School.

I. JUSTICE KENNEDY FAVORS STATE AUTHORITY IN CASES INVOLVING
INCONSEQUENTIAL CONFLICTS WITH NATIONAL AUTHORITY..... 1121

II. JUSTICE KENNEDY FAVORS NATIONAL AUTHORITY IN CASES
INVOLVING SIGNIFICANT CONFLICT BETWEEN STATE AND
NATIONAL AUTHORITY 1123

CONCLUSION..... 1129

INTRODUCTION

Justice Anthony Kennedy’s opinion for the Court in *United States v. Windsor*¹ is notable for a series of doctrinal feints.² The opinion relies heavily on equal protection precedents, but in the end these are used to establish a value (“equal liberty”) ascribed to the Due Process Clause. Similarly, the opinion shifts from a deferential standard of review to a highly suspicious assessment of legislative motivation. Most glaring is Justice Kennedy’s, on-again, off-again reliance on the principle of federalism. After an extended discussion suggesting that regulation of marriage might be a reserved power of the states, he concludes that it is unnecessary to decide this question because state authority over marriage is “of central relevance in this case quite apart from principles of federalism.”³ The opinion then argues that Congress’s “unusual deviation” from accepting a state’s definition of marriage is evidence of illicit disapproval of same-sex marriage.⁴

It might seem to follow from this emphasis on state authority over marriage that Justice Kennedy would be required also to respect traditional state definitions of marriage in a case challenging the constitutionality of such laws. Perhaps, this is why Chief Justice Roberts comments in his dissent that “it is undeniable” that the Court’s judgment is “based on federalism.”⁵ In contrast, Justice Scalia argues that Justice Kennedy is locked in, not to deference to state judgments about marriage, but to condemnation of state laws limiting marriage to heterosexual couples.⁶ The Roberts position, I would guess, will be dismissed by cynics and realists who think that in *Windsor* Kennedy is simply enforcing his own strong views about the centrality of the right to sexual freedom and his obvious sympathy for homosexuals. Legalists, however, might reply that Kennedy’s emphasis on deference to state authority cannot be cavalierly

1. 133 S. Ct. 2675 (2013).
2. They are fully described by Justice Scalia. *Id.* at 2698 (Scalia, J., dissenting).
3. *Id.* at 2692 (majority opinion).
4. *Id.* at 2693.
5. *Id.* at 2697 (Roberts, C. J., dissenting).
6. *Id.* at 2705–06 (Scalia, J., dissenting).

dismissed in light of his strong record favoring a vigorous role for states in our federal system.⁷

One point I wish to make in this brief Article is that, despite the state sovereignty rhetoric found in many of Justice Kennedy's decisions, he supports only a weak version of the principle of federalism. In fact, taken as a whole, Justice Kennedy's record demonstrates a deep fear of political disintegration; therefore, his support for federalism is limited to circumstances where the assertion of state power does not seriously challenge—or in some way actually enhances—the authority of the central government. The notion that he would allow a deeply divisive issue like same-sex marriage to be decided in a variety of ways in states across the country is inconsistent with his deeply held view about the need for unchallenged, central authority. A larger point follows from this. Those doctrinal feints in *Windsor*, including Justice Kennedy's confused and ambivalent reliance on federalism, are closely related to an aspect of the decision that is perfectly clear: his commitment to judicial supremacy. Perversely, the looser the conception of law, the more crucial seems that institutional apex of central authority, the Supreme Court.

