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THE SUPREME COURT AS CIVIC EDUCATOR: FREE SPEECH ACCORDING TO JUSTICE KENNEDY

HELEN J. KNOWLES*

INTRODUCTION

Recent analyses of the First Amendment free speech opinions of the Rehnquist Court have confirmed that decisions in this area of the law contradict the traditional ideological labels that scholars and other Court commentators routinely use to describe the Justices. However, Justice Anthony M. Kennedy, whose opinions defined much of the Rehnquist Court's speech jurisprudence, is still described in terms of his First Amendment 'libertarianism.' In this article[1], I argue that this approach provides an inadequate understanding of this aspect of the judicial decision making of the Justice who is now the sole occupant of the 'swing' seat on the Roberts Court. Kennedy is a free speech libertarian. Rather than describing his opinions in terms of this ideology, however,

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1. This article is a revised version of a paper presented at the 2007 Annual Meeting of the Southern Political Science Association, and draws on material from THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY (Rowman & Littlefield, forthcoming 2008). I would like to thank Eugene Volokh and Art Ward for their excellent comments and suggestions on earlier drafts of this article. I am also grateful for feedback received from Nigel Ashford, Randy Barnett, Jolly Emrey, Jim Schmidt, and Mark Silverstein; and for the research assistance provided by the staff of the Manuscript Division at the Library of Congress. Much of the analysis in this article was undertaken while I was a 2006 Institute for Humane Studies Summer Graduate Research Fellow, and research at the Library of Congress was funded by an Institute for Humane Studies Hayek Fund for Scholars Grant.

we should focus on the goal of civic education that he uses his judicial opinions to achieve.

Kennedy's interest in civic education became publicly apparent in 2001 when, in collaboration with the American Bar Association, he created the Dialogue on Freedom. The principles of this extrajudicial program are inextricably intertwined with Kennedy's jurisprudence. In the area of expressive freedom, the importance of civic education can be seen in the Justice's opinions in *Texas v. Johnson*,[2] *Rosenberger v. Rector & Visitors of the Univ. of Va.*,[3] and *Hill v. Colorado*.[4] In each case, Kennedy authored an opinion that passionately defended the civic educational value of maintaining viewpoint diversity.

To substantiate my conclusions I draw on Justice Kennedy's pre- and post-confirmation speeches, and the papers of Justice Harry Blackmun. Parts I and II provide analysis of Kennedy's goal of fostering civic education. In Part III, I then discuss the chosen cases, which all demonstrate the Justice's ability to achieve his goal, whether writing for a five-justice majority or on his own in concurrence or dissent. In each of these cases Justice Kennedy passionately defends the First Amendment's strong restrictions on viewpoint discrimination. He does so using language designed to achieve a civic educational goal, the significance of which has heretofore been overlooked by scholars of his jurisprudence.

I. THE FIRST AMENDMENT—"AN AMERICAN DOCTRINE"

"[T]he first amendment is not the preserve of a particular political enclave. It is not a liberal doctrine. It is not a conservative doctrine. It is an American doctrine."[5]

It is now well established that the United States Supreme Court during William Rehnquist's tenure as Chief Justice was "divided" in such a way that cases could be neither accurately predicted nor

2. 491 U.S. 397 (1989).
3. 515 U.S. 819 (1995).
4. 530 U.S. 703 (2000).
5. Burt Neuborne, *First Amendment*, 6 TOURO L. REV. 113, 130 (1989).

adequately analyzed using the labels "conservative," "liberal," "Democratic," or "Republican." The differences that generated jurisprudential disagreements were far more complex than these ideological/partisan political terms suggest.[6] As scholars now reflect upon the First Amendment free speech legacy of that Court, it has become clear that Justice Anthony Kennedy became the Court's dominant voice in free speech cases upon the retirement of Justice William Brennan in 1990.[7]

Data about Justices' voting patterns leave us with little doubt that "unadulterated support for freedom of expression is hardly the lodestar of liberalism assumed by political scientists."[8] This was particularly true for the divided Rehnquist Court.[9] Justice Kennedy, who is generally considered a conservative justice,[10] was the most libertarian member of that Court in free speech cases. He voted against the government in almost three quarters of those cases. Justices Clarence Thomas and David Souter also had a libertarian bent to their free speech

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6. *See* MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW (2005).

7. BURT NEUBORNE, *Free Expression and the Rehnquist Court*, *in* THE REHNQUIST COURT: A RETROSPECTIVE 15 (Martin H. Belsky, ed., 2002) ("where free expression is concerned, it would probably be more accurate to call it [the Rehnquist Court] the Brennan/Kennedy Court") (alteration added).

8. Lee Epstein and Jeffrey A. Segal, *The Rehnquist Court and the First Amendment: Trumping the First Amendment?*, 21 WASH. U. J.L. & POL'Y 81, 109 (2006).

9. Not only did the Rehnquist Court generate free speech decisions whose patterns of voting belied traditional "conservative" and "liberal" labels, but also far more than its predecessors it heard and resolved "value-conflict" cases—involving expressive freedom and other constitutional values—in favor of the litigants who brought the free speech challenges. *Id.* at 93.

10. Although, it should be noted that scholars and journalists have described Justice Kennedy's conservatism in numerous ways. For example, see EARL M. MALTZ, *Anthony Kennedy and the Jurisprudence of Respectable Conservatism*, *in* REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 140 (Earl M. Maltz, ed., 2003); DAVID G. SAVAGE, *Anthony M. Kennedy and the Road Not Taken*, *in* A YEAR AT THE SUPREME COURT 35, 46 (Neal Devins & Davison M. Douglas, eds., 2004) (describing Kennedy's conservatism as Reagan era conservative "idealism"); Terence Moran, *Kennedy's Constitutional Journey*, LEGAL TIMES, July 6, 1992, at 21 ("a conservatism of character more than one of ideology..."); Richard C. Reuben, *Man in the Middle*, CALIFORNIA LAWYER, October, 1992, at 36 ("small-town, traditional-values conservatism...").

jurisprudence, but statistically they trailed Kennedy by a long way—in speech cases they voted to protect the individual's rights about sixty percent of the time. At the other end of the spectrum were Chief Justice Rehnquist and Justice Stephen Breyer, who supported the individual's position in only forty percent of cases.[11] Quite clearly, these patterns cannot be explained by using "liberal" and "conservative," or "Democratic" and "Republican" labels. These data suggest that while there emerged a majority of the Court committed to the Constitution's libertarian protection of speech, describing this coalition[12] of justices in terms of "conservatism," "liberalism," or even "libertarianism" is, on its own, not very helpful. However, we cannot take ideology out of the equation entirely. After all, when the Framers wrote that "Congress shall make no law . . . abridging the freedom of speech," they drew on an ideology—a "set of [consistent] idea-elements."[13] Therefore, it is inevitable that the Justices who interpret this clause will make ideological decisions.[14] Understanding these decisions, however, requires us to realize the very real "limitations of labeling."[15]

Justice Kennedy's freedom of expression jurisprudence is a case in point. Several scholars have remarked that the Justice has struck a decidedly libertarian tone in speech cases.[16] As I have argued elsewhere,

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11. The following are the percentages of decisions in which members of the Rehnquist Court took the speech-protective position (1994-2002 Terms): Kennedy 74.5%; Thomas 61.1%; Souter 61%; Stevens 55.7%; Ginsburg 53.6%; Scalia 49.6%; O'Connor 44.7%; Rehnquist 41.8%; Breyer 39.7%. Compiled using data from Eugene Volokh, How the Justices Voted in Free Speech Cases, 1994-2002, *available at* http://www.law.ucla.edu/volokh/howvoted.htm (updating Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994-2000*, 48 UCLA L. REV. 1191 (2001)); Epstein and Segal, *supra* note 8, at 93.

12. My use of this word is not meant to suggest that the majority of justices who usually took the speech-protective position always consisted of the same individuals, because it clearly did not.

