

## [Justice Anthony Kennedy, Libertarian?](#)

[Damon W. Root](#) | June 18, 2012

The latest issue of *Time* magazine features a cover story entitled “What Will Justice Kennedy Do?” Among other things, the story attempts to make sense out of the fact that Kennedy sometimes sides with the Supreme Court’s more conservative justices while at other times siding with the Court’s liberals. “More and more cases are decided based on his idiosyncratic values,” *Time* says.

[David Boaz of the Cato Institute](#) [argues](#) that there might be a better word than “idiosyncratic” to describe Kennedy’s approach:

Justice Kennedy seems to be very concerned with liberty. He often sides with conservatives on economic issues (which are actually never mentioned by *Time*) and campaign speech, and with liberals on civil liberties, gay rights, and school prayer. Pretty inconsistent, huh?

Or then again, maybe Justice Kennedy has a basically libertarian view of the world and the Constitution. The word “libertarian” never appears in the article. Perhaps it should.

Boaz makes it clear that he isn’t calling Kennedy “a down-the-line, Nozick-reading, Cato Institute libertarian,” but rather is saying that there’s “a strong libertarian streak in Kennedy’s jurisprudence.” I think that’s a fair statement. In addition to the issues Boaz mentions, Kennedy has also cast libertarian-leaning votes against [race-based government classifications](#) and in favor of [protecting unpopular speech](#) like flag burning. But then again Kennedy also sided with the majority in two of the most notoriously non-libertarian decisions in recent years: [Gonzales v. Raich](#), which upheld the federal government’s ban on marijuana as a valid exercise of congressional power under the Commerce Clause, and [Kelo v. City of New London](#), which allowed New London, Connecticut's [abusive use](#) of eminent domain to stand. So while the term libertarian may apply to a nice chunk of Kennedy’s jurisprudence, it unfortunately does not apply to all of it.