I. JUSTICE KENNEDY FAVORS STATE AUTHORITY IN CASES INVOLVING INCONSEQUENTIAL CONFLICTS WITH NATIONAL AUTHORITY

In a surprising number of federalism cases, the assertion of state authority involves no threat or only a minor threat to national authority. Indeed, it is possible for the assertion of state authority to enhance aspects of central authority. Consider, for example, *Hollingsworth v. Perry*,⁸ the case challenging California's constitutional provision prohibiting same sex marriage. Justice Kennedy argued that the Court should have deferred to the state law judgment that proponents of a state initiative should be authorized to defend that initiative in court, a position that would have allowed the Supreme Court to resolve the constitutional issues raised by traditional state marriage laws.⁹ To take a different example, when the Court, in an opinion authored by Kennedy, invalidated the application of a prior version of the Religious Freedom Restoration Act¹⁰ to the states, the Court protected state autonomy to impose reasonable and nondiscriminatory regulations on religious behavior. In

7. See cases cited *infra* notes 8–16 and accompanying text.

8. 133 S. Ct. 2652 (2013).

9. *Id.* at 2668–69.

10. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

doing so, however, it also protected the authoritativeness of its own interpretation of the Free Exercise Clause.

More commonly, protecting state authority does challenge central authority—but only marginally. Despite the uproar among nationalistic legal scholars caused by the Court’s invalidation of the Guns in Schools Act¹¹ and the Violence Against Women Act,¹² such cases involve challenges to discretionary policies that originate in an institution that is itself subject to strong parochial pressures. Moreover, these national policies, while frustrated by the defined limits of Congress’s delegated powers, can often be achieved by resorting to the taxing and spending power, and, in any event, the remaining regulatory powers of Congress remain vast in their reach. Justice Kennedy’s votes in the cases defining limits to enumerated powers, even including his vote to invalidate the Affordable Care Act,¹³ cannot, therefore, be seen as countenancing major or permanent loss of the federal government’s power.

Much the same can be said of Eleventh Amendment cases where a congressional policy is found to conflict with state control over the immunity of their courts. The national legislative powers involved in these cases can be achieved through a range of enforcement mechanisms other than state courts, a fact that Justice Kennedy has fully explored and emphasized.¹⁴ Similarly, Tenth Amendment cases that protect state legislative and executive functions from federal commandeering¹⁵ leave Congress free to achieve its preferred policies

-
11. 18 U.S.C. § 922 (2012), *invalidated by* United States v. Lopez, 514 U.S. 549, 551 (1995).
 12. 42 U.S.C. § 13981 (2006), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).
 13. The dissenting opinion in *National Federation of Independent Business v. Sebelius* (which Kennedy joined) remains committed to *Wickard v. Filburn*, a decision once widely assumed to authorize virtually unlimited scope to Congress’s commerce power. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2648 (2012) (Scalia, J., dissenting). It is true that this dissent denies that the Affordable Care Act is justified under the taxing power and also contains an understanding of the Necessary and Proper Clause that has some potential for constricting the power of the national government. However, it remains within Congress’s power to modify the terms of the statute to meet the dissenters’ definition of a tax. See *id.* at 2648–55. Moreover, given the long history of judicial deference to Congress’s judgment about the means it chooses to enforce its enumerated powers, it is unlikely that the dissenters’ position on the meaning of “necessary and proper” will turn out to be an important constraint.
 14. See *Alden v. Maine*, 527 U.S. 706, 754–57 (1998) (discussing what role a state’s sovereign immunity plays in enforcing federal law).
 15. See *Printz v. United States*, 521 U.S. 898, 925 (1997); see also *New York v. United States*, 505 U.S. 144, 149 (1992) (holding that “while Congress has substantial power under the Constitution to encourage the

through generally applicable statutes¹⁶ or by the federal government itself.

II. JUSTICE KENNEDY FAVORS NATIONAL AUTHORITY IN CASES INVOLVING SIGNIFICANT CONFLICT BETWEEN STATE AND NATIONAL AUTHORITY

There is, of course, a set of cases involving more significant conflicts between state and federal authority.¹⁷ These conflicts are more significant because they involve inconsistencies between local legislative judgments and constitutional judgments of the Supreme Court, judgments that can be viewed as the highest expression of

States to [enact a legislative program consistent with federal interests], the Constitution does not confer upon Congress the ability simply to compel the States to do so”).

16. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985) (stating that the Court has “not hesitated [to overrule recent precedent] when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause”).
17. Less easily categorized are dormant commerce clause cases and preemption cases. In the former, congressional authority has not been exercised. The conflict, therefore, can be seen as implicating the Court’s authority to enforce a value (nondiscriminatory trade) that it finds to have constitutional status. To this extent in dormant commerce clause cases national authority is in significant conflict with state authority. In preemption cases, of course, the claim is that a state statute conflicts with a federal statutory scheme. Therefore, preemption cases might be analogized to cases where discretionary national legislative policies conflict with state legislative policies. Nevertheless, these cases also involve national judicial authority because any inconsistency between national and local policies is based on a judicial construction of the federal statutory scheme and the Court’s judgment about the degree of state interference with national purposes. In important instances Justice Kennedy votes in both of these types of cases in favor of limiting the power of the states. *See e.g.*, *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 366 (2000) (finding Massachusetts’s prohibition on trade with Burma was preempted); *Arizona v. United States*, 132 S. Ct. 2492, 2494 (2012) (holding that an Arizona statute criminalizing undocumented status and authorizing law enforcement to arrest any suspected undocumented aliens was preempted); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 271, 273–74 (1988) (deciding that “a provision that awards a tax credit against the Ohio motor vehicle fuel sales tax for each gallon of ethanol sold (as a component of gasohol) by fuel dealers, but only if the ethanol is produced in Ohio or in a State that grants similar tax advantages to ethanol produced in Ohio” violates the Commerce Clause); *Carbone v. Clarkstown*, 511 U.S. 383, 386 (1994) (determining that a flow-control ordinance which required all solid waste to be processed at a municipal transfer station violated the Commerce Clause because it deprived competitors of access to the local market).

centralized authority because they involve the supreme law of the land as announced by an institution relatively insulated from parochial political pressures. In the bulk of these cases, including two important gay-rights decisions authored by Justice Kennedy,¹⁸ state statutes are invalidated as being inconsistent with the Constitution. Others involve state institutions resisting federal injunctive decrees that are meant to enforce the Court's constitutional interpretations.¹⁹ Still others involve state institutions directly contesting such interpretations by enforcing laws that are designed to prod the Court into limiting or reversing an announced constitutional principle.²⁰

In this set of cases, Justice Kennedy strongly favors national authority and tends to describe decentralized decision making not as an expression of a healthy system of federalism, but as unjustified, even wholly irrational or vicious. On occasion he has gone so far as to depict localized decision making as a dire threat to the rule of law and the Constitutional system.

It is important to recognize that these characterizations of Justice Kennedy's disapproval and fear of decentralized authority are not unlikely inferences constructed from free-wheeling interpretations of his positions. They are based on his own words. In the legal academy there is, I think, an unwillingness to appreciate the full import of these words. This could be, of course, because Kennedy's sentiments are widely shared and therefore seem unremarkable. It could also be because the exaggeration and invective that are found in much of our constitutional discourse have inured the Justice's audience. At any rate, it is instructive to offer some examples of the kind of language that Justice Kennedy employs when the authority of the national government is challenged in a serious way.

In *Romer v. Evans*,²¹ Justice Kennedy authored an opinion that invalidated a state initiative ("Amendment 2") that prohibited "any . . . claim of discrimination" based on homosexual status.²² The public arguments made by the proponents of Amendment 2 indicated that its main purpose was to prevent the gradual establishment of specially protected legal status for homosexuals.²³ Now, it certainly can be doubted that it would be wise to prevent homosexuality from becoming a suspect class, and, in any event, it can be doubted that a

-
18. *Romer v. Evans*, 517 U.S. 620, 623 (1996); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).
 19. *Brown v. Plata*, 131 S. Ct. 1910 (2011).
 20. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
 21. 517 U.S. 620 (1996).
 22. *Id.* at 623–25.
 23. Stephen Bransford, *Gay Politics vs. Colorado and America: The Inside Story of Amendment 2*, at 7 (1994).

state constitutional amendment like Amendment 2 would be a practical means to achieve that goal. But it cannot be doubted that the Supreme Court's equal protection cases have (rather paradoxically) established different degrees of protection from discrimination for different groups. Nor can it be doubted that various governmental institutions, including the Court, could establish (and, in some instances, have established) a special level of legal protection for homosexuals.