13. John Gerring, *Ideology: A Definitional Analysis*, 50 POL. RES. Q. 957, 980 (1997).

14. Eugene Volokh, *The Rehnquist Court: Pragmatism vs. Ideology in Free Speech Cases*, 99 NW. U. L. REV. 33, 34 (2004).

15. Lawrence Friedman, *The Limitations of Labeling: Justice Anthony M. Kennedy and the First Amendment*, 20 OHIO N.U. L. REV. 225 (1993).

16. *See, e.g.*, Steven G. Calabresi, *The Libertarian-Lite Constitutional Order and the Rehnquist Court*, 93 GEO. L.J. 1023, 1049 (2005) (describing Kennedy's free speech opinions as "strikingly libertarian"); Thomas W. Merrill, *The*

and as the analysis below indicates, this is an accurate description.[17] However, just like 'conservative' and 'liberal,' there is a certain amount of definitional baggage attached to 'libertarian.' And Kennedy has expressed his discomfort at the tendency to attach ideological labels to his jurisprudence.[18] Therefore, in order to tease out of Kennedy's opinions his commitment to the libertarian principles written into the speech clause of the First Amendment, we have to understand the goal that he pursues through these writings.

This article explains that the goal pursued by Kennedy is to use the Court's opinions as tools of civic education. This argument is demonstrated through analysis of Justice Kennedy's opinions in *Texas v. Johnson*,[19] *Rosenberger v. Rector & Visitors of the Univ. of Va.*,[20] and *Hill v. Colorado*.[21] As we will see, fostering civic education in these cases involves writing opinions that clearly and concisely articulate the boundaries of the constitutionally protected liberty to express oneself free of government restrictions based on one's point of view.

II. JUSTICE KENNEDY'S CIVIC EDUCATIONAL DIALOGUE

Although it is difficult to determine how Justice Kennedy defines "civic education," the following definition given by Ira Strauber is broadly representative of Kennedy's views, and it helps us to identify some of the recurring themes explored below. First, in the context of the law, civic education is comprised of "the lessons that litigation, adjudication, and commentary are *supposed* to teach about the conservation or, alternatively, the transformation of law, policies, and

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Constitution and the Cathedral: Prohibiting, Purchasing, and Possibly Condemning Tobacco Advertising, 93 NW. U. L. REV. 1143, 1169 (1999); Mark Tushnet, *Kormendy Lecture Series: Understanding the Rehnquist Court*, 31 OHIO N.U. L. REV. 197, 199 (2005) (discussing Kennedy's "libertarian inclinations" in First Amendment opinions); Volokh, *supra* note 14, at 41 (Kennedy is "broadly speech-libertarian").

17. KNOWLES, supra note 1.

18. Jason DeParle, In Battle to Pick Next Justice, Right Says Avoid a Kennedy, N.Y. TIMES, June 27, 2005, at A1.

19. 491 U.S. 397 (1989).

20. 515 U.S. 819 (1995).

21. 530 U.S. 703 (2000).

culture in a liberal-democratic polity."[22] Second, it involves an idea "both within and—equally important—outside law school . . . that all those who engage in constitutional and legal commentary thereby help to articulate competing visions of lawmaking that are essential to building a vibrantly free political community."[23]

This commitment to active engagement of the legal community in civic educational endeavors has been clear throughout Kennedy's career. For many years prior to his appointment to the Supreme Court, Kennedy taught constitutional law classes at McGeorge School of Law in his hometown of Sacramento (including during his time as a member of the Ninth Circuit Court of Appeals). Upon his appointment to the Supreme Court, in a farewell speech Justice Kennedy told his McGeorge students "I hope I've been able to teach you that rules alone don't make the law and that knowledge of the rules doesn't make you a lawyer."[24] On several occasions, Kennedy has been criticized for allowing his decision making—and, by association, his views on the Court's civic educational role—to be unduly influenced by the legal educational profession for which he clearly has such respect. His critics contend that this profession does not represent the views of mainstream American society.[25] However, as Kennedy has said, it is his judicial experience

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22. IRA L. STRAUBER, NEGLECTED POLICIES: CONSTITUTIONAL LAW AND LEGAL COMMENTARY AS CIVIC EDUCATION 17 (2002) (emphasis in original).

23. *Id.*

24. Quoted in Moran, *supra* note 10, at 21. Student law review notes demonstrate this, Kennedy has written, because they show "in real and concrete form the principle that members of the bench and bar are but *temporary trustees* of a law that must soon be entrusted to a new generation." Anthony M. Kennedy, *Introduction*, 25 PAC. L.J. xiii (1993) (emphasis added). As Kennedy explained during his Supreme Court nomination hearing, "the legal profession is the only profession that is intimidated by its initiates. We have law review articles written by students who are not even lawyers and they get paid a great deal of attention;" this could only be positive because "I guess that is one thing that keeps the law vigorous and vital." *Confirmation 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. 88, 164, 177 (1987) [hereinafter *Kennedy Hearings*].

25. *See* Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., joined by Rehnquist, C.J., and Thomas J., dissenting) ("Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda . . ."); Romer v. Evans, 517 U.S. 620, 652-53 (1996) (Scalia, J., joined by Rehnquist, C.J., and Thomas J., dissenting) ("When the

that has taught him "that constitutional doctrines of the next generation, though announced by the federal courts, are first tested in the crucible of the classroom."[26] So, while law schools should not be the only intellectual stimuli, it is also true that debates about fundamental constitutional principles should not be left to the devices of "normal political debate and resolution."[27] With regard to the First Amendment, it is particularly important to keep this in mind. The community that civic education encourages will be more restricted, and less vibrant, if its participants do not understand, and are therefore unable to respect, the proper constitutional boundaries for the expressive freedom that the Constitution establishes. As Kennedy has written, "speech is the beginning of thought."[28]

A. The Dialogue on Freedom—The Concept

Justice Kennedy's passion for civic education became publicly apparent in an extrajudicial setting after the terrorist attacks of September 11, 2001. In response to those events, he created a program called the "Dialogue on Freedom," a program designed to encourage student discussion of civic participation and democratic values. The goal was

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Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's members are drawn . . . . This law-school view of what 'prejudices' must be stamped out may be contrasted with the more plebeian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws . . . ."); Rowland Evans and Robert Novak, *Professor Sways Justice Kennedy*, CHI. SUN TIMES, September 4, 1992 at 33 (accusing Kennedy, in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), of succumbing to the lobbying and influence exerted by Harvard Law Professor Laurence Tribe).

26. Anthony M. Kennedy, Judge, Address before the Sacramento Chapter of the Rotary (February 1984), *in* Committee on the Judiciary, Judiciary Nominations files, A. Kennedy, Sup. Court, 100th Congress, Records of the Senate, Record Group 46, National Archives, Washington, D.C.

27. Antonin Scalia, *The Judges Are Coming*, CONG. REC. 18921 (1980) (objecting to twentieth century changes in legal education that resulted in "substantial doses of 'policy analysis'—intensive examination of the social desirability of each rule of law").

28. Ashcroft v. The Free Speech Coalition, 535 U.S. 234, 253 (2002).

"to foster among our nation's youth the identification and understanding of fundamental American values and those universal moral precepts that all free people share."[29] Administered by the American Bar Association (reflecting Kennedy's belief that "the bar ought to step up from time to time and say there are certain values that unite us"[30]), dialogues have been established at schools across the nation, with students and prominent judges and politicians engaging in the discussions envisioned by Kennedy. Students are asked to think about how they would address the disparities between their American political and cultural beliefs, and those held by three individuals in the fictional country of Quest, where there is very high unemployment, the few people who do work are paid very low wages, and the government is dominated by corruption. Students discuss the anti-American, religious and political doctrines of Drummer, the most charismatic speaker in Quest. And they are asked to formulate responses to the hostility towards Western values exhibited by two citizens of Quest—W and M.[31]

The program has a goal of creating unity, not division. It seeks to celebrate and promote an understanding of the "rights and responsibilities that are universal," rather than to generate "a series of little debates" from which might emerge a relativistic attitude to cultural and political values.[32]

B. The Dialogue on Freedom—And Justice Kennedy's Jurisprudence

A few commentators have taken notice of this initiative, but they have not argued that it can inform our understanding of Kennedy's jurisprudence.[33] This is an unfortunate oversight because the notion of

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29. Dialogue on Freedom Summary, available at http://www.abavideonews.org/ABA243D/DOF_summary.html.

