BOOK REVIEW

A FAINT-HEARTED LIBERTARIAN AT BEST: THE SWEET MYSTERY OF JUSTICE ANTHONY KENNEDY

THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY. HELEN J. KNOWLES. ROWMAN & LITTLEFIELD, 2009.

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INTRODUCTION

Anyone who has even a passing interest in the Supreme Court knows that, with the departure of Justice Sandra Day O'Connor, Justice Anthony Kennedy became the Court's one and only swing Justice. In the highly charged cases that split on "ideological" lines—with Chief Justice John Roberts and Jus-

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tices Antonin Scalia, Clarence Thomas, and Samuel Alito on the "conservative" side and Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer on the "liberal" side—Justice Kennedy inevitably provides the deciding vote.[1] On abortion, gun rights, capital punishment, campaign finance, affirmative action, detention of enemy combatants, and the host of issues that do not make the front pages but do affect millions of lives and billions of dollars, Justice Kennedy's views become the law of the land.

The Supreme Court bar aims its briefing squarely at Ronald Reagan's third choice to fill Justice Lewis Powell's seat on the high court—a practice that has become known as the "Kennedy Brief."[2] And those who follow the Court for a living gamely try to assess how much all those citations to "Kennedy, J." will persuade (or alienate) the Court. Like modern-day Kremlinologists, we all try to discern what each question the Justice asks at oral argument signals about how the Court will rule and on what grounds.

This attention is not unwarranted, particularly in recent years. For example, in October Term 2006—the first full term after Justice Alito replaced Justice O'Connor and thus made Justice Kennedy the definitive "man in the middle"—Justice Kennedy dissented in only two of the Court's seventy-two opinions.[3] What is more, Justice Kennedy was in the majority for *all twenty-four* of that term's 5-4 decisions, siding thirteen times with the conservatives, six times with the liberals, and five times in less conventional alignments.[4] Although the following year the Court had only twelve split decisions, including the 5-3 *Stoneridge*[5] case (where Justice Breyer recused himself) but not the two 4-4 results with no voting records released,

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1. Sonia Sotomayor's ascension to the Court, replacing Justice Souter, is unlikely to change this dynamic. Some have speculated, however, that, whether for reasons of judicial philosophy or personal style, she may push Kennedy more consistently toward the conservative camp. *See* Jan Crawford Greenburg, *Looking Ahead: October Term 2009*, 2008–2009 CATO SUP. CT. REV. 347, 350 (2009).

2. *See, e.g.*, Jeffrey Rosen, *Supreme Leader: The arrogance of Justice Anthony Kennedy*, THE NEW REPUBLIC, June 18, 2007, at 16, 19.

3. Memorandum from Akin Gump Strauss Hauer & Feld LLP on End of Term Statistics and Analysis—October Term 2006, at 4 (Jun. 27, 2007), *available at* http://www.scotusblog.com/movabletype/archives/SuperStatPack.pdf.

4. *Id.* at 2.

5. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008).

Justice Kennedy was in the majority in eight—more than any other Justice. Each of these was an "ideological" split.[6] This past term, Justice Kennedy again led the way with majority votes in eighteen of the twenty-three 5-4 decisions (sixteen of them "ideological") and seventy-three of seventy-nine overall.[7]

Still, all this focus on Justice Kennedy probably is not healthy for anyone—not for lawyers or journalists, and not for the Court as an institution or the country more broadly. It is probably not even healthy for Justice Kennedy himself, whose self-regard has likely (and understandably) grown with the outsized role he has come to play.

Yet here I am reviewing a book on Justice Kennedy's jurisprudence, *The Tie Goes to Freedom* by SUNY-Oswego political science professor Helen J. Knowles.[8] But I am not writing because Justice Kennedy is the most interesting Justice—that would be Justice Scalia. Nor am I writing because Justice Kennedy is the Justice with whom I agree most on jurisprudential theory—that would be Justice Thomas, though even after reading the book I am at pains to describe what Justice Kennedy's global jurisprudential theory actually is. I am not even writing because Justice Kennedy has the most intriguing intellect—that would be Justice Breyer, the Justice from whom I would most like to take a seminar. Having laid my biases on the table, the reason I am writing this review is because the book in question makes the provocative and surprising claim that Justice Kennedy is a libertarian.

Few, if any, observers would assert that Justice Kennedy is a full-throated dyed-in-the-wool libertarian, the ideological equivalent of Professors Richard Epstein, Roger Pilon, or Randy Barnett (or even Judge Douglas Ginsburg or Chief Judge Alex Kozinski). Neither does Knowles argue this. Still, few people would label Justice Kennedy "libertarian" in any sense of the word. Knowles's claim is more modest: In "four areas of

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6. Memorandum from Akin Gump Strauss Hauer & Feld LLP and SCOTUSblog.com on End of Term Statistical Analysis—October Term 2007, at 2–3 (Jun. 28, 2008), *available at* http://www.scotusblog.com/wp/wpcontent/up-loads/2008/06/superstatpackot07.pdf.

7. SCOTUSBLOG STATPACK FINAL DATA 6.29.09, at 2–3 (2009), http://www.scotusblog.com/wp/wp-content/uploads/2009/06/full-stat-pack.pdf.

8. HELEN J. KNOWLES, THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY (2009).

the law—freedom of expression, equal protection of the law, race-based classifications, and noneconomic, individual decision making and autonomy"—a certain libertarianism infuses Justice Kennedy's jurisprudence.[9] More precisely, Knowles argues that where government and individual interests are equal, Justice Kennedy sides with freedom, much like an umpire awarding the tie to the runner when he reaches the base at the same time the ball does (to extend the baseball analogies that have pervaded our judicial debates of late). The question remains: In what sense and to what extent can Justice Kennedy's judicial record be characterized as focusing "on liberty"?

Part I of this Review will describe the book's arguments. Part II offers a critique of those arguments and reviews cases that seem to belie them. While I remain skeptical that Justice Kennedy is a libertarian other than in a modest or insignificant way—or, if he is a libertarian in some metaphysical sense, that he applies his libertarianism in a consistent and constitutionally sound way—the book is highly educational and informative, and a good read.

I. THE BOOK

Knowles begins with one of the biggest understatements a Court-watcher could make: Justice Kennedy "has not pleased all of the people all of the time."[10] This includes libertarians, so even as Knowles describes the Justice's jurisprudence as "modestly libertarian," she acknowledges that "he neither has a comprehensive, overarching judicial philosophy, nor subscribes to a jurisprudence that is heavily influenced by political theory."[11] Indeed, much of the book's introduction is a "prebuttal" to the expected charge that Knowles paints her subject with her own wishful thinking. While admitting the Justice's other failures, Knowles emphasizes that "his requirement that governmental actions pass far more stringent tests when they impinge upon liberty in ways that demean the individual, negatively affect a person's dignity, diminish personal respon-

9. *Id.* at xvii.

