At the ideological center of the Supreme Court sits Anthony M. Kennedy, whose pivotal role on the Rehnquist Court is only expected to grow in importance now that he is the lone “swing justice” on the Roberts Court. The Tie Goes to Freedom is the first book-length analysis of Kennedy, and it challenges the conventional wisdom that his jurisprudence is inconsistent and incoherent.

Using the hot-button issues of privacy rights, race, and free speech, this book demonstrates how Kennedy forcefully articulates a libertarian constitutional vision.

The Tie Goes to Freedom fills two significant voids—one examining the jurisprudence of the man at the ideological center of the Supreme Court, the other demonstrating the compatibility of an expansive judicial role with libertarian political theory.

Helen J. Knowles is assistant professor of political science at the State University of New York, Oswego. Her articles have been published in Journal of Supreme Court History, Slavery & Abolition, Ohio Northern University Law Review, First Amendment Law Review, and the Journal of Legal Education.

Everyone who seeks to understand today’s Supreme Court—Anthony M. Kennedy’s Supreme Court—will profit from reading Helen J. Knowles’s thoughtful and engaging analysis of Justice Kennedy’s libertarian constitutional vision. Helen J. Knowles explains why he, too, goes to freedom.”

THOMAS V. KELLY
associate professor of political science, Maxwell School of Syracuse University

Justice Kennedy’s jurisprudence is of obvious significance, and Helen J. Knowles has written an exceptional exposition of it and its jurisprudence. The result is a series of fascinating insights on the most central and centrist thinker on the contemporary Supreme Court. This is the first place to look for hints about how the Supreme Court may respond to a new administration.”

MARK GRABER
professor of law and government, University of Maryland School of Law

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“Despite decades of conservative complaints about judicial activists
THE TIE GOES TO FREEDOM
In memory of
Ralph Knowles and Paul Donovan
Epigraph

The law is what we live with. Justice is sometimes harder to achieve.

—Sherlock Holmes
(Arthur Conan Doyle, *The Adventure of the Red Circle*)

Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.

—James Madison, *Federalist* No. 51
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Table 4.1.  Passages from the first and final versions of Justice Kennedy’s dissent in *Metro Broadcasting v. FCC*
“WHAT DO YOU LIKE ABOUT JUSTICE KENNEDY?” During the course of writing this book, numerous people have asked me this question. It used to catch me off guard, because it is not something I ever thought about asking myself. I never stopped to consider whether the person, whose judicial opinions, speeches, and confirmation testimony I would spend years studying, was someone I “liked.” What fascinated me, from the beginning, was not the person, but the work product. Admittedly, understanding Justice Anthony M. Kennedy’s jurisprudence has required me to try and understand the justice himself; and, on the one occasion when I did have the opportunity briefly to speak to him (he did not respond to requests to be interviewed for this project), I gained the impression that he was the gracious, mild-mannered individual that others report him to be. However, it was the subject of our short conversation—the importance and value of education, which served to confirm one of my conclusions about his judicial philosophy, which I consider to have been far more informative than any insight into his personality.

What, then, do I find interesting about Justice Kennedy’s jurisprudence, and why have I written this book? In order to answer this, it is instructive to employ the following hypothetical. Imagine that it is oral argument day at the U.S. Supreme Court.

“Oyez! Oyez! Oyez! All persons having business before the Honorable Supreme Court of the United States are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!” Following some administrative announcements, the chief justice clears his throat and indicates that the Court will now hear arguments in the
first case of the day. As the attorney rises, proceeds to the lectern, and nervously sets down his papers, he feels the palpable sense of tension within the courtroom begin to rise. Perhaps this change in atmosphere is a figment of his imagination. Yet, for this “one-shooter”1—who is arguing his first case, on this particular first Monday in October, before a Court that recently welcomed two new members whose views (judicial or otherwise) about gay marriage (the subject of the case at hand) are as yet unknown—this is probably an accurate perception. “Mr. Chief Justice, and may it please the court.” Instead of following this obligatory opening statement with a question mark, which seemed all too appropriate, but at the same time distinctly inappropriate, the attorney makes the following observation. “I understand that this will be a difficult case for this Court to decide. If a majority of this Court believes that the correct interpretation of the word ‘liberty,’ in the due process clause of the Fourteenth Amendment, is a narrow one defined by closely consulting the nation’s history and traditions, then my client will not prevail in this case.” In the months since the Court had granted certiorari in the case, if Court watchers—both scholarly and journalistic—were to be believed, then the votes of only two of the justices were truly “up for grabs.” However, on this occasion the attorney’s opening sentence prompted all nine members of the Court to sit up and take notice. Encouraged, the attorney continued: “If, on the other hand, a majority of this Court affords ‘liberty’ a more expansive interpretation—embodying the concepts of individual autonomy, dignity, and responsibility (balanced against legitimate state interests)—then the government faces a far greater burden of justifying its actions in this case.” Afterward, several of the justices would remark to their clerks that it was refreshing not to hear an advocate step forward and say: “This will clearly be an easy case for you to resolve, because it is clearly obvious that my client should win because the other side wrongly interprets the Constitution”—or words to that effect. As one of the justices said to her secretary afterward: finally, a lawyer who does not think the justices have an easy job.2

Although this scene is fictional, it addresses a current jurisprudential reality—that the constitutional boundaries of individual liberty, as defined by the U.S. Supreme Court in the twenty-first century, will most likely be drawn by reference to one of the two sets of interpretive guidelines described by my imaginary attorney. And, in the immediate future in closely divided cases, the prevailing interpretation will likely be “what Anthony Kennedy says it is.”3 It is this that I find interesting. Therefore, in the chapters that follow, I do not provide a comprehensive, analytical breakdown of all of the opinions written and votes cast by Kennedy during his, thus far, two decades on the Court.4 Rather, what you will find is an examination of the justice’s understanding of the content and boundaries of constitutionally protected liberty, as it pertains
to four areas of the law—freedom of expression, equal protection of the law, race-based classifications, and noneconomic, individual decision making and autonomy. In other words, the question that I try to answer is: What meaning has Kennedy, whose vote has been determinative in so many landmark cases, given to the constitutional “Blessings of Liberty”? 
When I came to the United States, I brought with me a passion for the pursuit of knowledge about the constitutional foundations and principles of the American governmental system and the work of the U.S. Supreme Court. This book represents part of the fulfillment of that American dream, but it is a goal that could not have been achieved without the input, advice, and encouragement from a great many people whose paths I consider myself incredibly lucky to have crossed.

Ever since the first day of graduate school, I have been able to call upon the wisdom and experience of Mark Silverstein. His passion for teaching and studying judicial politics and constitutional theory is infectious; it was his enthusiasm and knowledge about law and courts that converted me into a student of public law; and it was he who ensured that I chose a dissertation topic in which someone, other than myself, would be interested. Mark has always been exceedingly generous with his time, graciously answering my endless requests to review article and manuscript drafts. I could not have asked for a better person with whom to discuss both the Supreme Court and horses—an unlikely, but to the both of us I suspect, quite logical pairing of subjects.

I was attracted to Boston University because the political science program explicitly encouraged interdisciplinary study; after all, I had never been, and knew I would never really be, a true political scientist. I was equally adamant, however, that I never wanted to be a lawyer. Upon reflection, therefore, I find it more than slightly amusing that I chose, of my own free will, to pursue the interdisciplinary option by enrolling in a class at BU Law School. Had I not done so, I would not have met Randy Barnett, the second person to have a