30. Charles Lane, *Attacks Led to 'Dialogue' for Justice Kennedy*, WASH. POST, January 26, 2002, at A11 (quoting Justice Kennedy).

31. *Dialogue on Freedom Hypothetical*, http://www.abanet.org/dialogue/whatis.html.

32. *Id.*

33. *See* TUSHNET, *supra* note 6, at 172-73; Tony Mauro, *A Lost Chance to Be the Chief*, LEGAL TIMES, March 7, 2005, at 1 (implying that the significance of the program lay in the "quality time" it allowed a prospective chief justice to spend with First Lady Laura Bush); Jeffrey Rosen, *Supreme Leader: The Arrogance of Justice Anthony Kennedy*, NEW REPUBLIC, June 18, 2007, at 21-22.

civic education that the program embodies began to inform his decision making much earlier than September 11, 2001. As Judge Alex Kozinski, Kennedy's close friend and former clerk, has remarked: "There are those who might say the [Dialogue] is corny or hokey, but it's really him."[34]

At the inaugural Dialogue on Freedom, at the School Without Walls in Washington, D.C. in January 2002, Justice Kennedy observed, "Governments are most dangerous when they try to tell people what to think."[35] One might wonder how a Justice of the United States Supreme Court, a federal government employee, can legitimately take the normative position that governments should not be in the business of attempting to direct our thoughts. How, it might be asked, can Justice Kennedy say this while at the same time advocating a dialogue on liberty, the constitutional boundaries of which are delineated by the Supreme Court. The answer lies in the libertarian and expressive freedom principles underpinning the statement. The civic educational goal of Justice Kennedy's free speech opinions is achieved in the following way. The First Amendment *preserves* and *protects* a marketplace of ideas, and the Court *defends* this marketplace. The result is a citizenry exposed to a multiplicity of views—an enlightened citizenry that is best positioned to ensure the individual liberty (speech-related or otherwise) of all its members.

There are several reasons why this is the case. For example, we can look to the general educational value of providing people with the greatest possible access to diverse knowledge and opinions. James Madison expressed this view in 1822, in an oft-quoted letter to William T. Barry:

> A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will for forever govern ignorance. And, a people who mean to be their own

34. Charles Lane, *Justice Kennedy's Future Role Pondered*, WASH. POST, June 17, 2002, at A1 (quoting Judge Kozinski).

35. Amy Goldstein & Charles Lane, *At D.C. School, Justice Kennedy and Teens Explore U.S. Values*, WASH. POST, January 29, 2002, at A17 (quoting Justice Kennedy). I am particularly grateful to my fellow 2006 Institute for Humane Studies Summer Graduate Research Fellows for their input on interpreting this quotation.

> Governors, must arm themselves with the power which knowledge gives.[36]

Madison recognized, just as he had a generation earlier in *The Federalist No. 10*, that people do not all think alike. "The latent causes of faction," he wrote, "are . . . sown in the nature of man."[37] This means that extinguishing factions is equivalent to extinguishing our natural liberty. The correct remedy for factions is more factions. Similarly, the correct way to combat the speech one does not like is to put forward an alternative view.

When we apply this to the First Amendment, we arrive at the recognition that embodied in its speech provision is the important need to prevent such suppression *by the government* because of the element of distrust that underpins the Constitution. An informed citizenry is vital for understanding this part of individual liberty. There are two reasons why both of them are evident in Justice Kennedy's libertarian free speech jurisprudence. First, because order and liberty can peacefully coexist, some legitimate constitutional restrictions on speech can be imposed. And because "[i]t is emphatically the province and the duty of the judicial department to say what the law is,"[38] the responsibility for articulating these limitations, as they are defined by the text and principles of the Constitution, falls to the Justices of the United States Supreme Court, including Anthony Kennedy. Second, an awareness of these speech boundaries helps to overcome what Randy Barnett describes in *The Structure of Liberty* as a "pervasive social problem"—the problem of knowledge.[39] While we all have personal knowledge that is unique to ourselves, we must never lose sight of the fact that at the same time we all have personal knowledge that we might value equally. Therefore, when we make use of our knowledge we must do so with the

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36. Letter from James Madison to William T. Barry, (Aug. 4, 1822), *in* JAMES MADISON: WRITINGS 1772-1836 790 (1999). For analysis of the letter as a Madisonian expression of the importance of education, see Michael Doyle, *Misquoting Madison*, LEGAL AFF., July/Aug. 2002.

37. THE FEDERALIST NO. 10 (James Madison), THE FEDERALIST BY ALEXANDER HAMILTON, JAMES MADISON AND JOHN JAY 131 (Benjamin F. Wright, ed., 2002).

38. Marbury v. Madison, 5 U.S. 137, 177 (1803) (alteration added).

39. RANDY BARNETT, THE STRUCTURE OF LIBERTY—JUSTICE AND THE RULE OF LAW (1998).

awareness that we are ignorant of so much of the knowledge and opinions of others. This immediately suggests that collective and social decisions (such as those made by groups of political decision-makers) should not be grounded in perceptions that the negative effects of an action or view warrant prohibiting or suppressing it. Of course, this might prompt one to reply that every action negatively affects something or somebody. It might also be said that there will always be dissenters from some views. That this is true therefore requires (for the ultimate preservation of liberty) *some* determination of the legitimate restrictions on speech and conduct.[40]

It would be wrong to state that a democratic government of limited powers can legitimately respond to citizens' claims and concerns if it delineates the nature and boundaries of the claims and concerns that it hears. Similarly, it would be misleading to state that the corollary of this is the argument that we should place our trust not in the government's but rather in the citizens' expressive judgments. One need not follow this to its logical conclusion to see the problems associated with, as Richard A. Epstein has described it, relying on the "good citizens to reach the right result every time."[41]

C. An Educational Institution?

It obviously takes some effort to know what one's First Amendment rights are. The text of the Free Speech Clause might seem simple, but only Justice Hugo Black read "Congress shall make no law abridging the freedom of speech" to mean "*no* law."[42] If "a debate [is] structured by a familiar framework"—education breeds this familiarity—then "many people who otherwise would have to invest too much of their time or other resources in order to join" that debate might well choose to express themselves, relatively safe in the *knowledge* that their speech

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40. *Id.* at 29.

41. Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 54 (1992).

42. Smith v. Cal., 361 U.S. 147, 157 (1959) (Black, J., concurring) (emphasis added). And, even Black's absolutism was tempered by a firm distinction between speech and conduct. *See generally* MARK SILVERSTEIN, CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK, AND THE PROCESS OF JUDICIAL DECISION MAKING (Cornell University Press) (1984).

will not be subject to government penalties.[43] Judicial opinions represent one means of disseminating this knowledge.[44] The idea of judges—particularly the men and women who sit on the Supreme Court—using their opinions in a civic educational manner has endured some criticism.[45] However, Eugene V. Rostow's famous description of the Court as "an educational body, and the Justices are inevitably teachers in a vital national seminar" expresses a sentiment that scholars are more likely than not to agree with.[46] Even though they disagree about the specific normative details of this view of the Court, law professors and political scientists alike endorse it in larger debates about the role of the Court in a constitutional democracy.[47]

What about the empirical side of the discussion, however? What if the Court holds "vital national seminars" that no one attends? Does the American public find it necessary to engage in civic education in order, for example, to maintain the country's commitment to democratic

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43. SAMUEL P. NELSON, BEYOND THE FIRST AMENDMENT: THE POLITICS OF FREE SPEECH AND PLURALISM 18 (2005) (alteration added) (emphasis in original).

44. Justice Kennedy has passionately expressed his belief that while teaching the public about the work of the Court is a vital national goal, it is not a goal that should be achieved by televising the Court's proceedings. "We are judged by what we write, in the federal reports," he argues. "We have a timeline, a language, a grammar, an ethic; an etiquette, a formality, a tradition that is different from the [televised] political branches." *Supreme Court Justice Anthony Kennedy Testifies Before the Senate Judiciary Committee on Judicial Independence & Security*, (C-SPAN television broadcast Feb. 17, 2007).

45. Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 176 (1998) (Klarman is skeptical about the educational value of opinions interpreting the Constitution's abstract language.).

46. Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952). Christopher Eisgruber accurately captured academia's reaction to Rostow's description when he wrote that "an astonishing range of thinkers has endorsed some version of this idea." Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 962 (1992).

47. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 26 (2d ed. 1986) (as an authoritative "voice of the Constitution," the Court is an "educational institution that both takes the observation to correct the dead reckoning [of the past] and makes it known" to future generations (alteration added)); James E. Fleming, *The Constitution Outside the Courts*, 86 CORNELL L. REV. 215 (2000); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Mark Tushnet, *Style and the Supreme Court's Educational Role in Government*, 11 CONST. COMMENT. 215 (1994).

self-government? And, regardless of the answers to these questions, does the Court actually play any role in the distribution of this knowledge? In other words, "Does the Court . . . have an educative responsibility, or does it instead merely have an occasional educative effect as a by-product of interpretive accidents?"[48] Scholars have been reluctant to address the empirical questions raised by the concept of the Supreme Court as a civic educator. This is because it is not at all clear that there is an identifiable group of students that either wishes to be, or actually is, being civically educated by the nine Justices in Washington, D.C. Were Justice Kennedy to answer these questions, I suspect that he would identify a judicial role that lies somewhere in between "responsibility" and "effect." Even though Kennedy frequently expresses the belief that because "[t]he law lives in the consciousness of people," it would be undemocratic to think that "government is for experts," I suspect that he is under no illusion that the average American is listening to what he says.[49]

This begs the question: Just how educationally useful are his opinions? In other words, can the Court really be considered a civic educator if there exist few people with either an interest in or a concern about furthering their knowledge of constitutional principles as the Supreme Court articulates them? Robert F. Nagel rejects the argument that "fancy talk"—discussion of high free speech principles—educates the public about the proper boundaries and content of a constitutional right.[50] Rather, he states, such rhetoric merely confuses the average citizen:

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48. Eisgruber, *supra* note 46, at 963-64, 1014. Eisgruber specifically stated that he was not addressing the empirical question whether or not the Court's educative opinions actually do educate.

49. Justice Kennedy quoted in *Federal Judges Convene Civic Education Summit*, 34 THE THIRD BRANCH (2002), *available at* http://www.uscourts.gov/ttb/july02ttb/convene.html (alteration added).

50. Robert F. Nagel, *How Useful Is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302 (1984). Discussing Justice Brennan's opinion in *Texas v. Johnson*, Eisgruber makes a similar point: "Saying that Brennan does not provide the American people with arguments likely to motivate them to do what is right is quite different from saying that Brennan does not clearly describe what the American people ought to do." Eisgruber, *supra* note 43, at 985 and 981-985 generally. On Kennedy's opinion rhetoric, see Akhil Reed Amar, *Justice Kennedy and the Ideal of Equality*, 28 PAC. L.J. 515, 516 (1997); TUSHNET, *supra* note 6,

> A public exposed to the judiciary's lessons will inevitably ask certain troubled questions. Why, for example, if the first amendment's guarantee of freedom of speech is so important, is it so often invoked to protect seemingly silly, unsavory, or dangerous activities? Why does its application so often seem strained, difficult, and doubtful?[51]

If the public response to a Court decision was to ask such questions, Nagel argues, it would "ultimately undermine public support for the idea of free speech."[52] As we will see below, these criticisms are quite inconsistent with the principles that underpin the Constitution's protection of expressive freedom. For reasons that will become clear, in America's constitutional democracy the role of the Supreme Court is not determined by the extent to which there is majoritarian agreement about the Constitution's content. And the inquiries of which Nagel speaks (and the civic educational dialogue that they would generate) should be encouraged rather than channeled into a dead-end street.

III: IDENTIFYING THE "REASON FOR SCRUPULOUS PROTECTION"[53]— THREE CASE STUDIES

There are many ways in which the Supreme Court's First Amendment jurisprudence distinguishes between types of speech. The Court has never placed all expression into a single category, and it has never applied one standard of review to all utterances and/or expressive activities. The three cases analyzed below were chosen for their ability to explain Justice Kennedy's pursuit of the goal of civic education in a particular area of First Amendment free speech law—viewpoint discrimination. Before proceeding to an analysis of the opinions in

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at170-71, 78; Tushnet,*Style and the Supreme Court's Educational Role in Government*, *supra* note 47, at 219.

51. Nagel, *supra* note 50, at 329.

52. *Id.* at 329-30.

53. "[E]ducating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes," W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (alteration added).

Texas v. Johnson, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, and *Hill v. Colorado*, it is important briefly to understand the two main reasons why Kennedy's commitment to the use of opinions to foster civic education is so evident in viewpoint discrimination cases.[54]

The first reason is reflective of just what viewpoint discrimination is, and why it is almost always afforded the "most exacting scrutiny" by the Court.[55] One of the most prevalent defenses of government actions that restrict expression based on the speaker's views rests on the fear of the "communicative impact" of speech. The two most common types of communicative impact are (1) audiences having "undesirable or unlawful" reactions to the speech and (2) audiences reacting because material offends them.[56] A government that decides to restrict speech because of such fears demonstrates very little trust in its citizens' personal responsibility or levels of tolerance. The Framers certainly recognized the fallibility of humans and knew that it was unrealistic to expect individuals to act responsibly, and to tolerate their fellow citizens at every turn. Their solution was to establish a system that limited the actions of the *government*; they did not envision a set of paternalistic restrictions on individuals' thought processes. Justice Kennedy shares the Framers' commitment to the fundamentality of the principles of personal responsibility and tolerance. Therefore, it is no surprise that in his First Amendment jurisprudence he places great emphasis on educating people about the importance of preventing the government from discriminating against speech because of a speaker's views.

The second reason for the choice of cases reflects the educational benefits that the Justices expect the public to receive from exposure to the speech protected by the First Amendment. It is doubtful, for example, that the majority of people who choose to watch pornography do so because it might change their views about the content of the material or about pornography in general. For example, the Court has

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54. I am very grateful to Eugene Volokh for prompting me to consider this issue.

55. Simon & Schuster v. Crime Victims Bd., 502 U.S. 105, 125 (1991) (Kennedy, J., concurring in the judgment) (citing Texas v. Johnson, 491 U.S. 397, 412 (1989)).

56. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 212-16 (1983).

said adults have a constitutional right to watch "sexually-oriented" cable television programs at any time during the day (as opposed to only at nighttime, when the risk that children will be exposed to the broadcasts is significantly reduced). When they said this, the Justices were probably not concerned with furthering the nation's civic education about the boundaries of First Amendment liberty.[57] They were not, in other words, seeking to encourage people to watch pornography because it might enlighten them as to the merits of certain sex acts.

A. Texas v. Johnson

Justice Kennedy endorsed a civic educational understanding of the Court's role in one of his earliest Supreme Court opinions. Described by him as "a great teaching case" because "[i]t teaches that the Constitution has meaning in your own times,"[58] *Texas v. Johnson* involved constitutional questions about which few people had heard or strongly held a view.[59] During a political demonstration outside the 1984 Republican National Convention in Dallas, Gregory Lee Johnson set fire to an American flag. Nobody was injured, but several onlookers later testified that they were "seriously offended" by the incident. One person returned to the site to collect the remains of the flag; he took them home and buried them in his backyard. The offense that Johnson's actions generated was sufficient to convict him under a Texas statute making it a crime to "intentionally or knowingly desecrate . . . a state or national flag." The State defined 'desecrate' as to "deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."[60]

The five-Justice majority that voted to strike down the Texas law on First Amendment grounds was composed of Justice Brennan (who wrote the opinion), Justices Thurgood Marshall, Harry Blackmun, Antonin Scalia, and Kennedy. Although he joined Brennan's opinion

57. U.S. v. Playboy Entertainment, 529 U.S. 803 (2000).

58. *The Role of the Judiciary in Promoting the Rule of Law*, (C-SPAN television broadcast 2005) (alteration added).