10. *Id.* at 1.

11. *Id.* at 3 (citing *Hearings on the Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 100th Cong. 154 (1987) [hereinafter Kennedy Confirmation Hearings]).

sibility, or treat people in a particular way because of their race is entirely consistent with the tenets of libertarian thought."[12] Knowles's book could thus be about Justice Kennedy's moderation, or his belief in a strong role for the judiciary, but the scope of such review would be limited to the types of cases mentioned above: freedom of speech, equal protection, individual liberty, and privacy rights.

Justice Kennedy's view of the Constitution seems to merge the opposing camps of originalism and "living constitutionalism." While "the intentions and the purposes of the framers should prevail," accepting "that new generations yield new insights and new perspectives does not mean the Constitution changes. It just means that our understanding of it changes."[13] Knowles further notes that Justice Kennedy "agonizes" over his decisions, and indeed he has said that "the clear legal philosophy of Scalia or Brennan 'does seem to yield them an answer a little more quickly.'"[14] She admits that "even in the areas of the law where the light of Justice Kennedy's modestly libertarian jurisprudence seems to shine brightest, there are occasions when it would appear that the Justice is definitely not giving the tie to freedom."[15] Nevertheless, she presses on with an examination of libertarian first principles and how those principles manifest themselves in Justice Kennedy's judicial philosophy. It is a philosophy, she asserts, that emphasizes tolerating diverse views, preserving and protecting human dignity, and accepting personal responsibility.

A. What is Libertarianism?

Knowles begins with an outline of fundamental libertarian—or classical liberal—principles. First, there is "individual self-ownership" or "self-sovereignty," which means individual decision-making autonomy.[16] Second is "bounded liberty"—"not a license to engage in whatever one wants" but rather liberty to

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12. *Id.* at 5.

13. *Id.* at 11 (emphasis omitted) (quoting Kennedy Confirmation Hearings, *supra* note 11, at 230).

14. *Id.* at 12 (quoting JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 181 (2007)).

15. *Id.* at 17.

16. *Id.* at 20–22.

act based in a theory of natural rights "whose boundaries are defined by individuals' pre-political liberty jurisdictions."[17] Third is the concept of "limited government," in the Lockean sense that individuals delegate some of their sovereignty—"giving up some individual freedom"—to form a political society that protects their individual rights.[18] Finally, there is the "harm principle," the Millian idea that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[19] Those who accept these four principles can then justify the limited government, freedom-maximizing nature of applied libertarianism through pluralistic arguments or through consequentialism—relying upon law and economics notions such as Pareto optimality. Justice Kennedy apparently belongs in the former category and views the role of the courts as enforcing an ordered liberty that does not impose any particular morality or value, not even efficiency.[20]

After further defining the rule of law as it applies to Justice Kennedy's worldview—especially that "the law must recognize that in each person there is a core of spirituality, and dignity, and humanity, and within that broad general formulation you can begin to define those rights that are fundamental to our own humanity"[21]—Knowles provides an overview of the three libertarian elements of Justice Kennedy's jurisprudence. The first is the "universal" element, which Knowles argues is tied to a belief in tolerance, universal rights, and looking to international law for confirmation of "those universal moral precepts that all free people share."[22] The second is the "humane" element, which centers on the Constitution's

17. *Id.* at 22–24.

18. *Id.* at 25–26.

19. *Id*. at 27 (quoting JOHN STUART MILL, *On Liberty*, *in* UTILITARIANISM, ON LIBERTY, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, REMARKS ON BENTHAM'S PHILOSOPHY 69, 78 (Geraint Williams ed., 1993)).

20. *Id*. at 33 (quoting Kennedy Confirmation Hearings, *supra* note 11, at 207).

21. *Id*. at 34–35 (quoting Kennedy Confirmation Hearings, *supra* note 11, at 230).

22. *Id*. at 37 (quoting Anthony Kennedy, Remarks at the ABA Rule of Law Symposium (Nov. 10, 2005), *available at* http://www.abavideonews.org/ABA329/av3.php). Of course, Kennedy is one of the Justices who has been criticized for using foreign law to interpret the Constitution—most notably in *Roper v. Simmons*, 543 U.S. 551 (2005), the under-eighteen-death-penalty case—as a violation of U.S. sovereignty and popular control over constitutional decision making.

protection of human dignity and on remedies for "the anguish to the person, . . . the inability of the person to obtain his or her own self-fulfillment, the inability of a person to reach his or her own potential."[23]

Third is the "responsible" element, with personal responsibility placing limits on liberty. According to Knowles, Justice Kennedy believes that when individuals disregard their responsibilities, sometimes the government must step in. Unless the government "afford[s] *both* responsibility and liberty adequate respect, neither of them will be secure, and the dignity that liberty gives us the right to search for will indeed be threatened."[24] Knowles thus suggests that Justice Kennedy has an expansive view of liberty, guided by the light hand of a benevolent state, and balanced by a robust judicial review. Knowles calls this a "'traditional' libertarianism," a "modest type . . . [of which] is infused into Justice Kennedy's jurisprudence."[25]

B. Freedom of Speech

The book's second chapter covers Justice Kennedy's approach to the First Amendment's guarantee of freedom of speech—which appears in ten percent of all of his opinions (in approximately eighty-five percent of which he was in the majority).[26] Although Justice Kennedy is no free speech "absolutist" as Justice Hugo Black was, Knowles points out that Justice Kennedy, more than anyone else who served on the Rehnquist Court, has no tolerance for content-based speech restrictions. Indeed, in the 1994–2002 Terms, Justice Kennedy took the pro-speech position roughly three-quarters of the time, with Justices Thomas and Souter the next most "libertarian" at about sixty percent.[27]

But if jurists as diverse as Justices Kennedy, Thomas, and Souter are doctrinal lodestars, can the underlying constitutional provision—here the Free Speech Clause—be described as libertarian, or even coherent? Actually, yes, says the libertarian

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23. KNOWLES, *supra* note 8, at 42 (quoting Kennedy Confirmation Hearings, *supra* note 11, at 180). Knowles sees parallels in this vision to John F. Kennedy's description of liberalism.

24. *Id*. at 48.

25. *Id*. at 51.

26. *Id*. at 16.

27. *Id*. at 54–55 (citing Eugene Volokh, How the Justices Voted in Free Speech Cases, 1994–2002 (June 7, 2006), www.law.ucla.edu/volokh/howvoted.htm).

