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Frank J. Colucci. Justice Kennedy's Jurisprudence: The Full and Necessary Meaning of Liberty. Lawrence, Kan.: University Press of Kansas, 2009. xi + 243 pp. \$34.95 (cloth), ISBN 978-0-7006-1662-6.

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Decoding Justice Kennedy

Arguably the most consequential Supreme Court justice on the bench today is Justice Anthony Kennedy. Justices generally separate themselves from their peers based on their effective leadership of the Court (think of Chief Justices John Marshall and Earl Warren) or their ability to articulate a resonant constitutional vision (Hugo Black, William Brennan, Antonin Scalia, just to list the most recent examples). Kennedy's mark on history, however, comes not from his leadership abilities or from the persuasiveness of his legal arguments, but from the simple fact that he stands at the ideological center of a Supreme Court with remarkably stable liberal and conservative blocs of four justices each. In a string of landmark rulings, it has been Kennedy's vote that has mattered. In many of them, Kennedy's written opinions define the law of the land.

Kennedy sometimes writes on behalf of the Court's liberals. This was the case, for instance, in Lawrence v. Texas, the 2003 decision striking down criminal sodomy laws, and in a pair of decisions striking down the death penalty as applied to the mentally retarded and minors. In these opinions, Kennedy pushed the Court in a liberal direction. In other major cases he has aligned with his conservative colleagues. He did so in 2007 when, in the Parents Involved case, he voted to strike down local school desegregation plans (although in that case he carved out a more moderate position than his conservative colleagues); when he wrote the opinion upholding a federal prohibition on "partial-birth" abortion (Gonzales v. Carhart [2007]); and, most recently, in Citizens United (2010), when he wrote the opinion of the Court striking down limits on corporate spending in elections.

Put simply, on a striking number of contentious issues, constitutional law is what Justice Kennedy says it is. Lawyers who argue before the Supreme Court clearly know this. Jeffrey Rosen has written about the emergence of the "Kennedy Brief," in which "lawyers on both

sides fall over themselves to court Kennedy's favor by repeatedly citing the opinions of Justice Kennedy."[2]Some predict that the constitutional challenge to prohibitions on gay marriage, currently working its way through the lower federal courts, will ultimately come down to Kennedy's vote.

With so much of recent American constitutional law resting on the shoulders of Justice Kennedy, it is a timely moment to step back and consider his approach to constitutional interpretation. In Justice Kennedy's Jurisprudence: The Full and Necessary Meaning of Liberty, Frank J. Colucci has written a valuable and comprehensive examination of the justice's body of work. Colucci organizes his study thematically, with his first chapter dedicated to Kennedy's conception of individual liberty (which includes Kennedy's opinions relating to the Establishment Clause, the Eighth Amendment, and gay rights), followed by chapters examining his approach to abortion, free speech, equal protection, and federalism. The structure of each chapter is similar. Colucci begins by noting that Kennedy's opinions in this particular area of law have been criticized as unprincipled and inconsistent. He then explains that such critiques fail to appreciate the core tenets of Kennedy's jurisprudence. The bulk of each chapter is then given over to demonstrating this point through detailed readings of Kennedy's major Supreme Court opinions. Colucci also draws upon opinions Kennedy wrote while on the U.S. Court of Appeals for the Ninth Circuit (where he sat from 1975 until he was confirmed to the Supreme Court in 1988) along with material from the justice's speeches and from his confirmation hearing testimony. Colucci also looks at the papers of Justices Blackmun and Marshall, although these sources do not add much that is not already in the public record. Indeed, Kennedy's life beyond his public statements has almost no place in this book. This is strictly a study of Kennedy's jurisprudence. (The one partial exception is Colucci's claim, tentatively offered, that Kennedy's Catholicism plays a role in his jurisprudence. Although even here, the claim is pursued not by examining Kennedy's religious beliefs, but simply by comparing Kennedy's writings with papal statements and noting similarities.)