59. 491 U.S. 397 (1989). For an extensive treatment of the public and political reaction to the case, see ROBERT JUSTIN GOLDSTEIN, FLAG BURNING AND FREE SPEECH: THE CASE OF TEXAS V. JOHNSON (2000).

60. *Johnson*, 491 U.S. at 400 n.1.

"without reservation,"[61] Kennedy chose to write a short, two-page concurrence that was a rather extraordinary display of what he has since described (somewhat apologetically) as "judicial hand-wringing."[62]

Even though Justice Kennedy has since suggested that he should not have searched his soul in quite such a public fashion, there remains no doubt that his concurrence in *Johnson* serves an identifiable civic educational purpose. Examining some of the changes that the opinion underwent demonstrates this. The first draft contained passages that expressed the Justice's disdain for Johnson's actions. However, as Table 1 shows, the language of the second and final version was noticeably toned down. Perhaps this was in response to comments from Justice Blackmun, whose marginalia on the first draft include objections to certain phrases that did not appear in the final opinion. More importantly, it was probably in recognition of the essential First Amendment principles of tolerance and viewpoint diversity at stake in the case—the principles that Kennedy feels it is important to convey to the American public. In the second draft, Kennedy inserted language reflecting the elements of individual liberty that are central to his jurisprudence.[63]

Kennedy wrote, "[T]he flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit." Originally, Kennedy referred to beliefs "*all* Americans share." The removal of "all" from his final opinion marked his awareness that the beliefs to which he was referring were not and should not be interpreted as the beliefs that a majority hold; in the eyes of the Constitution, it was just as American to burn the flag as to wave it.[64] Indeed, in the final opinion Kennedy took pains to emphasize that this was not a case in which the Justices could allow their decision to be

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61. *Id.* at 420 (Kennedy, J., concurring).

62. Jeffrey Rosen, *The Agonizer*, THE NEW YORKER, Nov. 11, 1996, at 82 (quoting Justice Kennedy).

63. Texas v. Johnson, Justice Kennedy concurrence, first and second drafts, Box 533, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. [hereinafter HAB-LOC].

64. *Johnson*, 491 U.S. at 421 (Kennedy, J., concurring). As Justice Brennan wrote for the Court in Johnson: "We can imagine no more appropriate response to burning a flag than waving one's own . . . ." *Id.* at 420.

affected by their "distaste for the result."[65] Doing so would result in "undermining a valued principle that dictates the decision."[66] He respected the passionate, and heartfelt dissenting objections of his colleagues—Chief Justice Rehnquist and Justices Byron White, John Paul Stevens, and Sandra Day O'Connor—but wrote: "I do not believe the Constitution gives us the right to rule" in this way, "however painful this judgment is to announce."[67] Barely one year earlier, at his Supreme Court nomination hearing, then-Judge Kennedy reminded the Senate Judiciary Committee that the First Amendment "ensures the dialogue that is necessary for the continuance of the democratic process."[68] *Johnson* emphasized that Kennedy believes that this dialogue is based upon the idea of tolerating even those views given with "vengeful insolence."[69]

While it might be true that "the authors [of concurrences] keep a careful eye on their own judicial identities to assure they remain intact for future battles,"[70] it is misleading to view Kennedy's *Johnson* concurrence in this manner.[71] Rather, the opinion illustrated that his First Amendment jurisprudence cannot be correctly labeled as 'conservative' or 'liberal' because this is not the way in which he views the principles embodied in this first section of the Bill of Rights. *Johnson* stood for the

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65. *Id.* at 420.

66. *Id.*

67. *Id.* at 421 (Kennedy, J., concurring).

68. *Kennedy Hearings*, *supra* note 24, at 111.

69. Texas v. Johnson, Justice Kennedy concurrence, first draft, Box 533, HAB-LOC, *supra* note 63.

70. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1415 (1995) (alteration added). *See also* R. Dean Moorhead, *Concurring and Dissenting Opinions*, 38 A.B.A. J. 821, 882 (1952) (arguing that separate opinions can provide significant information about appellate judges). This sentiment was reflected in much of the newspaper coverage of *Johnson*, which emphasized the "personal toll" aspects of Kennedy's concurrence. *See, e.g.*, Linda Greenhouse, *Justices, 5-4, Back Protesters' Right to Burn the Flag*, N.Y. TIMES, June 22, 1989, at A1. A notable exception was Al Kamen, *Court Nullifies Flag-Desecration Laws*, WASH. POST, June 22, 1989, at A1 (picking up on the key First Amendment sections in the opinion).

71. To use the apt phrase coined by Justice Ginsburg (when she was a member of the U.S. Court of Appeals, D.C. Circuit), Kennedy's opinion did not constitute a "solo performance." Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 143 (1990).

principle that the special protection of individual liberty afforded by the First Amendment's free speech provision involves issues divorced from either conservatism or liberalism. Concededly, they were "libertarian" issues, but more importantly they struck at the heart of what it meant to maintain the vitality, vibrancy, and progress of democracy through "rational public discourse."[72]

It took Kennedy only six short paragraphs to explain why he felt compelled to write separately in *Johnson*. He wrote to defend the Court's protection of the First Amendment, "a pure command of the Constitution," a goal he said it achieved by striking down "a clear and simple statute" that conflicted with it.[73] The brevity of Kennedy's opinion was important. It enabled him to avoid negatively affecting judicial collegiality.[74] More importantly, though, its conciseness made it a stronger vehicle for civic education. When major national newspapers chose to publish excerpts from the case, there was room to print Kennedy's concurrence in its entirety.[75] And in such a short opinion it

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72. Anthony M. Kennedy, Assoc., J., U.S. Sup. Ct., Speech at the American Bar Association Annual Meeting 2 (Aug. 9, 2003, rev. Aug. 14, 2003) (paginated transcript available from the Public Information Office, U.S. Sup. Ct.) (copy on file with author).

73. Texas v. Johnson, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring).

74. Michael Traynor, *Judge Richard Arnold: His Collegiality and Concurring Opinions*, 58 ARK. L. REV. 545, 553 (2005) (If "a short [concurring] opinion . . . tactfully makes a useful point . . . it certainly seems worth considering whether such a contribution has such independent value that it should not be discounted by some perceived diminishment in collegiality. . . .") (alteration added).

75. For example, see *Excerpts of Opinions from Supreme Court Decision in* Texas v. Johnson, WASH. POST, June 22, 1989, at A8; *Excerpts from High Court's Decision Barring Prosecution in Flag Protest*, N.Y. TIMES, June 22, 1989, at B8. The argument that Kennedy's concurrence in *Johnson* serves a valuable civic educational purpose is supported by the fact that the opinion does not fit comfortably into any of the traditional categories of concurrences identified by the most prominent literature on this subject. *See* Lori Beth Way & Charles C. Turner, *Disagreement on the Rehnquist Court: The Dynamics of Supreme Court Concurrence*, 34 AM. POL. RES. 293, 298-299 (2006). The opinion is partly consistent with the authors' "signaling" category of concurrences, because Kennedy used it to send a message to the Court's audiences; however, what Kennedy clearly did not do was to use this writing to express a desire to revisit an issue in the future, which is the other characteristic of a "signaling" concurrence. Similarly, one might argue that it was a "preserving" opinion because it "does not challenge the majority opinion." However, it would be wrong to place Kennedy's *Johnson* concurrence in

was very difficult for the fundamental principles to get lost. One could clearly see the forest and the trees—or, to put it another way, the flag did not obscure the First Amendment.

