



# THE LOVE SONG OF J. ANTHONY KENNEDY

*Steven M. Klepper*

**T**HE JUNE 2015 MARRIAGE equality decision in *Obergefell v. Hodges*<sup>1</sup> fell during the same month as the 100th anniversary of the publication of T.S. Eliot's *The Love Song of J. Alfred Prufrock*. There has been a great recent debate over the value of a liberal arts degree. I graduated from Goucher College, and I can tell you that a liberal arts degree can lead to spending your leisure time doing things like writing a *Prufrock* spoof from the perspective of a sitting justice. Whether that helps or hurts the cause, I do not know.

The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment.<sup>2</sup>

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<sup>1</sup> 135 S. Ct. 2584 (2015).

<sup>2</sup> Eliot began *Prufrock* with a quote (in Italian) from THE INFERNO. I'll begin with a quote from Alexander Hamilton, writing as "Publius" in THE FEDERALIST NO. 78. The reason for these footnotes is that I suspect most or all of this piece will become hopelessly dated in the next ten years, and I wish to be able to inform the future reader and my future self what I was thinking.

Steven M. Klepper

Let us go then, you and me  
To my chambers at 1 First Street  
In a Depression-era edifice of marble.  
Let us drive, into the justices' private garage  
Avoiding the mirage  
Of openness at the grand front steps  
Closed to the public for security checks:<sup>3</sup>  
Past depopulated library stacks infinite  
Obsoleted by the Internet.  
To lead you to an overwhelming question . . .  
Oh, don't ask, "What's your role?"  
Let us go down the rabbit hole.

Online, the bloggers come and go  
Repeating zingers from Nino.<sup>4</sup>

The black robes that separate us from the teeming masses,  
The black robe that complements my wire-rim glasses,  
Was zipped 'round my body in the robing room  
Before emerging from the curtain to cries of "oyez"  
Nestling in my leather chair just next to center  
'Tween Roberts and Ginsburg (not just literally)  
For another first Monday in October  
To question another Echo Chamber attorney.<sup>5</sup>

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<sup>3</sup> The Court's front entrance has been closed for public entry (though not exit) since 2010, for security purposes. See Statement Concerning the Supreme Court's Front Entrance, 2009 S. Ct. J. 779 (May 3, 2010) (Breyer, J., joined by Ginsburg, J.) ("I write with regret to note the closing of the Court's front entrance . . . [such that] visitors to the Court – including the parties whose cases we decide, the attorneys who argue those cases, and the members of the public who come to listen and to observe their government in action – will have to enter through a side door."). Also, the "mirage of openness" reflects the Court's adherence to its no-cameras-in-the-courtroom policy, which does much to preserve Justice Kennedy's anonymity. See Jonathan Sherman, *End the Supreme Court's Ban on Cameras*, N.Y. TIMES, Apr. 24, 2015, [www.nytimes.com/2015/04/24/opinion/open-the-supreme-court-to-cameras.html](http://www.nytimes.com/2015/04/24/opinion/open-the-supreme-court-to-cameras.html).

<sup>4</sup> Justice Antonin Scalia is known as "Nino" among his colleagues. It's much more poetic than "Scalia," even where (as here) it leads to an incorrect emphasis on the second syllable.

<sup>5</sup> This line refers to a recent article describing how 66 attorneys dominate the Court's

## *The Love Song of J. Anthony Kennedy*

And indeed I have found time,  
To rise from solo practice in Sacramento  
To sit on the world's most powerful bench.  
I bided time, I bided time,  
While Reagan's nomination battles reached crescendo.  
His first bearded choice underwent a Borking,  
The next up in a puff of reefer smoke.<sup>6</sup>  
Lucky number three: perfectly boring.  
Not time for them, time for me.  
And then time for hundreds of decisions,  
Thousands of positions and dispositions,  
And the perquisites of life in D.C.

Online, social media teems  
With Notorious R.B.G. memes.<sup>7</sup>

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docket. See Joan Biskupic et al., *The Echo Chamber*, REUTERS, Dec. 8, 2014, [www.reuters.com/investigates/special-report/scotus/](http://www.reuters.com/investigates/special-report/scotus/).