At the heart of the book are two central arguments regarding Kennedy's jurisprudence: (1) that Kennedy has "an identifiable, coherent, and distinct approach to constitutional interpretation" (p. 170); and (2) that he has been consistent throughout his career in pursuing that approach. Although Colucci critiques some of Kennedy's opinions, his primary aim is to defend the justice from those who dismiss his opinions as failures of legal reasoning. Numerous scholars seem to have a special passion for attacking Kennedy's opinions. The core of the standard critique is that Kennedy relies upon high-sounding rhetoric and moral abstractions to dress up decisions that are dictated first and foremost by the justice's own policy preferences.

Colucci is generally persuasive in his argument for Kennedy's consistency. During his years on the Supreme Court, Kennedy has continued to stake out many of the same positions to which he expressed his commitment while on the Ninth Circuit and during his confirmation hearings. This case for consistency, however, requires one to consider Kennedy's jurisprudence at a level of considerable generality. The basic principles Kennedy has used as the touchstones of his vision of the law, and the rhetoric with which he has justified his opinions, do indeed show a striking consistency throughout his career as a judge. The question becomes, then, whether a coherent, distinct jurisprudence can be found in the abstract principles and rhetoric that Kennedy so often relies upon. This is a far more challenging point to make.

Colucci contends that Kennedy's jurisprudence is based on a "moral reading of the Constitution," premised on the justice's distinctive commitment to using judicial power to protect against invasions of individual liberty and autonomy. Kennedy rejects the originalist methodology advocated by some of his conservative brethren on the Court, favoring, in Colucci's words, an approach in which the judge "transcends constitutional text and tradition" (p. 8). In cases involving claims of individual liberty, Kennedy's approach requires the judge to "independently consider[] whether government actions have the effect of preventing an individual from developing his or her distinctive personality or acting according to conscience, demean a person's standing in the community, or violate essential elements of human dignity" pp. (8-9).

This "independent" analysis is guided by what Kennedy has referred to as "objective referents," which in various opinions have included social science scholarship, trends in public opinion, and foreign practices.

For those who tend toward frustration or exasperation when trying to make sense of Kennedy's oftentimes florid and abstract prose, Colucci's explications are unlikely to satisfy. Kennedy's constitutional vision, Colucci explains, boils down to the following: "the term liberty embodies a moral concept that judges must independently enforce to its full and necessary meaning" (p. 10). Such broad and vague descriptions risk simply restating Kennedy's equally broad and vague justifications for some of his most controversial opinions. Too often Colucci relies on Kennedy's own words to describe the justice's approach-even such diffuse and questionbegging references as the "full and necessary meaning" of liberty (a phrase repeated mantra-like throughout the book)-as if they convey some sort of determinate meaning. It is hard to know, for instance, what to make of Colucci's insistence that for Kennedy "the moral concepts embodied in the text of the Constitution-and not prior understanding or interpretations of these conceptsprovide the basis for determining the extent of the personal liberty that courts have a duty to enforce" (p. 13).

One of the Kennedy's standard moves in his opinions is to use broad references to liberty as a trump card. Requirements of personal liberty thus sweep away possible competing interests. Here is a typical Kennedy line (this from a case involving a separation-of-powers question): "Liberty demands limits on the ability of any one branch to influence basic political decisions" (p. 142). Probably the famous example of Kennedy's liberty-as-trump approach is found in the plurality opinion in Planned Parenthood v. Casey (1992), which Kennedy co-authored. "The Casey opinion," Colucci notes, "begins with the word 'liberty,' ends with the word 'liberty,' and emphasizes 'The controlling word in the case before us is "liberty"" (p. 52). This is also the opinion in which Kennedy contributed the much-quoted line: "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."[3] (Justice Scalia has ridiculed this as the "famed sweet-mystery-of-life passage."[4])

It is unfortunate that at these crucial points Colucci generally takes Kennedy at his word. Or, more precisely, he tends to explain (and generally defend) Kennedy's diffuse rhetoric with more of the same. "In *Casey*," Colucci explains, "Kennedy affirmed his ideal of the full and nec-

essary meaning of liberty while upholding regulations he believes will facilitate wise exercise of that right.... The opinion ... affirmed his commitment to a moral reading of liberty" (p. 57). While Kennedy's commitment to individual liberty offers a broad enough platform to support Colucci's claim of coherence and consistency, it hardly sheds much light on Kennedy's decision-making process. It helps to explain Kennedy's rhetorical tendencies, and maybe even to give some insight into the basic framework of analysis that Kennedy relies upon. But it is of limited utility in explaining why, for instance, Kennedy finds certain abortion regulations constitutional while others are not; or why government racial classifications are impermissible (except in certain contexts); or why corporations have free speech rights.