éminence grise, Professor Richard Epstein.[28] Justice Kennedy's jurisprudence aligns with three major arguments against content-based speech restrictions: First is anti-paternalism—the government should not be deciding which views are harmful; second is the protection of individual liberty and autonomy by preventing the government from "distorting" the public discourse; and third is that efforts at content-based speech restriction often are linked to suspicious government motives. These arguments are not comprehensive, Knowles acknowledges, but "they do demonstrate a quest for doctrinal synthesis that is based on the libertarian principles that make up the universal element of [Justice Kennedy's] judicial decision making."[29]

Knowles runs through a series of cases as examples of Justice Kennedy's free speech libertarianism. She begins with *Texas v. Johnson*, where the Court found that flag-burning was a protected form of expression and struck down the statute that criminalized it.[30] Writing for an unlikely majority that included not only Justices Kennedy and Scalia but also Justices Marshall and Blackmun, Justice Brennan found that "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[31] Justice Kennedy fully agreed with this principle but wrote a six-paragraph concurrence recognizing that "sometimes we must make decisions we do not like."[32] That is, much like Justice Scalia's oft-stated distaste for having to join this opinion, Justice Kennedy felt bound by the First Amendment. Unlike Justice Scalia's textualist interpretation, however, Justice Kennedy stood for toleration rather than pure constitutional adherence.

In *Simon & Schuster v. Crime Victims Board*, a unanimous Court—with newly confirmed Justice Thomas sitting out—struck down New York's "Son of Sam" law, designed to prevent criminals from profiting from the publication of memoirs about their crimes.[33] Justice Kennedy again wrote a special concurrence, this time joining only in the judgment of the majority.

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28. *Id.* at 57 (discussing Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 46 (1992)).

29. *Id.* at 60.

30. 491 U.S. 397, 399 (1989).

31. *Id.* at 414.

32. *Id.* at 420–21 (Kennedy, J., concurring).

33. 502 U.S. 105, 123 (1991).

It was "unnecessary and incorrect" to ask whether the challenged law was justified by any compelling state interest because "the sole question is, or ought to be, whether the restriction is in fact content based."[34] If the answer is "yes," then the regulation cannot be constitutionally sustained. For Justice Kennedy, the fundamental right to free speech obviated strict scrutiny analysis even though people legitimately relinquish many rights when they commit a crime.

Justice Kennedy reiterated this theme in his dissent from a six-Justice majority in *Hill v. Colorado*, which upheld a state law establishing one-hundred-foot advocacy-free zones around "health care facilities"—essentially a ban on "sidewalk counseling" outside abortion clinics.[35] Justice Kennedy protested that the ruling violated the First Amendment because the law specifically targeted the content of speech: "[I]f a citizen approaches a public official visiting a health care facility to make a point in favor of abortion rights . . . [and] says, 'Good job, Governor,' there is no violation; if she says, 'Shame on you, Governor,' there is."[36] This free speech case was important to Justice Kennedy, Knowles argues, because providing women with information about abortion—pro and con—"makes a fundamental contribution to their ability to responsibly exercise their liberty."[37] Moreover, the "emphasis on viewpoint toleration" in Justice Kennedy's dissent is emblematic of "the universal element of [his] modestly libertarian jurisprudence."[38]

Curiously, Knowles ends her analysis of Justice Kennedy's approach to free speech with an example where he joined in upholding a statute limiting advocacy: one-hundred-foot campaign-free zones around polling places on election days.[39] His "willingness to vote to uphold the law . . . casts a shadow over the libertarianism of his free speech jurisprudence," Knowles admits, but ultimately his "judicial agonizing" has "never led

34. *Id.* at 124–25 (Kennedy, J., concurring in the judgment).
35. 530 U.S. 703 (2000).
36. *Id.* at 769 (Kennedy, J., dissenting).
37. KNOWLES, *supra* note 8, at 74.
38. *Id.*
39. Burson v. Freeman, 504 U.S. 191 (1992).

him to stray far from his belief that 'governments are most dangerous when they try to tell people what to think.'"[40]

C. Equal Liberty for Sexual Minorities

In her third chapter, Knowles explores the "egalitarian element" of Justice Kennedy's jurisprudence through his approach to sexual orientation cases. It is in this area, Knowles argues, that Justice Kennedy's "individual rights" theory is most on display: "Individuals had a duty . . . to treat other individuals as individuals," and therefore "government needed to set a good example for the country's citizens."[41] Justice Kennedy applies this framework not only to limit state action that is race-conscious, but also to limit denials of equal protection based on sexual orientation. He rejects the conservative idea that individuals seeking protection for their intimate sexual conduct must seek it in the legislature, noting "the tendency of such bodies to make decisions that discriminate against minorities for morals—rather than law-based reasons."[42] This position is unquestionably libertarian, whether categorized in the "egalitarian" or the "humane" aspect of Knowles's paradigm. Of course, finding that position in the law is a separate matter. Libertarians, after all, believe that the proper design and operation of legal and political institutions is the best guarantor of liberty, rather than relying on the benevolent preferences of philosopher kings.

Justice Kennedy apparently gave early indications that he was a jurist who "took the issue of gay rights seriously,"[43] going back to a 1980 case when he was still Judge Kennedy of the Ninth Circuit. Although he rejected the claims of three individuals discharged from the Navy for engaging in homosexual behavior, Judge Kennedy made clear that he was constrained by precedent and traditional deference to the military.[44] He also held that, if the Navy's policy stigmatized those discharged

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40. KNOWLES, *supra* note 8, at 85, 87 (quoting Justice Kennedy as quoted in Amy Goldstein & Charles Lane, *At D.C. School, Justice Kennedy and Teens Explore U.S. Values*, WASH. POST, Jan. 29, 2002, at A17).

41. *Id.* at 90.

42. *Id.* at 91.

43. *Id.* at 93 (quoting Artemus Ward, The Gay Rights Jurisprudence of Anthony Kennedy: An Institutional Analysis 4 (Apr. 15, 2004) (unpublished manuscript), *available at* http://www.allacademic.com//meta/p_mla_apa_research_citation/0/8/3/4/6/pages83460/p83460-1.php).