B. Rosenberger v. Rector & Visitors of the Univ. of Va.

Six years later, there could be little doubt that Justice Kennedy was a free speech libertarian. Some of his earlier First Amendment opinions suggested that what is now a clear commitment to limiting government regulation of expression took some time to evolve.[76] This was perhaps because it took several terms for Kennedy to reach a certain level of comfort with the power of the institution of which he was now a part.[77] However, Kennedy made it particularly obvious from the beginning of his tenure that he was not willing to tolerate any decision that provided the government with an opportunity to engage in content-based restriction of speech.[78] His opposition to such restrictions was

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this category because it is not an example of a "justice . . . not engag[ing] in any jurisprudentially or politically significant behavior." *See also* Pamela C. Corley, Concurring Opinion Writing on the Supreme Court 23-28 (2005) (unpublished Ph.D. dissertation, Georgia State University) (on file with Georgia State University Library) (Corley codes six types of concurrence; Kennedy's separate writing in *Johnson* does not fit the description of any of these).

76. *See* Friedman, *supra* note 15.

77. *See* Moran, *supra* note 10; Reuben, *supra* note 10. This conclusion is consistent with the findings of Albert P. Melone, because although Professor Melone concluded that Kennedy did not confirm the "freshman effect" hypothesis (that during his or her first few terms on the Court a justice is unlikely to desire to—and probably will not—write prominent and/or controversial opinions, especially dissents), it is clear that Kennedy's faith in using the power of the Court did accrue over time. Albert P. Melone, *Revisiting the Freshman Effect Hypothesis: The First Two Terms of Justice Anthony Kennedy*, 74 JUDICATURE 6 (1990); Richard Brust, *The Man in the Middle*, 89 A.B.A. J. 24, 25 (Oct. 2003) (quoting former Kennedy clerk Michael Dorf: Kennedy is "probably the most confident of all the justices in the court's power.").

78. The only exceptions are when the expression falls into a very small number of "historic and traditional categories long familiar to the bar . . . ." Simon & Schuster v. Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in the judgment). In this case, the Court unanimously concluded that New York's "Son of Sam" law was unconstitutional. The law's requirement "that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account" and "made available to the victims of the crime and the criminal's

evident in 1995, when he wrote for the five-Justice majority in *Rosenberger v. Rector & Visitors of the Univ. of Va.*[79] The case involved an example of *viewpoint* discrimination, which Kennedy described as "an egregious form of content discrimination."[80]

In *Rosenberger*, Kennedy was responsible for retaining the votes of four colleagues.[81] In this respect, the opinion differed from *Johnson*, in which Kennedy wrote for himself alone. This did not mean, however, that the *Rosenberger* opinion lacked the civic educational language of his separate writings. This rhetoric was clearly evident in a case whose details presented the Justice with a perfect opportunity to emphasize why he believed the boundaries of constitutionally protected free speech must be drawn to foster diverse views.

In 1990, Wide Awake Productions (WAP) applied to the University of Virginia's Student Activities Fund (SAF) for money to fund the publication of *Wide Awake*, a magazine of Christian viewpoints. Unlike the groups that produced the *Journal of Law and Politics*, the *Loki Science Magazine,* the *Virginia Literary Review*, and numerous other student publications, WAP was denied funding.[82] The University granted it the Contracted Independent Organization status it needed to

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other creditors" was a content-based regulation of speech, and the governmental goal was a "compelling state interest" but the method was not narrowly tailored to further that goal. *Id.* at 108, 116, 123. Kennedy wrote separately to explain why, given the egregious nature of the violation of freedom of expression that was the New York law, it was "unnecessary" and indeed "incorrect" to apply even the strict level of judicial scrutiny that the compelling interest test represented. Explaining that the origins of the test lay not in First Amendment jurisprudence but rather in the Court's body of decisions about equal protection of the law, Kennedy argued that it "has no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome restriction of speech based on content only . . . ." *Id.* at 124. To be sure, as every constitutional law student knows, there are certain categories of content-based speech that fall beyond the protection of the First Amendment, but Kennedy saw no need to add to them using a test producing results akin to "ad hoc balancing." *Id.* at 127.

79. 515 U.S. 819 (1995).

80. *Id.* at 829.

81. That Justices O'Connor and Thomas both wrote separate, solo concurrences suggests Kennedy may have had to work quite hard to retain their votes.

82. For a list of the publications that were funded, see Rosenberger v. Rector and Visitors of the Univ. of Va., 18 F.3d 269, 271 n3 (4th Cir. 1994).

apply for the funding. This meant that the University did not consider the group a "religious organization."[83] However, SAF funding was denied because the production of *Wide Awake* was judged to be a religious *activity*, and therefore unrelated "to the educational purpose of the University [of Virginia]."[84] The University guideline denying funding for the publication of *Wide Awake* was struck down, on viewpoint discrimination grounds, by a bare majority of the Supreme Court.[85]

WAP was formed by a group of undergraduates who wished "[t]o publish a magazine of philosophical and religious expression" in order "[t]o facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints" and "[t]o provide a unifying focus for Christians of multicultural backgrounds."[86] As Kennedy observed during oral argument in *Rosenberger*, "[T]he university can say that these are not educational activities, and draw the line there." However, it engages in unconstitutional viewpoint discrimination and deprives people of an opportunity to hear, and educate themselves about different ideas and perspectives—goals at the very heart of the *raison d'être* of a college or university—when it "draw[s] the further line that discussion of abstract views of religion is also prohibited."[87]

In cases that involve discrimination based upon either the content or the views of a particular expression, the civic educational value of Kennedy's opinions is immense. This was particularly clear in *Rosenberger*, where Kennedy took care to underscore the viewpoint diversity that colleges and universities, as seats of learning, are intended to foster. When *The New York Times* reported the decision in *Rosenberger*, it printed only two passages—both from the same

83. During the litigation that resulted from the funding denial, the University never claimed that WAP was such a group. A "religious organization" is defined in the University's Guidelines as "an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." *Rosenberger*, 515 U.S. at 826.

84. *Id.* at 824-25 (alteration added).

85. The Court also held that this free speech conclusion was consistent with the requirements of the Establishment Clause. The focus here, however, is on the expressive freedom aspect of the decision.

86. *Id.* at 825-826 (alterations added).

87. Transcript of Oral Argument at 32, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (No. 94-329) (alterations added).

section—of Kennedy's opinion.[88] It would be wrong to draw conclusions about the public impact and dissemination—and therefore the educational value—of opinions based upon excerpts in one national newspaper.[89] However, the choice of selections tells us much about the ability of Kennedy to grab the attention of the Court's audiences by paying special attention to the educational setting of the case. Here, it is worth reprinting the section containing these passages:

> Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. The quality and creative power of student intellectual

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88. *Excerpts from Supreme Court's Ruling on Religious Magazine*, N.Y. TIMES, June 30, 1995, at A24. This apparent neglect was largely because more attention was devoted to two other cases decided on the same day as *Rosenberger*: Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Miller v. Johnson, 515 U.S. 900 (1995). In fact, most major newspapers tended to focus on the religious aspects of the decision. For example, see Editorial, *Church and State United*, ATLANTA J. CONST., July 8, 1995, at A10; Laurie Goodstein & Joan Biskupic, *In Two Rulings, High Court Refines Relationship between Church, State*, WASH. POST, June 30, 1995, at A1; Linda Greenhouse, *Ruling on Religion*, N.Y. TIMES, June 30, 1995, at A1.

89. This approach may also raise the controversial issue of the "Greenhouse Effect," a trend toward liberalism in some Justices. For an excellent analysis of this phenomenon, see LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 118 (2006).

> life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.[90]

These words provide us with an excellent indication of the civic educational goal that Justice Kennedy pursues. Recall that the second component of the definition of civic education that I use in this article deals with "engag[ing] in constitutional and legal commentary" in order "to articulate competing visions of lawmaking that are essential to building a vibrantly free political community."[91] In *Rosenberger*, Justice Kennedy emphasizes that this commitment cannot be impeded. The First Amendment need to limit discriminatory government action is most urgent in this case, says Kennedy. This is because the desire to prohibit dissemination of certain views occurs in a "political community" that is located within the confines of a state institution that is "among the Nation's oldest and most respected seats of higher learning."[92]

As Justice Kennedy explained, the University was creating a dangerous environment of intolerance. A policy of denying funding to a group that writes about an "ultimate idea," would, if applied consistently, he wrote, "bar funding of essays by hypothetical student contributors named Plato, Spinoza, and Descartes"—not to mention the treatment that would be accorded "undergraduates named Karl Marx, Bertrand Russell, and Jean-Paul Sartre."[93] Kennedy drew to a close the free speech portion of his opinion by pointing out the absurdity (and the dangers) of disqualifying "any manifestation of beliefs in first principles."[94] Plato would be free, he wrote, "to submit an acceptable essay on making pasta or peanut butter cookies, provided he did not point out their (necessary) imperfections."[95]

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90. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (citations omitted).