As useful as Colucci's study is in bringing together Kennedy's writings and highlighting certain thematic strands, it is difficult to see this book as changing the minds of those who question the analytical rigor of Kennedy's opinions. Those who accuse Kennedy of being basically an outcome-driven justice who dresses up his policy preferences with high-sounding descriptions of the "heart of liberty" will likely not be persuaded. To say that Kennedy is driven by a moral reading of the Constitution and that his jurisprudence revolves around a commitment to giving liberty its "full and necessary meaning" is to hold a mirror up to Kennedy's public statements, not to explain them.

Beyond Kennedy's often expressed commitment to liberty, two important themes of the justice's work emerge with striking clarity through Colucci's careful and thorough treatment of Kennedy's writings. One is Kennedy's commitment to judicial supremacy. Among the members of the Supreme Court in recent years, Kennedy has been most willing to strike down state and federal legislation (p. 6). He loves to cite Chief Justice John Marshall's assertion in *Marbury v. Madison* that the Court has a distinctive duty to say what the law is, a line Kennedy treats as a license for bold assertions of judicial authority.

Another theme that emerges from Colucci's study is Justice Kennedy's deep concern with public perceptions of the Court and the Constitution. He opposes affirmative action because he believes it leads to divisive politics that have "the potential to destroy confidence in the Constitution and in the idea of equality." [4] At his confirmation hearings, he defended a constitutional right to privacy as reflecting values "that Americans legitimately think are part of their constitutional heritage" (p. 23). When discussing in the justices' private conference a

case involving an Establishment Clause challenge to the use of a prayer at a school graduation, Kennedy worried that striking down the prayer would "undermine confidence with the people" (p. 16). In the context of abortion, the divergence between Kennedy's personal opposition to abortion and his acceptance of a constitutional right to abortion can be explained in large part by his concern with public perceptions of the Court. Even in his choice of interpretative method Kennedy is willing to draw on public opinion. While eschewing originalism as the sole appropriate method of constitutional analysis, he has said that some level of judicial reliance on the views of the framers of the Constitution is necessary to preserve the legitimacy of the Court. People expect this, Kennedy stated in his nomination hearings, and they will be more willing to accept judicial opinions that are framed in this way (p. 4).

Colucci leaves the reader with a portrait of Justice Kennedy's jurisprudence that demonstrates a certain consistency. And perhaps somewhere beneath Kennedy's rhetorical abstractions there is a guiding legal principle and constitutional vision. But even if there is more coherence here than scholars have recognized, the contradictions still loom large. While often attentive to public opinion, Kennedy retains a distinctly nonpopulist faith in the value of social scientific expertise and foreign legal practices. And for all the language in his opinions about the necessity for bold judicial leadership on the most contentious of social issues, he consistently sides with positions that fall well within the mainstream of debate. The same person who has been derided as a "utopian moralist," has also been singled out as the vote on the Court that best approximates the median national voter.[6] By taking on a topic that is still a work in progress, Colucci's study is necessarily a provisional assessment. While there are of course many more books still to be written about the "Kennedy Court," this book offers a valuable start toward considering Kennedy's contributions.

Notes

- [1]. Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002).
- [2]. Jeffrey Rosen, "Supreme Leader: The Arrogance of Anthony Kennedy," *New Republic* (June 16, 2007).
- [3]. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).
- [4]. Lawrence v. Texas, 539 U.S. 558, 588 (Scalia, J., dissenting).
- [5]. *Grutter v. Bollinger*, 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting).

[6]. Rosen, "Supreme Leader"; Adam Liptak, "To *Times*, Feb. 1, 2009, at WK 1 (quoting Sanford Levinson). Nudge, Shift or Shove the Supreme Court Left," *New York*

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