

# The Academy of Political Science

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## Book Reviews

**The Tie Goes to Freedom: Justice Anthony M. Kennedy on Liberty** by Helen J. Knowles. Lanham, MD, Rowman & Littlefield Publishers, Inc., 2009. 312 pp. \$44.95.

I had a conversation several years ago with a Supreme Court justice, who offered a rather acid caricature of Justice Anthony M. Kennedy: “He wanders around the halls of the Supreme Court, wringing his hands, wailing ‘Oh me, oh my. What am I to do? How will I rule? The fate of the nation turns on my vote. What’s the right answer? Oh me, oh my.’”

In *The Tie Goes to Freedom*, Helen Knowles acknowledges the prevalence of this conception of Anthony Kennedy. She notes that Jeffrey Rosen has argued in *The New Republic* that Kennedy views “the Supreme Court as a pulpit from which to preach to the American people about his own, preferred brand of morality” (p. 1), and she concedes that many legal commentators suggest that “Kennedy’s jurisprudence is wrapped in a cloak cut from the cloth of inconsistency and pomposity” (p. 2). Knowles sets for herself the rather daunting task of rebutting the conventional wisdom. She insists that “in cases involving freedom of speech, equal protection law, and individual liberty and privacy rights this is an unfair reading of the justice’s opinions” (p. 2). It is a nice try.

Knowles argues that Justice Kennedy’s jurisprudence in these areas of constitutional law reflects a “modest libertarianism” that embodies three primary characteristics: a toleration of diverse views, a concern for human dignity, and an emphasis on personal responsibility. The problem is that these “characteristics” are so plastic that they could be invoked to describe pretty much any justice’s jurisprudence. The jurisprudence of such judicial opposites as Antonin Scalia and William Brennan could easily be captured by such vague notions, even though they disagree about almost everything. Scalia, for example, invalidates laws against flag burning, upholds laws restricting obscenity, and opposes a constitutional right to abortion: toleration, human dignity, personal responsibility. In short, the taxonomy does not really tell us very much.

Knowles maintains that Kennedy is “a highly principled jurist” (p. 15). He is not. Knowles is right that critics who claim that Justice Kennedy “takes his jurisprudential cues from the editorial pages of either the *New York Times* (when courting political liberals) or the *Wall Street Journal* (when courting political conservatives)” are wrong (p. 196). Kennedy is not looking merely

to be loved by the media. In his own way, he struggles to do what he thinks is right. But his hand-wringing neither reveals nor is guided by any clear, coherent, or consistent principles on constitutional law. His jurisprudence consists largely of ad hoc value judgments that are not in any clear way rooted in the Constitution.

A critical element of Knowles's re-creation of Justice Kennedy is her conclusion, expressed in her title, that for Kennedy, "The Tie Goes to Freedom." Defining "freedom" in the way Knowles seems to do, Kennedy is much preferable to some of his brethren, most notably Justices Alito, Roberts, Rehnquist, Scalia, and Thomas, whose own constitutional methodologies of "originalism" and "strict constructionism" are even less likely than Kennedy's jurisprudence of hand-wringing to side with "freedom." But this hardly commends Kennedy's decision making, either substantively or methodologically. Anthony Kennedy is the "man in the middle" not because he is wise or thoughtful or principled, but because he serves on an extraordinarily conservative Court. It is only against that backdrop that it makes any sense to say that for Kennedy, "The Tie Goes to Freedom."

Having said all this, I want to add a few important words of praise for Knowles. Although she does not persuade me of her main thesis—that Anthony Kennedy is a "highly principled jurist," she does offer an insightful and careful analysis of his opinions in important areas of constitutional law. Moreover, in her analysis of those opinions, she does uncover some themes that help explain Kennedy's outcomes. And because Kennedy does, in fact, remain the "man in the middle," it is essential for those of us who care about constitutional law to understand his thinking, whatever it might be.

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**The Opinion Makers: An Insider Exposes the Truth Behind the Polls**  
by David W. Moore. Boston, MA, Beacon Press, 2008. 196 pp. \$23.95.

In this highly engaging book, the "truth" that David W. Moore exposes is that the news media have a vested interest in perpetuating the notion of an intelligent or rational public, as revealed by responses to individual questions in the polls the media sponsor. This justifies the opinion polling they do as an increasing part of the news as "pseudo events" that they can create and use to attract audiences. The media are *The Opinion Makers* who "manufacture" public opinion: the responses to poll questions about policy issues that they report are much of the time illusory, in that the public often has little relevant knowledge or information on which to base its responses (though Moore provides no estimate of the prevalence of this). Moreover, the questions are typically "forced choices"; respondents are usually given little opportunity to say that they are not sufficiently informed to offer an opinion. And a sure sign of the meaninglessness of