The *Romer* opinion averts to none of these considerations. From the breadth of Amendment 2's language, Justice Kennedy concludes that the initiative seemed "inexplicable by anything but animus."²⁴ Indeed, he asserts as an "inevitable inference"²⁵ that the law was "born of animosity,"²⁶ a "bare . . . desire to harm a politically unpopular group."²⁷ Thus Justice Kennedy could not understand what he described as a challenge to "our constitutional tradition" as anything other than an irrational act of hatred.²⁸

When state-based policies collide with what the Court conceives to be our national legal norms and traditions, to Kennedy the consequences can seem not only morally ugly, but dangerous to nationhood itself. In a case challenging a state law that limited the terms of congressional representatives elected from that state, Justice Kennedy concurred in an opinion invalidating the law.²⁹ Kennedy argued that term limits implicated the idea that "the sole political identity of an American is with the State of his or her residence."³⁰ Thus, he depicted state-based term limits as threatening the very idea of nationhood by denying that citizens and their representatives in Congress need have any sense of loyalty or responsibility to the nation as a whole.

In modern times, with the enormous size and importance of the federal government firmly established, this claim is so unrealistic as to be baffling. What could have driven the thoughtful and careful Justice Kennedy to such an unlikely fear? The answer, perhaps, can be found in the majority's opinion, which argues that national representatives "owe their allegiance to the people [of the whole nation], and not to the States."³¹ Indeed, this idea is repeated in the

24. *Romer v. Evans*, 517 U.S. 620, 632 (1995).

25. *Id.* at 634.

26. *Id.*

27. *Id.*

28. *Id.* at 633.

29. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

30. *Id.* at 840.

31. *Id.* at 804 (majority opinion).

opinion's final paragraph: "Members of Congress . . . become, when elected, servants of the people of the United States."³² Apparently members of the politically-insulated Supreme Court, including Justice Kennedy, see political ties to localities as so parochial and divisive that the very idea of divided loyalties must be denied.

The authority of the national government is even more starkly challenged when a state institution does not comply with an injunction designed to correct a condition found by a lower federal court to violate a constitutional standard defined by the Supreme Court. In such instances, the noncompliance, whether caused by outright defiance or by differing priorities, is not merely a conflict between a locality's judgment about what is constitutionally permissible and the Court's subsequent determination. It is a conflict between, on the one hand, a judicial determination that a particular condition violates an existing constitutional requirement and, on the other, a locality's continuing recalcitrance.

In the litigation that culminated in *Brown v. Plata*,³³ a lower federal court had found that over-crowding in California's prison system violated the prohibition against cruel and unusual punishment by resulting in grossly inadequate levels of medical care.³⁴ The court ordered a series of reforms, including ambitious construction and hiring programs. These changes were not fully implemented because of budgetary shortfalls and a variety of administrative failures.³⁵ Eventually (after five years in one case and twelve in another), the lower court ordered the state to release 46,000 prisoners system-wide.³⁶ This decree was challenged as being in violation of the Prison Litigation Reform Act,³⁷ which limits the authority of federal judges to take control of state institutions.³⁸ Among the state's claims was the argument that the scope of the remedy exceeded the scope of the constitutional violation since the release of prisoners was not limited to those who had suffered inadequate medical attention.

Writing for the majority, Justice Kennedy upheld the decree. He described the underlying prison conditions as threatening the "essence of human dignity"³⁹ and explained the state's noncompliance in part

32. *Id.* at 837–38.

33. 131 S. Ct. 1910 (2011).

34. *Id.* at 1922.

35. *Id.* at 1926–27.

36. *Id.* at 1923.

37. 18 U.S.C. § 3626 (2012).

38. *Brown*, 131 S. Ct. at 1922–23.