44. *See* Beller v. Middendorf, 632 F.2d 788, 810–12 (9th Cir. 1980).

individuals affected by it, it would indeed infringe constitutionally protected liberty, and noted the "substantial academic comment" arguing that personal sexual decisions should be recognized as fundamental rights entitled to "full protection as an aspect of the individual's right of privacy."[45] Interestingly, as Knowles points out, Justice Kennedy would later "move the Court away from a jurisprudence of unenumerated 'privacy' to reliance on the textually grounded 'liberty.'"[46]

Most notably, Justice Kennedy wrote the opinions for the 6-3 majorities in *Romer v. Evans* and *Lawrence v. Texas*. In *Romer*, Justice Kennedy wrote passionately when striking down an amendment to the Colorado constitution that prohibited the state from enacting laws preventing discrimination based on sexual orientation.[47] He found that the amendment was driven by majoritarian, morality-driven animus, which placed too high an obstacle in the path of the "fundamental right of gays and lesbians to participate in the political process."[48] Tellingly, he began his opinion with a quotation from Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*, intimating that sexual orientation minorities were no less entitled to the equal protection of the laws than racial ones.[49]

In *Lawrence*, Justice Kennedy extended his vision of the Fourteenth Amendment's expansive protection of individual liberty and struck down Texas's anti-sodomy law.[50] Apparently the "right result was so obvious" to Justice Kennedy that he wrote the opinion "over the course of one weekend."[51] Knowles argues that Justice Kennedy's discussion of *Romer* in his *Lawrence* opinion confirms that the Justice is interested in asserting an expansive view of liberty, not defending gay rights per se: "[W]hat really underpinned that 1996 decision was the preservation of the dignified *liberty* of all, regardless of sexual orientation."[52]

Interestingly, Justice Kennedy's emphasis on liberty, rather than equality, precluded Justice O'Connor from joining the

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45. *Id.* at 806, 809.
46. KNOWLES, *supra* note 8, at 97.
47. Romer v. Evans, 517 U.S. 620 (1996).
48. *Id.* at 625.
49. *Id.* at 623; KNOWLES, *supra* note 8, at 108.
50. Lawrence v. Texas, 539 U.S. 558 (2003).
51. GREENBURG, *supra* note 14, at 37.
52. KNOWLES, *supra* note 8, at 118.

opinion. She concurred separately to find fault with the statute's application only to *homosexual* sodomy, reasoning that a nondiscriminatory sodomy law "would not long stand in our democratic society."[53] Justice Kennedy rejected this approach, refusing to resolve the "equality" issue while leaving "liberty" concerns to the political process:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[54]

Instead of hiding behind a nebulous right to "privacy" or allowing a political majority to oppress all, albeit "equally," Justice Kennedy embraced a robust view of liberty. Although libertarians likely welcome this type of analysis, they will be nevertheless displeased that Justice Kennedy forces his liberty paradigm into the expansive "substantive due process" framework the Court developed to work around its earlier evisceration of the Fourteenth Amendment's Privileges or Immunities Clause.[55]

D. Strict Scrutiny of Racial Classifications

Knowles's fourth chapter looks at another aspect of Justice Kennedy's "egalitarian" jurisprudence—his view of race-conscious state action. This time Justice Kennedy stays within equal protection doctrine, rather than escaping into a broader reading of liberty. Knowles argues that, although Justice Kennedy "has not been shy about expressing his opposition to government actions that treat individuals differently because of the color of their skin,"[56] he is no color-blind absolutist like Justices Scalia or Thomas. Justice Kennedy acknowledges, for example, that encouraging racial diversity—particularly in institutions of

53. *Lawrence*, 539 U.S. at 584–85 (O'Connor, J., concurring in the judgment).
54. *Id.* at 578–79 (majority opinion).
55. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).
56. KNOWLES, *supra* note 8, at 130.

higher education—is a constitutionally legitimate goal for government. What the government cannot do is force diversity on society by "[reducing] an individual to an assigned racial identity for differential treatment."[57] "To be forced to live under a state-mandated racial label," Justice Kennedy wrote, "is inconsistent with the dignity of individuals in our society."[58]

Metro Broadcasting v. FCC[59] provided an early indication of Justice Kennedy's views in this area. Justice Kennedy vehemently dissented from a 5-4 ruling upholding an FCC policy that gave preferential treatment to minority-owned broadcasting companies, again citing *Plessy* as a pernicious example of race-based government action.[60] Moreover, he unfavorably compared Justice Brennan's deferential standard of review (less stringent than strict scrutiny) to *Korematsu* and warned that equating race with broadcast content sets the government on the "tortuous" path to racial favoritism.[61] Racial discrimination, no matter how benign its motives, offends individual dignity and prevents people from pursuing their "unique constitutional visions."[62] "I regret that after a century of judicial opinions," Justice Kennedy wrote, "we interpret the Constitution to do no more than move us from 'separate but equal' to 'unequal but benign.'"[63]

In a later opinion, *Rice v. Cayetano*, Justice Kennedy wrote for the majority striking down race-based restrictions on voting for the trustees of the Office of Hawaiian Affairs, an agency charged with disbursing funds and benefits to certain statutorily defined "native Hawaiians."[64] Justice Kennedy evoked his "humane" element and found that the voting restriction "rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters."[65] Put differently, "[o]ne of the principal reasons race is treated as a forbidden classification

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57. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 795 (2007) (Kennedy, J., concurring).

58. *Id.* at 797.

59. 497 U.S. 547 (1990).

60. *Id.* at 631 (Kennedy, J., dissenting) (citing Plessy v. Ferguson, 163 U.S. 537 (1896)).

61. *Id.* at 632–34 (citing Korematsu v. United States, 323 U.S. 214 (1944)).

62. KNOWLES, *supra* note 8, at 135.

63. *Metro Broadcasting*, 497 U.S. at 637–38 (Kennedy, J., dissenting).

64. 528 U.S. 495 (2000).

65. *Id.* at 523.

is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."[66]

The *Metro Broadcasting* and *Rice* decisions set the stage for the major role that Justice Kennedy has played in the affirmative action cases of the present decade. In the University of Michigan cases, *Gratz v. Bollinger* and *Grutter v. Bollinger*, the Court struck down the college's admissions policy of awarding 20 points (out of 150) to "underrepresented minorit[ies]," but upheld the law school's policy of considering race as one of several factors helping create a "critical mass" of minorities.[67] In *Grutter*, Justice O'Connor applied strict scrutiny, but found that diversity was indeed a compelling interest and that, unlike the college's policy, the law school's "individualized, holistic review" met the narrowly tailored requirement (at least for the next twenty-five years).[68] Finding himself in dissent, Justice Kennedy expressed frustration that the Court did not apply real strict scrutiny:

> It is difficult to assess the Court's pronouncement that race-conscious admissions programs will be unnecessary 25 years from now. If it is intended to mitigate the damage the Court does to the concept of strict scrutiny, neither petitioner nor other rejected law school applicants will find solace in knowing the basic protection put in place by Justice Powell [in *Regents of the University of California v. Bakke*[69]] will be suspended for a full quarter of a century. Deference is antithetical to strict scrutiny, not consistent with it.[70]

Knowles explains that Justice Kennedy "was deeply concerned at the possibility that the traditional standard of review to which the Court held the government in race-dependent cases, and the individual dignity that it was designed to protect, would be sacrificed at the altar of pragmatism."[71] Moreover, while sympathetic to the goal of diversity in educational

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66. *Id.* at 517.