91. STRAUBER, *supra* note 22, at 17 (alteration added).

92. *Rosenberger*, 515 U.S. at 823.

93. *Id.* at 837.

94. *Id.*

95. *Id.* at 836-37.

C. Hill v. Colorado

Justice Kennedy has a clear jurisprudential commitment to protecting individuals' freedom to express themselves by limiting government efforts to regulate the content of their speech. Can the same be said, however, about his approach to cases involving individuals who do not wish to be spoken to? This question was confronted in *Hill v. Colorado*, decided in 2000.[96] In his lengthy dissenting opinion, Kennedy's understanding of whether we have a right not to be spoken to is defined by the responsible way in which individuals are required to exercise their liberty, considering the consequences of their actions for others.

In *Hill*, Kennedy dissented from Justice Stevens's majority opinion upholding a Colorado law that established 100-foot zones around "heath care facilities." These were zones within which a person was prohibited from "knowingly" coming within eight feet of another person, without their consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such a person . . . ."[97] The Court held that this was a content-neutral statute because it did not regulate speech; it only regulated "the places where some speech may occur."[98] Unlike the refined rhetoric of his concurrence in *Johnson*, the passion that oozed from Kennedy's dissent in *Hill* was exhibited in expressions of contempt for the damage that the First Amendment had sustained at the hands of the Justices who voted to uphold the Colorado statute. Kennedy argued that the majority's opinion relied on a flawed and frightening interpretation of constitutionally protected free speech principles.[99]

There are two ways in which Kennedy's dissent furthered his civic education goal. First, it clearly targeted a much larger audience than the group of colleagues with whom he disagreed. Over the years, several members of the Supreme Court have noted the positive contributions that dissenting opinions can make to democratic discourse. This discourse is both inevitable and encouraged, because resolution of

96. 530 U.S. 703 (2000).
97. *Id.* at 707, n.1.
98. *Id.* at 719.
99. *Id.* at 776 (Kennedy, J., dissenting).

one particular instance of constitutional litigation rarely brings to a close discussion of the questions that the case raised.[100] The Justices have also recognized the educational value of dissents,[101] as well as the philosophical similarities that exist between protecting the First Amendment in the name of a "marketplace of ideas" and expressing judicial disagreement in order to "contribute to the integrity of the process . . . by contributing to the marketplace of competing ideas."[102] Justice Brennan's commitment to preserving free speech led him to write, "None of us, lawyer or layman, teacher or student in our society must ever feel that to express a conviction, honestly and sincerely maintained, is to violate some unwritten law of manners or decorum."[103] In *Hill*, Justice Kennedy—who has assumed Brennan's role as defender of the First Amendment—used the power of a dissenting opinion to express his convictions, honestly and sincerely, as both a lawyer and a teacher.

The potential educational power of the opinion can also be determined by considering the passages that Justice Kennedy chose to read when he delivered his *Hill* dissent from the bench.[104] He carefully used excerpts that could express to a broad audience the most basic principles of free speech theory that the First Amendment exists to protect. In other words, he wanted people to know the boundaries of

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100. *See generally* CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES, ITS FOUNDATION, METHODS AND ACHIEVEMENTS: AN INTERPRETATION 68 (Garden City Publishing 1936) (1928) ("A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."); William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC'Y 104 (1948); William H. Rehnquist, *The Supreme Court: Past and Present*, 59 A.B.A. J. 361, 363 (1973) ("A dissent in a constitutional case . . . is an appeal to present and future brethren to see the light.").

101. *See, e.g.*, Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 36-39 (1994).

102. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 435 (1986).

103. *Id.* at 437.

104. The recordings of the opinion announcements in the case are available at http://www.oyez.org, case number 98-1856.

their constitutionally protected freedom of speech. First, he offered the following analogy:

> If, just a few decades ago, a State with a history of enforcing racial discrimination had enacted a statute like this one, regulating "oral protest, education, or counseling" within 100 feet of the entrance to any lunch counter, our predecessors would not have hesitated to hold it was content based or viewpoint based.[105]

According to Kennedy, the First Amendment does not excuse the Court from "apply[ing] the same structural analysis when the speech involved is less palatable to it."[106] Justice Kennedy invoked memories of a period in American history plagued by intolerance in order to expose the intolerance of the modern Court's decision in *Hill*.[107]

Kennedy further sought to reiterate his objection to what he believed was the majority's condoning of restrictions on speech with which the Court disagreed. He did so by considering what would happen "[u]nder the most reasonable interpretation of Colorado's law, if a speaker approaches a fellow citizen within any one of Colorado's thousands of disfavored-speech zones and chants in praise of the Supreme Court and its abortion decisions."[108] The answer was simple, stated Kennedy: "I should think there is neither protest, nor education, nor counseling."[109] This was a very dangerous path for the Court to take. It was a path that was inconsistent with the First Amendment's

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105. Hill v. Colorado, 530 U.S. 703, 767 (2000).

106. *Id.* at 767 (Kennedy, J., dissenting) (alteration added). Justice Stevens did respond to Kennedy's analogy, but only by drawing on his own civil rights analogy that hypothesized about a law that was very different to the Colorado law: "A statute making it a misdemeanor to sit at a lunch counter for an hour without ordering food would also not be 'content based' . . . ." 530 U.S. at 724.

107. This passage of Kennedy's dissent supports my conclusion, made below, that for Justice Kennedy this was primarily a free speech case, not a decision about abortion rights. It does not take into account the provisions in the Colorado law that directed it towards abortion-related issues. Kristen G. Cowan, *The Tailoring of Statutory Bubble Zones: Balancing Free Speech and Patients' Rights*, 91 J. CRIM. L. & CRIMINOLOGY 385, 413 (2001).

108. *Hill*, 530 U.S. at 769 (Kennedy, J., dissenting) (alteration added).

109. *Id.*

protection against viewpoint discrimination. As Kennedy went on to explain:

> If the opposite message is communicated, however, a prosecution to punish protest is warranted. The antispeech distinction also pertains if a citizen approaches a public official visiting a health care facility to make a point in favor of abortion rights. If she says, 'Good job, Governor,' there is no violation; if she says, 'Shame on you, Governor,' there is.[110]

In his dissenting opinion—which Kennedy did not join—Justice Scalia referred to the *Hill* decision as part of the Court's "whatever-it-takes proabortion jurisprudence."[111] This is because the Colorado law was aimed at antiabortion protesters. Employing the "persuasion principle,"[112] Scalia reasoned that while *Roe v. Wade*[113] still stood, the ability of individuals to oppose abortion was limited to the exercising of their First Amendment right to attempt to change the minds of pregnant women on an individual basis.[114] Scalia was additionally critical of the chilling effect of the Court's decision. Colorado defended the law as a means for ensuring the safety of persons entering "health care facilities,"[115] to which Scalia responded that the law could not possibly accomplish this goal because the imposition of an eight-foot zone would be least likely to dissuade from expressive activities those most likely to threaten the safety of individuals. "[B]ullhorns and screaming from eight feet away will serve their purposes well,"[116] he wrote. Instead, those who might choose not to express their antiabortion views for fear of

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110. *Id.*

111. *Id.* at 762 (Scalia, J., dissenting).

112. This principle states that the way to combat speech with which you disagree is not to censor it but instead to offer a competing opinion—an alternative perspective designed to *persuade* your audience that the position expressed by your interlocutor (or opponent) needs to be reconsidered. *See* David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 354 (1991).

113. 410 U.S. 113 (1973).

114. *Hill*, 530 U.S. at 762-63 (Scalia, J., joined by Thomas, J., dissenting).