39. *Id.* at 1928.

on “lack of political will.”⁴⁰ He asserted that the injunction could apply to healthy prisoners because all prisoners were at risk of receiving inadequate medical care if at some point they developed a need for such care.⁴¹ Appealing for the need for flexibility in designing structural injunctions, Kennedy denied that judicial control over difficult executive and legislative decisions, including predictions about the degree of danger posed to the public by various prisoner release plans, exceeded the judicial role.⁴²

Justice Scalia’s dissent claims that the Court’s decision affirmed “what is perhaps the most radical injunction issued by a court in our Nation’s history.”⁴³ Whether this is accurate or not, there can be no doubt that Justice Kennedy’s opinion revived the wide-open conception of the judicial role from the era of the institutional reform decrees in the 1970s and 1980s when lower federal courts had attempted to run local school districts, prisons, mental hospitals, and public housing programs. This revival is startling in light of the efforts by both the Court and Congress to place limits on the power of federal courts to operate public institutions.

Kennedy’s opinion in *Brown* demonstrates that when state recalcitrance causes a direct conflict between state power and explicit expressions of national authority, Justice Kennedy graphically displays certain familiar tendencies. First, there is a laxity in the legal concepts employed. The constitutional right is defined in lofty terms (“the essence of human dignity”),⁴⁴ and the specific violation is conceived of expansively (encompassing an entire prison system, including inmates who have not been mistreated). Second, state level recalcitrance is not viewed as an instance of sobering disagreement that should naturally lead to second thoughts about the exercise of national power. Rather the disagreements are depicted simply as failures (“lack of political will”).⁴⁵ Third, the consequence of the clash between national authority and state authority is an expanded role for the federal judiciary.

Although national authority is certainly challenged when states resist injunctions, as in *Brown*, the challenge to the Supreme Court itself is somewhat indirect since it is always possible that the lower court’s decree might have exceeded what is necessary to protect the constitutional principle previously announced by the Court. However,

40. *Id.* at 1936.

41. *Id.* at 1940.

42. *Id.* at 1944.

43. *Id.* at 1950.

44. *Id.* at 1928.

45. *Id.* at 1936.

in the circumstances of *Planned Parenthood v. Casey*,⁴⁶ even this slight degree of attenuation is missing. *Casey*, of course, upheld the fundamental holding of *Roe v. Wade*⁴⁷ that had established a fundamental constitutional right to abortion.⁴⁸ In this sense the state legislation at issue in *Casey* was the culmination of numerous state efforts over decades to get the Supreme Court to reconsider its decision in *Roe*.

Justice Kennedy co-authored the famous plurality opinion. To say the least, this opinion richly displays the intellectual impulses already identified. Its defense and conceptualization of the legal basis of the underlying right is loose indeed. In fact, the plurality acknowledges that there is “weight” to the arguments for overruling *Roe*.⁴⁹ It declines to do so, however, partly on the ground that the liberties protected by the Due Process Clause extend to: “choices central to personal dignity and autonomy 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.”⁵⁰ And the scope of this right is as uncertain as its derivation, for state restrictions on abortion violate this right if they create an “undue burden.”⁵¹

The plurality perceives state-based resistance to *Roe* as representing an intense struggle with national authority, almost combat. The *Roe* plurality Justices declare that they cannot create the impression that they will “surrender” to political pressure.⁵² To those who have accepted the ruling in *Roe*, “the Court . . . undertakes to remain steadfast.”⁵³ To overrule that decision, to give in to political “fire,”⁵⁴ would amount to “a breach of faith.”⁵⁵

As described by the plurality, this struggle implicates a judicial role that is staggering in its reach and significance. The plurality calmly reports that the myriad of disputed and profound questions—whether philosophical, religious, medical, and psychological—that were implicated by *Roe* all “fall within judicial competence.”⁵⁶ Moreover, the plurality displays no self-doubt in reporting that *Roe*

46. 505 U.S. 833 (1992).

47. 410 U.S. 113 (1973).