<sup>6</sup> Kennedy was President Ronald Reagan's third choice for the seat vacated by Justice Lewis Powell. The Senate rejected the first nominee, D.C. Circuit Judge Robert Bork, by a vote of 58 to 42, following intense public scrutiny of his views on the law and even his video-rental history – leading to the term “Borking” being coined. Reagan's second choice, Judge Douglas H. Ginsburg, was, like Bork, a D.C. Circuit Judge with manifestly conservative views and a radical-looking beard that did not help his cause. After Reagan announced Ginsburg's nomination, controversy erupted over the revelation that Judge Ginsburg did not, in connection with his D.C. Circuit nomination, disclose marijuana use. At Ginsburg's request, Reagan withdrew the nomination. See Steven V. Roberts, *Ginsburg Withdraws Name as Supreme Court Nominee, Citing Marijuana “Clamor,”* N.Y. TIMES, Nov. 8, 1987, [www.nytimes.com/1987/11/08/us/ginsburg-withdraws-name-as-supreme-court-nominee-citing-marijuana-clamor.html](http://www.nytimes.com/1987/11/08/us/ginsburg-withdraws-name-as-supreme-court-nominee-citing-marijuana-clamor.html). The nomination of the clean-shaven, moderate Kennedy flew through the Senate.

<sup>7</sup> I use “meme” in the narrow sense of an image, circulated on social media sites like Facebook, of a person or cartoon character with a text overlay. Through the power of such memes, Justice Ruth Bader Ginsburg has found new life as a cultural phenomenon. Gail Collins, *The Unsinkable R.B.G.: Ruth Bader Ginsburg Has No Interest in Retiring,* N.Y. TIMES, Feb. 20, 2015 (“You can buy T-shirts and coffee mugs with her picture on them. You can dress your baby up like Ruth Bader Ginsburg for Halloween. A blog called Notorious R.B.G. posts everything cool about the justice's life . . . You can even get an R.B.G. portrait tattooed on your arm, should the inclination ever arise.”). [www.nytimes.com/2015/02/22/opinion/sunday/gail-collins-ruth-bader-ginsburg-has-no-interest-in-retiring.html](http://www.nytimes.com/2015/02/22/opinion/sunday/gail-collins-ruth-bader-ginsburg-has-no-interest-in-retiring.html).

Steven M. Klepper

And the media over time  
Has wondered, “Does he dare?” and, “Does he dare?”  
On eminent domain or public prayer.<sup>8</sup>  
My jurisprudence, though? They do not care –  
“A politician in a robe,” they will claim.  
If public approval drops, I’m to blame.<sup>9</sup>  
Guessing my votes is key to the Fantasy SCOTUS game.<sup>10</sup>  
“There’s no method to his madness,” they will claim.  
Do I dare  
Take on the prisons?  
In my tenure  
There is time to mend or end solitary conditions.<sup>11</sup>

For I have joined them all already, joined them all:  
Since ’05, I’ve occupied the middle,  
With a vote record some think a riddle.  
If anxiety is what my name inspires,  
Think if the swing vote were Harriet Miers.<sup>12</sup>

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<sup>8</sup> See *Kelo v. New London*, 545 U.S. 469, 490-93 (2005) (Kennedy, J., concurring) (eminent domain decision, deeply unpopular among conservatives); *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014) (Kennedy, J.) (public prayer decision, deeply unpopular among liberals).

<sup>9</sup> The Supreme Court’s approval rating among conservatives dropped to an all-time low after the string of conservative losses during the past term. See Pew Research Group, *Negative Views of Supreme Court at Record High, Driven by Republican Dissatisfaction* (July 29, 2015), [www.people-press.org/2015/07/29/negative-views-of-supreme-court-at-record-high-driven-by-republican-dissatisfaction/](http://www.people-press.org/2015/07/29/negative-views-of-supreme-court-at-record-high-driven-by-republican-dissatisfaction/).

<sup>10</sup> Created by Professor Josh Blackman, Fantasy SCOTUS ([fantasyscotus.lexpredict.com/](http://fantasyscotus.lexpredict.com/)) is a site allowing users to compete for prizes for correctly predicting Supreme Court votes.

<sup>11</sup> Justice Kennedy authored the majority opinion in *Brown v. Plata*, 131 S. Ct. 1910 (2011), finding that overcrowded conditions in California prisons violated the Eighth Amendment. In his concurrence in *Davis v. Ayala*, 135 S. Ct. 2187, 2208-10 (2015), he signaled his likely willingness to entertain an Eighth Amendment challenge to solitary confinement.