67. Grutter v. Bollinger, 539 U.S. 306, 316 (2003) (law school admissions); Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (college admissions). Justice Scalia called these cases the "*Grutter-Gratz* split double header." *Grutter*, 539 U.S. at 348 (Scalia, J., concurring in part and dissenting in part).

68. *Grutter*, 539 U.S. at 337, 343.

69. 438 U.S. 265 (1978).

70. *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting) (citation omitted).

71. KNOWLES, *supra* note 8, at 153.

settings, Justice Kennedy labeled the "concept of critical mass" a "delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."[72]

"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race," Chief Justice John Roberts wrote in *Parents Involved*, the case challenging race-based school assignments in Seattle and Louisville.[73] Justice Kennedy could not sign on to that postulate and refused to join Chief Justice Roberts's four-Justice plurality that rejected all race-based measures designed to promote student body diversity. Instead, he penned a concurrence emphasizing that diversity "is a compelling educational goal a school district may pursue" and that the plurality "is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race."[74] Still, he conceded that the policies at issue were not narrowly tailored because the school districts could not explain how their "blunt distinction" between "white" and "non-white" students advanced their valid goal.[75] Furthermore, he criticized Justice Breyer's dissent as having "no principled limit."[76] When a court applies strict scrutiny, Justice Kennedy observed, "it cannot construe ambiguities in favor of the State."[77] Otherwise, Knowles explains, "the tie would not go to freedom."[78]

In short, Justice Kennedy rejects the Roberts approach as too absolutist and the Breyer approach as "permissive strict scrutiny" akin to rational basis review.[79] Instead, Knowles summarizes, Justice Kennedy requires that the important ideal of diversity

> not be created, fostered, or protected by programs based on the assumption that individuals will think or act in a certain way because of their race or ethnicity. Out of this belief comes Kennedy's commitment to the use of strict judicial

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72. *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting).

73. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality opinion).

74. *Id.* at 783, 787–88 (Kennedy, J., concurring in part and concurring in the judgment).

75. *Id.* at 787.

76. *Id.* at 791.

77. *Id.* at 786.

78. KNOWLES, *supra* note 8, at 157.

79. *Parents Involved*, 551 U.S. at 791 (Kennedy, J., concurring in part and concurring in the judgment).

> scrutiny in race-dependent cases, because government agencies (including courts) cannot be trusted to say what a *reasonable* race-based law is. The only political unit in society who is entitled to say that race matters is the most important political unit in society—the individual.[80]

Whatever this "modestly libertarian" diversity rationale means, at the very least it is safe to say that, for the foreseeable future, the outcome of race cases will all depend upon Justice Kennedy.[81]

E. Abortion: The Libertarian's Hard Case

Justice Kennedy's switch from the tentative five-Justice majority set to overrule *Roe v. Wade* to joining with Justices O'Connor and Souter to tri-author the plurality opinion in *Planned Parenthood v. Casey* that upheld *Roe's* "essential holding" is perhaps his most famous—and controversial—judicial act.[82] The trio crafted an "undue burden" test for reviewing abortion regulations, which invalidates laws if they have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[83] Justice Kennedy played the key role in applying this test in later cases, finding constitutional protection for a woman's liberty to end her pregnancy but recognizing that, as Knowles puts it, "this is a liberty that is bounded by important state interests . . . that permit the state to require the woman to exercise her liberty in an informed and responsible manner."[84]

Of course, there can be no single libertarian view of abortion; classical liberal political theory is not very helpful in resolving the potentially direct conflicts between the rights of two individuals (one of whom is conceived with no rights and then at some indeterminate point, gradually or suddenly, acquires them). Thus, there are both pro-choice and pro-life libertarians. Some see the right to abortion as an extension of other liberties the state exists to protect. Others, however, see this as one of the few areas best left purely to the democratic process—because it is an issue of values and personal morality informed

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80. KNOWLES, *supra* note 8, at 159.

81. *See, e.g.*, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (Kennedy, J., writing for a five-Justice "conservative" majority).

82. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845–46 (1992).

83. *Id.* at 876–77.

84. KNOWLES, *supra* note 8, at 163.

by science and religion, not an issue within the special competency of lawyers. Justice Kennedy seems to place abortion into his "responsible liberty" framework, constantly balancing a woman's liberty with the state's interest in protecting the fetus. As a constitutional matter—inasmuch as the debate over abortion has become a debate over the existence, scope, and meaning of the right to privacy—Justice Kennedy's view is that privacy is a value, not a right, but that it is part of the broad "right to liberty" explicitly protected by the Fourteenth Amendment's Due Process Clause, not a stand-alone unenumerated right implicit in the Constitution.[85]

Here is how Justice Kennedy's abortion jurisprudence has played out, according to Knowles: First, in *Webster v. Reproductive Health Services*, Chief Justice Rehnquist's majority opinion sidestepped *Roe*'s "fundamental right" idea and called abortion a "liberty interest protected by the Due Process Clause"—a formulation probably designed to mollify the junior Justice Kennedy.[86] Then, in *Hodgson v. Minnesota*[87] and *Ohio v. Akron Center for Reproductive Health*,[88] Justice Kennedy wrote opinions supporting state laws requiring parental notification before a minor could get an abortion. In both cases, the "responsible element of Justice Kennedy's modestly libertarian jurisprudence"—the heart of his abortion paradigm balancing individual liberty and state interests—was joined by only three colleagues, Chief Justice Rehnquist, Justice White, and Justice Scalia.[89] It would take *Planned Parenthood v. Casey*[90] and the fashioning of the "undue burden" test to satisfy both Justices Kennedy and O'Connor, with the latter serving as the true swing vote in reproductive rights cases.

Casey involved a challenge to five different provisions of Pennsylvania's new abortion law, and only Justices O'Connor, Kennedy, and Souter joined every part of the opinion, which struck down a spousal notification requirement but upheld the

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85. *Id.* at 166, 170.

86. 492 U.S. 490, 520 (1989).

87. 497 U.S. 417, 480 (1990) (Kennedy, J., concurring in the judgment in part and dissenting in part).

88. 497 U.S. 502, 520 (1990).