48. *Casey*, 505 U.S. at 845–46.

49. *Id.* at 853.

50. *Id.* at 851.

51. *Id.* at 874.

52. *Id.* at 867.

53. *Id.* at 868.

54. *Id.* at 867.

55. *Id.* at 868.

56. *Id.* at 855.

resulted in fundamental social transformation. It changed the way “people have organized intimate relationships and made choices that define their views of themselves and their places in society.”⁵⁷ Perhaps more astonishingly, one purpose of *Roe* was to “call[] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”⁵⁸ To give in to those who disagree with the Court would exact a “terrible price.”⁵⁹

Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to . . . speak before all others for their constitutional ideals.⁶⁰

Both the rule of law and nationhood itself are, apparently, fragile. The Court’s role in authoritatively resolving certain crucial constitutional cases is thought to be essential to both.

CONCLUSION

In a case challenging the constitutionality of traditional state marriage laws, the outcome would turn on the degree of deference that Justice Kennedy gives to state judgments about sensitive issues of morality, psychology, and sociology. To the extent that the state’s judgments on these matters differed from Justice Kennedy’s own, especially to the extent that his own judgments were already expressed in prior constitutional decisions, his record indicates that he would see the state’s judgments as illegitimate and even dangerous. This suggests that in *Windsor*, Kennedy respected, and even extolled, the state policy judgments favoring same-sex marriage, not so much because of principles of federalism, but because the New York law presented little challenge to centralized authority and, indeed, reinforced controversial opinions expressed by the Supreme Court in cases like *Romer* and *Lawrence*.

Recall the tentative, inconclusive nature of Justice Kennedy’s reliance on federalism in *Windsor* (as well the loose use of other legal materials). It may seem odd for an opinion to combine rather ambiguous and unsupported references to doctrines and precedent

57. *Id.* at 856.

58. *Id.* at 867.

59. *Id.* at 864.

60. *Id.* at 868.

with the kind of inflated view of the country's need for judicial supremacy that I have been describing. Indeed, by one view, the modern fixation on judicial supremacy can be explained by the revival of legal "fundamentalism," which sees constitutional questions as narrowly legalistic and therefore entirely within the realm of judicial expertise.⁶¹ Justice Kennedy's opinion in *Windsor* suggests that just the opposite may be true.

Beginning with Justice Kennedy's confirmation hearings⁶² and running through cases like *Romer*, *Lawrence*, and *Windsor*, Justice Kennedy has demonstrated an inclination to see legal authority in at least some kinds of constitutional cases as necessarily soft or indeterminate. It is plausible that a justice holding this view—especially if it is combined with a belief that this kind of legal authority must be applied to controversial matters that can in no way be regarded as within the special competence of judges—is also inclined to believe that the underpinnings of the central government's authority are fragile. For such a justice, the Court must displace political authority on the basis of wavering, indistinct legal explanations and without any special expertise at resolving the underlying cultural issues in question. It may be, then, that Justice Kennedy's version of legal realism undermines his capacity to feel confidence in the justifications put forward in controversial cases. The more insecure national authority—as represented by the Supreme Court's constitutional pronouncements—seems, the more dangerous robust assertions of state power seem. As a distinctive sense of law recedes, judicial supremacy emerges.

61. Larry Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5, 169 (2001).

62. In the course of his confirmation hearings, then Judge Kennedy wrote:

The framers chose their words with great care. Those words have an objective meaning that we should ascertain from the perspective of history and our constitutional experience. The words of the Constitution, their objective meaning, and the official consequence of their enactment as a constitutional rule, are the principal guides to constitutional interpretation. This said, please permit me to underscore my earlier statements that I do not have a unitary or grand design of constitutional interpretation.

The Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States Before the Committee on the Judiciary United States Senate, 100th Cong. 743 (1987). At his confirmation hearing, Judge Kennedy replied to a question on textual interpretation in a similar fashion: "Remember, though, Senator, that the 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." *Id.* at 86 (statement of Judge Anthony M. Kennedy).