<sup>12</sup> In 2005, President George W. Bush nominated White House Counsel Harriet Miers to replace Justice Sandra Day O’Connor, who had long been the Court’s swing vote. Prominent conservatives, fearful of Miers’ possibly moderate views on topics like abortion, joined liberals in questioning her credentials. At Miers’ request, Bush withdrew the nomination. See Michael A. Fletcher and Charles Babington, *Miers, Under Fire From Right, With-*

*The Love Song of J. Anthony Kennedy*

And oh, how they presume!

And I have heard the groans aplenty, heard them all –  
The groans that wish to fix me to their static camp,  
Reduce me to a caricature hanging by a pin,  
So I am pinned and predictable on their wall,  
So they can begin  
To control me as though they held the genie's lamp.  
And oh, how they presume!

And I have heard the sighs aplenty, heard them all –  
Sighs of exasperation or relief  
(Or Alito just mouthing disbelief!)<sup>13</sup>  
Sure, I feel schadenfreude  
When Nino gets annoyed.  
And oh, how they presume!  
And where do I fit in?

Shall I remind them of *Bush v. Gore* and gun rights?  
*Hobby Lobby? Citizens United?*  
Have I ever been soft on affirmative action?<sup>14</sup>

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*drawn as Court Nominee*, WASH. POST, Oct. 28, 2005, [www.washingtonpost.com/wp-dyn/content/article/2005/10/27/AR2005102700547.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/10/27/AR2005102700547.html). When the Senate thereafter confirmed Justice Samuel Alito to take O'Connor's place, Kennedy became the Court's new swing vote.

<sup>13</sup> When President Barack Obama criticized the Supreme Court's *Citizens United* decision at the 2010 State of the Union, lip readers noted that Justice Alito muttered "Not true." See Robert Barnes, *Reactions Split on Obama's Remark, Alito's Response at State of the Union*, WASH. POST (Jan. 29, 2010), [www.washingtonpost.com/wp-dyn/content/article/2010/01/28/AR2010012802893.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/01/28/AR2010012802893.html).

<sup>14</sup> Justice Kennedy joined conservatives in the *per curiam* majority opinion effectively resolving the 2000 election in *Bush v. Gore*, 531 U.S. 98 (2000), in the gun rights decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), in the corporate religious freedom decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and in affirmative action cases like *Gratz v. Bollinger*, 539 U.S. 244 (2003). He wrote the majority opinion, celebrated by conservatives, in *Citizens United v. FEC*, 558 U.S. 310 (2010), which allowed corporations to spend money to advocate for candidates in federal elections.

Steven M. Klepper

I could have been a humble feeder judge  
Sending my clerks to Justice Kozinski.<sup>15</sup>

Instead, the First Amendment means whatever I wish,  
Shaped by my predilections!  
So now . . . PACs . . . control elections?<sup>16</sup>  
Doctrine evolves in my Petri dish.  
Perhaps I'll mingle proverbs Confucian  
With citations to the Kiwi Constitution.<sup>17</sup>  
But though I've wielded power, I've avoided fame.  
Though RedState has called for my head (grown rather bald)  
upon a platter,<sup>18</sup>  
It may be only in the present tense I matter.  
Will history bother to understand my philosophy?  
I've never seen an Owen Roberts biography.<sup>19</sup>

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<sup>15</sup> Ninth Circuit Justice Alex Kozinski served as a law clerk to Kennedy when Kennedy sat on the Ninth Circuit. Kozinski is a prominent “feeder judge,” helping many of his clerks to land clerkships with Justice Kennedy and other justices. Kozinski used to regularly appear on conservative “short lists” for the Supreme Court.

<sup>16</sup> Kennedy is often the swing vote on First Amendment cases, including in *Citizens United*. That decision has given rise to “Super PACs,” a type of political action committee.

<sup>17</sup> Conservatives often criticize Kennedy for citing international law. See Stephen C. McCaffrey, *There's a Whole World Out There: Justice Kennedy's Use of International Sources*, 44 MCGEORGE L. REV. 201 (2014).

<sup>18</sup> Erick Erickson's conservative website, RedState, continually directs its strongest Court-related vitriol at Kennedy. See, e.g., Neil Stevens, *It's Time for Civil Disobedience: They're Coming for the Christians Now, Folks*, REDSTATE (Jun. 26, 2015), [www.redstate.com/2015/06/26/time-civil-disobedience/](http://www.redstate.com/2015/06/26/time-civil-disobedience/).