89. KNOWLES, *supra* note 8, at 178.

90. 505 U.S. 833 (1992).

other requirements.[91] Tellingly, the three-Justice plurality was not an opinion about privacy rights, opening instead with "*[l]iberty* finds no refuge in a jurisprudence of doubt" and concluding with similar libertarian language.[92] It is precisely this kind of rhetoric—the "grand phrases and philosophical musings" that Justice Kennedy applies to individual liberty cases—that gets him into trouble not just with conservatives who disagree with case outcomes, but with originalists, textualists, and others opposed to judicial pontification.[93] In what has become derisively known as the "sweet-mystery-of-life" passage,[94] Justice Kennedy explained: "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."[95] Still, this grandiloquence was to be checked by certain boundaries. Although the Court's duty is "to define the liberty of all, not to mandate our own moral code," abortion was a "unique act," not one that a woman has the freedom to make without considering the "consequences for others."[96]

Justice Kennedy's bounded liberty rubric was perhaps most notably on display in the partial-birth abortion cases, *Stenberg v. Carhart*[97] and *Gonzales v. Carhart*.[98] In *Stenberg*, a five-Justice majority overturned Nebraska's ban on partial-birth abortion because it was not limited to the procedure used for late-term abortions and had no exception for maternal health. Justice Kennedy dissented, finding that the law survived *Casey*'s level of scrutiny and that the majority "repudiates this understanding [of the state's role in legislating on abortion] by invalidat-

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91. *Id.*

92. *Id.* at 844, 901 (emphasis added) (concluding with "[w]e invoke [the Constitution] once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty").

93. GREENBURG, *supra* note 14, at 176, 182; *see also Casey*, 505 U.S. at 984 (Scalia, J., concurring in the judgment in part and dissenting in part) (calling the plurality's opening sentence "august and sonorous").

94. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (characterizing the relevant passage of Justice Kennedy's *Casey* opinion as "the passage that ate the rule of law").

95. *Casey*, 505 U.S. at 851.

96. *Id*. at 850, 852.

97. 530 U.S. 914 (2000).

98. 550 U.S. 124 (2007).

ing a statute advancing critical state interests, even though the law denies no woman the right to choose an abortion and places no undue burden upon the right."[99] In *Gonzales*, Justice Kennedy wrote the opinion for another five-Justice majority—after Chief Justice Roberts replaced Chief Justice Rehnquist and, more significantly, Justice Alito replaced Justice O'Connor—upholding a federal partial-birth abortion ban that lacked a maternal health exception.[100]

After taking heat from conservatives for *Casey*, Justice Kennedy now took heat from liberals for seeming to contradict his own *Casey* opinion—as well as for disingenuously reconciling *Gonzales* with *Stenberg* rather than recognizing that *Stenberg* would have to be overruled in order to reach the *Gonzales* result. Knowles says that the *Casey*-related criticism may be fair—the *Gonzales* opinion does not use the word "liberty"—while the latter problem can be explained away by the higher quality legislative draftsmanship and precision in the federal law than in Nebraska's.[101] In both cases, Justice Kennedy concluded that his "dialogue on liberty" included the government's legitimate power to make laws promoting the responsible exercise of liberty.[102] This approach may seem paternalistic, but it is the way Justice Kennedy unites the dignity, tolerance, and responsibility aspects of his view of liberty.

II. ANALYSIS

The Tie Goes to Freedom is thought-provoking and full of new and interesting ideas. It has to be if it is to take the step that precedes any attempt to make the case for Justice Kennedy's "modestly libertarian jurisprudence": understanding and making sense of that jurisprudence! Justice Kennedy is famously frustrating, pleasing some of the people all of the time and thus often facing the wrath of those on the short end of one of his deciding 5-4 votes. Knowles sees this zig-zagging across the middle ground, at least for certain areas of law, as representative of an earnest search for legal truths with a pro-liberty bias.

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99. *Stenberg*, 530 U.S. at 956–57 (Kennedy, J., dissenting).
100. 550 U.S. at 133, 143.
101. KNOWLES, *supra* note 8, at 190–91.
102. *Id*. at 188–89, 192–94.

While I had to think about this point—and am the better for it—the book's thesis is ultimately not convincing.

A. General Critique

First, there is a framing problem. While self-sovereignty, bounded liberty, limited government, and the harm principle form a perfectly acceptable summary of libertarianism, the proof is in how these principles play out in public policy. Knowles mentions the debate among libertarians regarding the use of the police power to promote health and safety versus using it to protect individual liberties.[103] That debate is not a libertarian one, however, but a general one that all post-Enlightenment democracies face, with libertarians leaning towards the liberty side, egalitarians favoring equality, and conservatives preferring order. Thus, to say that defining the scope of the police power is a central struggle within libertarianism is at once defining the philosophy out of meaningful existence *and also* crafting a definition of libertarianism that matches Justice Kennedy's jurisprudence instead of asking whether the latter fits the former.

Further, I am not convinced that a libertarian jurisprudence—or even a libertarian theory of the Constitution—can be defined by elements of "universality," "humanity," and "responsibility." It is true that libertarians believe in equal treatment under the law, human dignity, and bounded liberty, but so too does anyone else in the mainstream western legal tradition. And yet Justices Kennedy, Thomas, and Souter—to use Knowles's listing of the most pro-speech Justices—reach profoundly different results in applying those very same elements. Are they all libertarian? How a jurist defines each element, what relative weight he gives it in a given case, and, of course, the particular law or constitutional provision he is asked to interpret make all the difference in the world. Even supposing those elements, as Knowles uses them, were sufficient to describe the libertarian approach to the law, it is not at all clear that Justice Kennedy follows them in every case. Indeed, Knowles generally uses different areas of constitutional law to illustrate each one—free speech for the universal, racial and sexual classifications for the humane, and abortion for the re-

103. *Id.* at 28–29.

sponsible. Hence, it is not clear that Justice Kennedy fits even into her "modestly libertarian" paradigm (or, if he does, why this is significant). And so, again, the argument is either circular or explains too little to be useful.

This is not to say that Knowles's labors are lost, or that her book is not worth reading. While the author takes pains to explain why people should not automatically think of Justice Kennedy's jurisprudence as agonized, self-aggrandizing incoherence, we are better off just taking the Justice at his words and not trying to attribute any grand theories to him. In modern parlance: "It is what it is." To be sure, Knowles does a superb job of teasing out how Justice Kennedy approaches cases and thinks through doctrine. She portrays a jurisprudence that defies coherent exegesis beyond the types of broad "elements" I just finished criticizing. In other words, even if calling Justice Kennedy's jurisprudence libertarian in any meaningful way is a stretch, Knowles has not failed to explain Justice Kennedy's jurisprudence. It is instead Justice Kennedy's jurisprudence—which not infrequently produces libertarian outcomes—that has failed Knowles's (and everyone else's) attempt at categorization.

Running through the doctrinal areas the book covers, we encounter several illustrations of the weaknesses inherent in any unifying theory of Justice Kennedy, let alone one making the more precise claim that his jurisprudence is modestly libertarian. Consider free speech, where Justice Kennedy may find that the tie goes to freedom when the government's interest is in equipoise with its challenger. But Justice Kennedy often declines to question whether that asserted interest is legitimate. In *Burson v. Freeman*, for example, Justice Kennedy did not rigorously weigh the right to vote against the right to free speech, or the government's relative interest in protecting both.[104] It may be that the right to vote does indeed outweigh the right to free speech—at least in the context of that case—but it is not at all clear from his opinion why that is so. Knowles herself admits that Justice Kennedy's vote in *Burson* "casts a shadow" on her theory regarding his approach to free speech.[105]

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104. 504 U.S. 191, 211 (1992) (Kennedy, J., concurring).

