197. Anthony Kennedy, Opinion of the Court in *Obergefell v. Hodges* (2015)

Source:* Opinion of the Court, *James Obergefell, et al. v. Richard Hodges 576 U.S. ___ (2015)

One of the most remarkable changes in public sentiment in the first years of the twenty-first century concerned the rights of gay Americans. Long stigmatized as deviants of one kind or another, gay men and women, like other disadvantaged groups, had long sought to gain equal rights. But anti-gay feelings, fueled by religious conviction, a belief that gays somehow undermined the nation's resolve during the Cold War, and other prej-

udices, long held sway. In 2003, in the landmark case of *Lawrence v. Texas*, the Supreme Court declared unconstitutional a Texas law making homosexual acts a crime. The idea of liberty guaranteed in the Fourteenth Amendment, the majority held, extended into the most intimate areas of private life. In the years that followed, a number of states gave legal recognition to same-sex marriage, either through legislative acts or court rulings that followed the logic of *Lawrence*. Public opinion on this question evolved with remarkable rapidity, especially among younger Americans. In 2003, two-thirds of Americans opposed legalizing such marriages; by 2015, over 60 percent were in favor.

In 2015, in a 5-4 decision, the Supreme Court ruled that the Fourteenth Amendment establishes a constitutional right to marriage for gay Americans. Written by Justice Anthony Kennedy, who had also written the majority opinion in *Lawrence*, the Court's ruling included a brief history of marriage, a powerful exposition of the meaning of freedom in the early twenty-first century, and a reaffirmation of the liberal view of the Constitution as a living document whose protections expand as society changes.

From their beginning to their most recent page, annals of human history reveal the transcendent importance of marriage. . . . Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations . . .

Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. . . . The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time. For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract

between a man and a woman. As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential.

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristics of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas of protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. . . . For much of the twentieth century, moreover, homosexuality was treated as an illness. . . . Only in recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable. . . .

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. . . . It requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. . . . History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Fourteenth

Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal structure, a claim to liberty must be addressed. . . .

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who see 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. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.

Questions

1. How does Justice Kennedy believe we should understand the meaning of freedom?

2. Why does Kennedy distinguish between sincere personal beliefs of those who oppose gay marriage, and laws enacted by the government?

198. Security, Liberty, and the War on Terror (2008)

Source: Opinion of the Court,* Lakhdar Boumediene et al. v. George W. Bush *(2008).

In the aftermath of the attacks of 2001, the Bush administration claimed sweeping powers to fight the "war on terror," including the right to arrest and hold indefinitely without trial those declared by the president to be enemy combatants. The Supreme Court proved unreceptive to President Bush's claim of authority, backed in many instances by Congress, to suspend constitutional protections of individual liberties. In several widely publicized cases it reaffirmed the rule of law both for American citizens and foreigners held prisoner under American jurisdiction.

In *Hamdi v. Rumsfeld* (2004), an 8–1 majority ruled that an American citizen who had moved to Saudi Arabia and been captured in Afghanistan and then imprisoned in a military jail in South Carolina had a right to a judicial hearing. Four years later, the Court considered the case of persons held at a detention camp the government had established at the American naval base at Guantanamo Bay, Cuba. Although not American citizens, the petitioners claimed the right of habeas corpus guaranteed by the U.S. Constitution—that is, the right for a detained person to demand that a charge be leveled against him and to have a judge determine if evidence warrants continued imprisonment. By 5–4, with Anthony Kennedy casting the deciding vote, the Court affirmed their claim. Kennedy began by exhaustively reviewing the history of habeas corpus, stretching back to Magna Carta of 1215. The idea of imprisoning a person without charge, Kennedy insisted, was a violation of basic principles of American freedom.

Petitioners are aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba. There are others detained there, also aliens, who are not parties to this suit. Petitioners present a question not resolved by our

earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause [of the U. S. Constitution]. We hold these petitioners do have the habeas corpus privilege. Congress has enacted a statute, the Detainee Treatment Act of 2005 . . . that provides certain procedures for review of the detainees' status. We hold that those procedures are not an adequate and effective substitute for habeas corpus. Therefore . . . the Military Commissions Act of 2006 . . . operates as an unconstitutional suspension of the writ [of habeas corpus]. . . .

Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.

Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism. . . .

Officials charged with daily operational responsibility for our security may consider a judicial discourse on the history of the Habeas Corpus Act of 1679 and like matters to be far removed from the nation's present, urgent concerns. Established legal doctrine,

however, must be consulted for its teaching. Remote in time it may be; irrelevant to the present it is not. Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.

We hold that petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

Questions

1. How does Kennedy respond to the government's claim that a state of war allows it to ignore parts of the Constitution?

2. Why does Kennedy believe that devotion to freedom is as important a source of national strength as military might?