<sup>19</sup> Justice Owen Roberts was the Court's swing vote throughout much of the 1930s. A Republican appointee, Roberts authored the majority opinion in *Nebbia v. New York*, 291 U.S. 502 (1934), which vastly expanded state power to regulate in the public interest, but he then joined the conservative wing in striking down a state minimum wage law in *Morehead v. New York ex rel. Tiplado*, 298 U.S. 587 (1936). In 1937, he joined the opinions in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), sustaining the National Labor Relations Act against a Commerce Clause challenge, and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), affirming a state minimum wage law against a Due Process challenge. Historians have taken remarkably little interest in writing about Roberts or acknowledging any principled legal philosophy. Barry Cushman is an exception, with his book, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REV-*

## *The Love Song of J. Anthony Kennedy*

Few now recognize my name.<sup>20</sup>

And did I make the right choice, after all  
To save abortion rights in '92?  
At first I voted to bid *Roe* adieu.  
Blackmun was penning his angry dissent  
Rehnquist and White finally triumphant.  
But second thoughts sent me shuffling down the hall  
To gently rap on Harry's chamber door  
To say: "I am Flipper, come to your side,  
Come back to save the day, precedent won't fall" –  
So many women upon *Roe* relied,  
But they say: "That is not what *Roe* held at all;  
That is not it, at all."<sup>21</sup>

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OLUTION (1998), doing an excellent job of deconstructing the narrative that Roberts changed his vote in response to President Franklin D. Roosevelt's "Court Packing" plan. Still, however, there are no biographies of Owen Roberts – which is striking, given the amount of power he held on the Court at a key time in our nation's constitutional history.

<sup>20</sup> In a 2012 survey asking Americans to name Supreme Court justices, Kennedy came in sixth, with only 10% of respondents able to name him. See Mark Hansen, *Two-Thirds of Americans Can't Name a Single US Supreme Court Justice, Survey Shows*, ABA JOURNAL, Aug. 20, 2012, [www.abajournal.com/news/article/two-thirds\\_of\\_americans\\_cant\\_name\\_a\\_single\\_u.s.\\_supreme\\_court\\_justice\\_survey/](http://www.abajournal.com/news/article/two-thirds_of_americans_cant_name_a_single_u.s._supreme_court_justice_survey/).

<sup>21</sup> This verse comes from the behind-the-scenes account of *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), in David G. Savage, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 464-71 (rev. ed. 1993). I am exaggerating matters a little. At first, Kennedy planned to join a decision by Chief Justice William Rehnquist that upheld Pennsylvania's abortion restrictions. But as it became clear that the draft majority opinion by Rehnquist (who, along with Justice Byron White, was an original *Roe v. Wade* dissenter) was effectively overturning *Roe*, Kennedy stopped by the chambers of Justice Harry Blackmun (*Roe*'s author), while Blackmun was writing his dissent. To the shock of Rehnquist and Scalia, Kennedy joined the middle-of-road opinion by Justices Sandra Day O'Connor and David Souter that reaffirmed *Roe*'s "essential holding," but that upheld the particular restrictions at issue. It found that a generation of women had come to rely on *Roe*, warranting adherence under *stare decisis*. During the clerks' end-of-term farewell party, a skit featured a Justice Kennedy character who came out to the theme from the 1960s television show *Flipper*. Pro-choice groups considered *Casey* to be a terrible loss.

And did I make the right choice, after all,  
Doctrinally in *Obergefell*?<sup>22</sup>  
The Chief suggested an equal protection rationale.<sup>23</sup>  
But after *Romer*, after *Lawrence*, after *Windsor*, I stuck with dignity  
For marriage equality.<sup>24</sup>  
It's possible to confine the right to couples!  
And even if a lower court should misinterpret it's no trouble:  
If extended to polygamy,  
Why, of course we'll grant certiorari,  
And unanimously the Nine will say:  
    "That is not it at all,  
    That is not what we held, at all!"

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<sup>22</sup> "Obergefell" is pronounced "OH-ber-guh-fell." Richard Wolf, *Grieving widower takes lead in major gay marriage case*, USA TODAY, Apr. 10, 2015, [www.usatoday.com/story/news/nation/2015/04/10/supreme-court-gay-marriage-obergefell/25512405/](http://www.usatoday.com/story/news/nation/2015/04/10/supreme-court-gay-marriage-obergefell/25512405/).