105. KNOWLES, *supra* note 8, at 85, 87. At the same time, Justice Kennedy is consistently libertarian on campaign finance and political speech cases. For example, he filed a strong dissenting opinion in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 695 (1990) (Kennedy, J., dissenting), which involved

On sexual minorities, Justice Kennedy admirably avoids hiding behind a nebulous "privacy" right separate from other protected liberties. His robust view of personal freedom, however, still ultimately rests on the awkward "substantive due process" the Court expanded to work around its evisceration of the Privileges or Immunities Clause and its neglect of the Ninth Amendment. Suffice it to say, Justice Kennedy's writings in this area—as on other social issues—involve lofty rhetoric and judicial hand-waving that cause more consternation than the more reliably liberal or conservative votes of his colleagues.

Even in cases involving racial classifications, it seems that only Justice Kennedy has the special constitutional understanding—the knowledge of how to apply strict scrutiny—that allows racial consciousness generally without allowing individualized race-based determinations. While this reasoning may be consistent with libertarianism's focus on individual rather than group rights, Justice Kennedy's approach does not always inspire confidence.

Finally, I need not repeat or elaborate on the criticism Justice Kennedy has faced for his contribution to the abortion case law. He is of course responsible, along with Justices O'Connor and Souter, for creating the unworkable "undue burden" standard—the modern equivalent to Justice Stewart's "I know it when I see it" definition of obscenity in the 1970s. Libertarians can disagree in good faith about abortion as a matter of both law and policy, but Justice Kennedy's confusing and contradictory opinions on the subject do not reflect the libertarian mindset.

In short, Justice Kennedy's jurisprudence is a constant struggle to find the right balance between liberty and responsibility—a point Knowles makes repeatedly. Although this fact does not make the Justice libertarian, it does produce the type of standardless decisions that some would label inconsistent. What is more, it could make Justice Kennedy's balancing of liberty against other concerns into an imposition of his vision of where that balance should lie, rather than leaving that decision to the broader public through the political process. That approach, to be sure, would be decidedly *not* libertarian. As Jeffrey Rosen has noted, for example, Justice Kennedy tends to use the ideas

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corporate funding of political campaigns. The Court is currently reviewing that precedent. Citizens United v. Federal Election Commission, No. 08-205 (U.S. reargued Sept. 9, 2009).

of "dignity" and "equality" in a paternalistic way, not to enhance freedom.[106] Justice Kennedy may thus be better described as being in favor of good government—with liberty as a positive and welcome externality—but one that requires his workmanlike beneficence to bring the majestic law to the people.[107]

B. Contraindicative Cases

Setting aside the above criticisms of Knowles's book—in reality criticisms of any attempt to make a silk purse out of Justice Kennedy's jurisprudence—there are a host of cases in which Justice Kennedy did not exactly unfurl the libertarian flag. This non-libertarianism is especially apparent in doctrinal areas that Knowles does not cover, such as criminal law, property rights, and governmental powers. A cursory survey of only those cases in which Justice Kennedy wrote an opinion—excluding those in which he simply joined opinions antithetical to limited government or other libertarian principles—turns up the following:

> *National Treasury Employees Union v. Von Raab*: Justice Kennedy wrote for the majority in holding that the random drug testing of U.S. Customs employees does not violate the Fourth Amendment because, in their unique and important position, they have a "diminished expectation of privacy."[108]
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> *Turner Broadcasting System v. FCC*: When cable television operators challenged the constitutionality of requiring carriage of local broadcast stations on cable systems, Justice Kennedy wrote for the 5-4 majority in

106. *See* Rosen, *supra* note 2, at 2–3.

107. Professor Randy Barnett has said that this type of modernist thinking has led to a "judicially redacted constitution [that] creates islands of liberty rights in a sea of governmental powers." RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 1 (2004).

108. 489 U.S. 656, 672 (1989); s*ee also id.* at 668 ("We think the Government's need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms."). In the companion case of *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 620 (1989), Justice Kennedy also wrote for the majority in holding that the random drug testing of railway engineers constituted a "special need[]" justifying departure from standard warrant and probable-cause requirements. *Skinner* is a closer case for libertarians, however, because of the government's strong and legitimate interest in railroad safety.

upholding the law because "must-carry" provisions are content neutral and thus do not violate the First Amendment.[109]

U.S. Term Limits, Inc. v. Thornton: Justice Kennedy concurred in the Court's ruling that states cannot impose term limits on their congressional representatives, despite the Constitution's silence on whether states could add qualifications to those constitutionally enumerated.[110]

United States v. Ursery: Justice Kennedy concurred in the Court's finding that civil property forfeitures did not constitute a "punishment" for purposes of the Double Jeopardy Clause.[111]

Turner Broadcasting System v. FCC: Justice Kennedy again wrote for a 5-4 majority in upholding the "must-carry" regulation in the face of a First Amendment challenge, in deference to Congress's judgment about the need to ensure a competitive communications marketplace.[112]

United States v. Bajakajian: Justice Kennedy dissented for four Justices from a decision holding that the Eighth Amendment's Excessive Fines Clause limits the amount of money the government can seize from an

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109. 512 U.S. 622, 652 (1994) ("In short, the must-carry provisions are not designed to favor or disadvantage speech of any particular content. Rather, they are meant to protect broadcast television from what Congress determined to be unfair competition by cable systems."); *see also* Roger Pilon, *A Modest Proposal on "Must-Carry," the 1992 Cable Act, and Regulation Generally: Go Back to Basics*, 17 HASTINGS COMM. & ENT. L.J. 41, 45–46 (1994) (summarizing Justice Kennedy's opinion in *Turner Broadcasting*).

110. 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (asserting that state regulation of congressional qualifications "runs counter to fundamental principles of federalism").

111. 518 U.S. 267, 296 (1996) (Kennedy, J., concurring) ("The forfeiture cause of action is not charging a second offense of the person; it is a proceeding against the property in which proof of a criminal violation by any person will suffice, provided that some knowledge of, or consent to, the crime on the part of the property owner is also established.").