115. *Id.* at 763.

116. *Id.* (alteration added).

prosecution would be the same people "who would accomplish their moral and religious objectives by peaceful and civil means . . . ."[117] In this respect, Scalia concluded, the Court's decision represented a grave threat to the First Amendment.[118]

Frank Colucci places his analysis of Kennedy's opinion in *Hill* into a broader discussion of the Justice's abortion jurisprudence. "Although nominally a free speech case," states Colucci, "Kennedy uses his opinion in *Hill* to explicate his view of the moral nature of the abortion decision under the Constitution, and the extent to which both government and other individuals have the liberty to influence that decision."[119] To be sure, Kennedy does try to achieve this goal. However, his opinion should not be described as only "nominally" about freedom of speech.

Hill was decided on the same day, in 2000, as *Stenberg v. Carhart*,[120] in which the Court struck down a Nebraska ban on so-called "partial-birth" abortions. Kennedy's dissent in this case suggested to many observers that his support for abortion rights had weakened since the famous 1992 decision in *Planned Parenthood v. Casey*,[121] in which he joined Justices O'Connor and Souter to create the decisive joint opinion maintaining the "central holding" of *Roe*. As I have argued elsewhere, this overlooks the Justice's belief in the importance of individual responsibility.[122] In *Stenberg*, Kennedy took care to explain that as individual as the decision to abort a fetus might be, it is not a decision without consequences for parties other than the pregnant woman. Kennedy's understanding of the nature and boundaries of the right originally articulated in *Roe* reflects his belief that the woman must recognize that this affects her constitutionally protected liberty. Kennedy

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117. *Id.*

118. *Id.* at 763-64.

119. FRANK J. COLUCCI, THE JURISPRUDENCE OF JUSTICE ANTHONY KENNEDY 150 (April 2004) (unpublished Ph.D. dissertation, University of Notre Dame) (on file with author). *Cf.* Linda Greenhouse, *Court Rules That Governments Can't Outlaw Type of Abortion*, N.Y. TIMES, June 29, 2000, at A1, A26 ("Justice Scalia and Justice Kennedy read their impassioned dissenting opinions in the courtroom . . . for more than half an hour, making clear that this First Amendment debate was in many respects a proxy for the court's ongoing abortion debate").

120. 530 U.S. 914 (2000).

121. 505 U.S. 833 (1992) (Kennedy, J., dissenting).

122. KNOWLES, *supra* note 1, at chapter five.

also wrote an emphasis on personal responsibility into his dissent in *Hill*. However, it is clear that he considered this case to be about the First Amendment, not abortion. Any other conclusion runs contrary to the principles of free speech that Kennedy defended in both *Johnson* and *Rosenberger*.

At the beginning of his dissent in *Hill*, Kennedy noted, "the Court's decision conflicts with the essence of the joint opinion in [*Casey*]."[123] He returned to the subject of *Casey* in the last section of the opinion, explaining why the Court's decision violated the understanding of individual liberty for which both *Casey* and the First Amendment stand. The only passage that he quoted from the 1992 decision was the following:

> [Abortion] is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted.[124]

This is the essence of Kennedy's view that the decision whether or not to have an abortion is a decision that, while constitutionally protected, is part of a liberty that the individual must exercise responsibly. In *Hill*, the focus of Kennedy's opinion is freedom of speech, because providing women with information about views on abortion fundamentally contributes to their ability to responsibly exercise their liberty.

Listening to Justice Kennedy read excerpts of his *Hill* dissent, one is struck by the increased measure of passion with which he spoke the words of the entire final paragraph of his opinion. When he said this was a case involving individuals seeking to express their opinions about what was, in their view, "a grievous moral wrong," one cannot help but

123. 530 U.S. at 765 (Kennedy, J., dissenting) (alteration added).
124. *Id.* at 791 (quoting *Casey*, 505 U.S. at 852) (alteration added).

think that this was a view he shared.[125] Indeed, one can criticize Kennedy's inclusion in his opinion of a lengthy quotation from a woman's testimony, before the Colorado State Senate, about the extent to which her decision not to have an abortion was influenced by the receipt of anti-abortion literature from a clinic protester. Kennedy merely tipped his hat to the possibility that one could undoubtedly find "women who would testify that abortion was necessary and unregretted."[126] However, such criticism misses the most important point of Kennedy's dissent in *Hill*—that "speech makes a difference."[127]

CONCLUSION

When the government seeks to restrict expressive freedom based on the viewpoint of the speaker, Justice Kennedy often votes to strike down the action on the grounds that it constitutes discrimination in violation of the First Amendment's protection of free speech. In this respect, he has a decidedly libertarian understanding of the first provision of the Bill of Rights. Indeed, his libertarianism extends to most cases involving free speech. In terms of the jurisprudential legacy of the Rehnquist Court, this is significant because Kennedy frequently had the opportunity to write his libertarian views into opinions that spoke for a majority of his colleagues; there is no reason to expect this to change with regard to the Roberts Court.

As I have argued in this article, however, the importance of Kennedy's First Amendment jurisprudence cannot be fully appreciated simply by labeling it as 'libertarian.' In order to understand his passionate defense of freedom of expression, we need to examine the goal that he seeks to achieve through the opinions he writes in this area of the law. The goal that Kennedy pursues—civic education—is particularly evident in cases involving viewpoint discrimination. In three

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125. *Id.* at 792.

126. *Id.* at 790.

127. *Id. Cf.* Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights: Hill v. Colorado, the Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 AM. U. L. REV. 179, 224-25 (2001) (arguing that the inclusion of the testimony does not mean that Kennedy thought this view was "correct," but rather that it was evidence that abortion protesters' speech could be influential).

such cases—*Texas v. Johnson*, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, and *Hill v. Colorado*—that spanned Kennedy's time on the Rehnquist Court, the Justice authored opinions that passionately defended the right of the people to engage in responsible and tolerant expression of views that the Constitution protects.

In the most public expression of his commitment to civic education, Justice Kennedy reminded the students participating in the first Dialogue on Freedom that "[g]overnments are most dangerous when they try to tell people what to think."[128] The analysis above has shown that this extra-judicial statement of Kennedy's belief in expressive freedom has found judicial manifestation in his Court writings. This serves the important civic educational purpose of ensuring that rational, tolerant individuals are able to think for, and to express, themselves. After all, the alternative is to have the government tell us what to think by selecting the views that it considers "desirable." This is not consistent with the principles underlying the First Amendment, and has little or no civic educational value.

Justice Kennedy has said that freedom is something that "lives in the consciousness of people."[129] Its "work," though, "is never done";[130] as Kennedy reminded the American Bar Association in 2007, "the work of freedom has just begun."[131] For the work of freedom of *expression* to continue, the individuals for whom the First Amendment exists must be free to engage in educational and enlightening dialogues on the diversity of topics upon which they hold, and form views. Otherwise, says Kennedy, the government will indeed be telling us what to think.

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128. Goldstein & Lane, *supra* note 35 at A17 (alteration added).

129. *Supra* note 49.

130. Kennedy speech, *supra* note 72.

131. Tony Mauro, *Justice Kennedy to ABA: 'The Work of Freedom Has Just Begun'*, LEGAL TIMES, Aug. 14, 2007, at 1; http://www.law.com/jsp/article.jsp?id=1186996023650.

First Draft	Final Version
"I agree that the flag holds a lonely place of honor in an age when absolutes are distrusted and **hard** truths are burdened by unneeded apologetics."	"I agree that the flag holds a lonely place of honor in an age when absolutes are distrusted and [simple] truths are burdened by unneeded apologetics."
"Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs **all** Americans share, beliefs in law and peace and that **special** freedom which sustains the human spirit."	"Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit."
"whether or not he could appreciate the enormity of the offense he gave **with such vengeful insolence**, the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution."	"whether or not he could appreciate the enormity of the offense he gave, the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution."

Table 1: Passages from the first and final versions of Justice Kennedy's concurrence in Texas v. Johnson (the changes are indicated in bold type)[132]

132. *Supra* note 67, HAB-LOC.