<sup>23</sup> At argument in *Obergefell*, Chief Justice Roberts asked the states' counsel "if Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can't. And the difference is based upon their different sex. Why isn't that a straightforward question of sexual discrimination?" Oral Argument Transcript, *Obergefell v. Hodges*, No. 14-556, at 62 (U.S. Apr. 28, 2015). This questioning, at least to my mind, indicated that Roberts was concerned that an opinion extending the rationale of *Windsor* would jeopardize state bans on polygamy, and that he preferred an equal protection rationale that would not present the same risk. I even speculated in June that Roberts might vote with the majority and assign himself the majority opinion to write it on narrower equal protection grounds. See Steven M. Klepper, *Joe Loves Tom and Sue: Why Roberts Could Be Writing the Same-Sex Marriage Decision*, MD. APPELLATE BLOG, Jun. 15, 2015, [mdappblog.com/2015/06/15/roberts-writing-same-sex-marriage-decision/](http://mdappblog.com/2015/06/15/roberts-writing-same-sex-marriage-decision/). I turned out to be dead wrong, with Roberts writing a vehement dissent. He wrote: "Although the majority randomly inserts the adjective 'two' in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not." *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting). My guess is that Roberts did try to sway Kennedy toward an equal protection rationale, even if Roberts was not willing to vote for the petitioners. Roberts' swipe at the "adjective 'two'" showed disdain for what he saw as misplaced confidence by Kennedy that same-sex marriage could be justified on dignity grounds without jeopardizing polygamy bans.

<sup>24</sup> Kennedy wrote the previous three big wins for gay rights: *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *United States v. Windsor*, 133 S. Ct. 2675 (2013). The latter two decisions relied on the concept of dignity.



*The Love Song of J. Anthony Kennedy*

No! I am not Chief Justice, nor was meant to be;  
I sit to his left and hold the key vote.  
For prognosticators I'm the lead quote  
(My sphinx-like questions oft injecting doubt).  
At conference eight await my crucial word.  
It's anticlimax by Clarence's turn.<sup>25</sup>  
One side will be relieved I am aboard.  
Yet is it rational in this concern  
To feel the odd man out?

I near eighty . . . I near eighty . . .  
Will a President Hillary replace me with a lady?<sup>26</sup>

Shall I write my memoirs? Do I dare to do a tour?  
If I go on Sunday talk shows they might all find me a bore.<sup>27</sup>  
I have seen historians picking heroes to adore.

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<sup>25</sup> The justices speak and vote in descending order of seniority at their conferences to decide the disposition of cases. Thus, Kennedy votes immediately before Justice Clarence Thomas.

<sup>26</sup> This line presents the greatest risk of becoming dated. At present, it certainly seems like the 2016 presidential election is Hillary Clinton's to lose. But then I think of the November 1991 *Saturday Night Live* skit, "Campaign '92: The Race to Avoid Being the Guy Who Loses to Bush." Regardless, if Justice Kennedy were to retire during the next administration, the odds are substantial that the appointing president would be Hillary Clinton. Three out of the last four Democratic Supreme Court nominees have been women, and a shortlist would be likely to include numerous female candidates, including D.C. Circuit Judges Patricia Millett and Nina Pillard, Fourth Circuit Judge Pamela Harris, and Ninth Circuit Judge Jacquelyn Nguyen.

<sup>27</sup> A few years ago, members of the Maryland Chapter of the Federal Bar Association received an invitation to join the Capitol Hill Chapter's annual lunch with a Supreme Court justice. I attended and learned that normally the lunch fills up quickly with D.C. attorneys. But Kennedy was speaking that year, and he wasn't a big draw. That's why attorneys as far as \*gasp\* Baltimore received an invitation. Really? The most powerful sitting justice isn't a draw? I realize he's not the dynamic speaker that Scalia is, but doesn't power count for something? Kennedy was an engaging speaker, telling us about his rise from Sacramento solo practice and sharing a delightfully funny anecdote about Chief Justice Rehnquist.

*Steven M. Klepper*

I do not think that they will adore me.

In July the Right scoffed to hear me tell  
I took six days to write *Obergefell*.<sup>28</sup>  
Yes, it's relatively little time spent,  
But my soaring language went  
Among the liberals uncontested . . . .

And then on the seventh day I rested.



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<sup>28</sup> At the July 2015 Ninth Circuit Judicial Conference, Kennedy told an audience that he took six days to write *Obergefell*. See Kristina Davis, *Justice Kennedy: "Constitution is yours,"* SAN DIEGO UNION-TRIBUNE, July 15, 2015, [www.sandiegouniontribune.com/news/2015/jul/15/justice-anthony-kennedy-9th-circuit-rulings/](http://www.sandiegouniontribune.com/news/2015/jul/15/justice-anthony-kennedy-9th-circuit-rulings/).