112. 520 U.S. 180, 199 (1997) ("Even when the resulting regulation touches on First Amendment concerns, we must give considerable deference, in examining the evidence, to Congress' findings and conclusions, including its findings and conclusions with respect to conflicting economic predictions.").

individual for his failure to declare that he was taking money out of the country.[113]

United States v. American Library Association: A four-Justice plurality upheld Congress's use of its spending power to require libraries receiving federal funding to install Internet filtering software, in the face of a First Amendment challenge. Justice Kennedy concurred in the judgment to note that the Children's Internet Protection Act imposed a comparatively small burden on library patrons that was not disproportionate to any potential speech-related harm.[114]

Hiibel v. Sixth Judicial District Court of Nevada: Justice Kennedy wrote for a 5-4 majority and held that statutes requiring people to identify themselves to police officers do not violate the Fourth or Fifth Amendments.[115]

Kelo v. City of New London: Justice Kennedy joined a 5-4 majority that found that the use of eminent domain to transfer land from one private party to another satisfied the "public use" requirement of the Fifth Amendment's Takings Clause because the new owner's intended use promised to generate jobs and tax revenue.[116] He wrote separately to emphasize that violations of property rights were subject only to rational-basis review.[117]

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113. 524 U.S. 321, 352 (1998) (Kennedy, J., dissenting) ("In my view, forfeiture of all the unreported currency is sustainable whenever a willful violation is proved."); *see also* Roger Pilon, *High Court Reins In Overweening Government*, WALL ST. J., June 23, 1998, at A20.

114. 539 U.S. 194, 215 (2003) (Kennedy, J., concurring) ("Given this interest [in protecting children from inappropriate material], and the failure to show that the ability of adult library users to have access to the material is burdened in any significant degree, the statute is not unconstitutional on its face.").

115. 542 U.S. 177, 191 (2004) ("Answering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances." (citations omitted)).

116. 545 U.S. 469 (2005).

117. *Id.* at 490 (Kennedy, J., concurring) ("This Court has declared that a taking should be upheld as consistent with the Public Use Clause [of the Fifth Amendment], as long as it is rationally related to a conceivable public purpose. . . . This deferential standard of review echoes the rational-basis test used to review eco-

Reasonable people can debate whether Justice Kennedy's opinions in these cases produced desirable outcomes as a matter of either law or policy, but in the close calls the ties certainly did not go to freedom. An equally important problem with Justice Kennedy's opinions is that he fails to see or ignores potentially valid libertarian legal solutions. For example, in the two *Turner Broadcasting* decisions, he failed to analyze how market economics would affect the competition problems Congress was trying to solve with its must-carry legislation.[118]

Of the cases in which Justice Kennedy did *not* write an opinion, a recent one stands out, alongside *Kelo*, as a red flag to libertarians. In *Gonzales v. Raich*, Justice Kennedy joined the Court's "liberals"—as did Justice Scalia, who received criticism from all sides for a separate concurrence that carved out a "drug war exception" to the Constitution—in allowing Congress to ban the use of marijuana where states approve its use for medicinal purposes.[119] The Court's expansive reading of Congress's Commerce Clause power spelled the end of the short-lived federalism resurgence ushered in by *United States v. Lopez*[120] and *United States v. Morrison*.[121]

Finally, although Justice Kennedy's death penalty jurisprudence may not make the parade of anti-liberty horribles listed above—because the policy issue divides libertarians—it does call into question the Justice's commitment to the rule of law. For example, in *Roper v. Simmons*, Justice Kennedy saw a national consensus against the juvenile death penalty because eighteen states—forty-seven percent of those that allow capital punishment—now prohibit the execution of underage murderers.[122] As Justice Scalia pointed out in dissent, "[w]ords have no

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nomic regulation under the Due Process and Equal Protection Clauses." (internal quotation marks and citations omitted)).

118. *See supra* notes 109 & 112.

119. 545 U.S. 1 (2005).

120. 514 U.S. 549, 549 (1995) (striking down the Gun-Free School Zones Act of 1990 as exceeding Congress's Commerce Clause authority).

121. 529 U.S. 598, 598 (2000) (striking down a statute providing federal remedy for victims of gender-motivated violence as exceeding Congress's Commerce Clause authority).

122. 543 U.S. 551, 564 (2005); *see also* Kennedy v. Louisiana, 128 S. Ct. 2641, 2653 (2008) (finding national consensus against the death penalty for certain heinous crimes not resulting in death). In *Coker v. Georgia*, 433 U.S. 584, 584 (1977), however, the Court had already effectively precluded capital child rape statutes. Nev-

meaning if the views of less than 50% of death penalty States can constitute a national consensus."[123] To quote Rosen again: "Kennedy was more interested in his own abstractions about national consensus than in whether one actually existed. Democracy, he has repeatedly argued, can't exist without consensus . . . [a]nd, when consensus proves elusive, Kennedy believes the Court can will one into existence."[124] To say the least, such an attitude—and perhaps Rosen's article needs to be taken with a few grains of salt—is neither modest nor libertarian.

Justice Kennedy also famously cited foreign law to show an *international* consensus in *Roper*[125]—as he had in *Lawrence v. Texas*.[126] Setting aside the role of any sort of "consensus" in a constitutional (and federal) republic, the way other western or democratic countries view such legal and moral questions—while fascinating as a matter of comparative law and politics—is irrelevant as far as interpreting the founding document of the *American* polity is concerned.[127]

CONCLUSION

The Tie Goes to Freedom is a heavily researched and well-written book that does much with the subject matter the author chose. The argument that Justice Anthony Kennedy is libertarian in the limited ways Helen Knowles defines and explains within the parameters of her thesis—particularly with respect to free speech, equal protection, and individual dignity—is probably sound. Still, this is a small discovery considering the broad swath of Supreme Court jurisprudence. Moreover, it says little about whether Justice Kennedy is faithful to the Constitution, which is a stronger measure of libertarianism.[128]

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ertheless, five states had recently passed such legislation—as did Congress for purposes of the Uniform Code of Military Justice.

123. *Roper*, 543 U.S. at 609 (Scalia, J., dissenting).

124. Rosen, *supra* note 2, at 20.

125. *Roper*, 543 U.S. at 575.

126. 539 U.S. 558, 573 (2003).

127. *See, e.g.*, Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFFAIRS, July–Aug. 2004, at 40, 42.

128. *See generally* Randy E. Barnett, *Is the Constitution Libertarian?*, 2008–2009 CATO SUP. CT. REV. 9, 24 (2009) ("As written, the original Constitution of the United States, together with its amendments, may be the most explicitly libertarian governing document ever actually enacted into law.").

Good on speech and race, bad on government power, and ugly on abortion and the death penalty, Justice Kennedy is a *sui generis* enigma at the heart of the modern Supreme Court. However new Justice Sonia Sotomayor affects the Court's dynamics, it is unlikely that Justice Kennedy will shift from his role as the deciding vote in most controversial cases. Helen Knowles has thus done us a great service in deconstructing Justice Kennedy's faint-hearted libertarianism and helping us better understand the "sweet mystery" of his jurisprudence.