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Elizabeth Rindskopf Parker
Pacific McGeorge School of Law

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Symposium: The Evolution of Justice Anthony M. Kennedy's Jurisprudence

Introduction

Elizabeth Rindskopf Parker*

A symposium exploring the opinions of Associate Justice Anthony M. Kennedy of the United States Supreme Court needs little justification. Justice Kennedy's jurisprudence undeniably deserves special attention, with his increasing frequency as the deciding vote on the Supreme Court. As the thoughtful contributions that follow demonstrate, Justice Kennedy's growing number of opinions offer a rich body of material for scholarly exploration, easily justifying similar symposia at every American law school at the beginning of the twenty-first century.

Thus, in celebration of Justice Kennedy's quarter century of service on the United States Supreme Court, this issue of the *McGeorge Law Review*, "The Evolution of Justice Anthony M. Kennedy's Jurisprudence," has gathered a series of articles by noted scholars, some former Kennedy court clerks, and other teaching colleagues. They reveal Justice Kennedy's indelible influence on the current state of American law by exploring his opinions in the areas of life, liberty, and property, the First Amendment, criminal justice, and a commentary on the emerging significance of international law in his thinking. In articles respectively by Professor Lawrence C. Levine and Professor Randy Beck, Justice Kennedy's impact on the rights of the gay community and women seeking the right of abortion are considered. Professor John G. Sprankling explores a less well-known area of Kennedy thought, tracing the evolution of his opinions on property rights. Professor Ashutosh Bhagwat takes a unique approach to Justice Kennedy's opinions in free speech cases, examining the statistical profile of these opinions. Additionally, Justice Kennedy's treatment of First Amendment cases raising issues of religion is the focus of Professor R. Randall Kelso's article. Professor Gregory E. Maggs considers the sources on which Justice Kennedy has relied to support claims about the original meaning of the Constitution and his purposes for doing so. Professor Stephanos Bibas examines Kennedy's Sixth Amendment jurisprudence, both sensitive and pragmatic, in three separate areas of criminal procedure—sentence enhancements, the admissibility of hearsay, and

* Former Dean, University of the Pacific, McGeorge School of Law (2002–2012).

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the regulation of defense counsel's responsibilities. Professor Linda E. Carter looks at death penalty cases where Justice Kennedy has become a leader in the consistent application of Eighth Amendment analysis to a variety of challenging issues in highly emotional factual settings. Professor Robert Weisberg explores Justice Kennedy's extra-judicial thought in his comments about the post-sentencing world of American prison incarceration. Finally, Professor Stephen C. McCaffrey looks at Justice Kennedy's unique and sometimes controversial willingness to support his opinions with reference to the practices of other countries and institutions.

Beyond the valuable scholarly contribution made by these articles, there is a second, more personal reason why the symposium which produced them was so appropriate and meaningful for the University of the Pacific, McGeorge School of Law. For in fact, Justice Kennedy might fairly be described as one of the "founding fathers" of the Law School in its modern form. Under the leadership of the late Dean Gordon Schaber, Justice Kennedy was part of a visionary faculty team who transformed a small evening law school into a large American Bar Association approved law school with day, evening, and graduate law programs, whose well-regarded graduates today dominate law practice in California's capital and are also leading lawyers internationally. Justice Kennedy was involved from the inception of the new school, when it first moved to its current thirteen-acre campus in the Oak Park neighborhood of Sacramento. The school's beginnings were modest, however, and Justice Kennedy reports that his first classes were held in a small doctor's office in the school's first building, now a part of its Legal Studies Center, the most prominent of over twenty campus buildings.

Notwithstanding a personal career that has taken him to the pinnacle of the American legal profession, Justice Kennedy's involvement with Pacific McGeorge has continued over the years, taking several different forms. Indeed, until summer 2011, he had taught a class every year but one since 1965—making him the school's longest serving faculty member. As a professor and faculty member, Justice Kennedy has thus had an impact on generations of Pacific McGeorge law students. In Sacramento, he taught constitutional law to the evening division, where his annual "court packing lecture" was so popular that day division students, too, are said to have packed his classroom to hear it. More recently, for almost twenty-five years, Justice Kennedy co-taught a popular course comparing fundamental rights in Europe and the United States at the Law School's annual Salzburg Summer Program.

More than founding father and long-time popular professor, however, Justice Kennedy's role has evolved into that of a loyal steward, always "on watch" for the Law School's well-being. This characteristic loyalty is seen as well in the commitment to the deep roots which Justice Kennedy and his wife Mary enjoy in Sacramento. Their frequent "homecoming visits" to family and friends have allowed almost annual trips to the Law School campus as well, some planned,

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others impromptu. These visits permit Justice Kennedy to keep current on Pacific McGeorge developments and also show him in a very human context. His photographic memory (albeit, he claims, sometimes “no longer with same day delivery”) allows him to remember countless names and family relationships as he moves about campus. The obvious pleasure he derives from long-time friendships makes controlling the law school crowd—which inevitably gathers around him—a hopeless endeavor, as Justice Kennedy pauses to explore recent personal developments with countless staff, faculty, students, and Sacramento friends. When classes are in session, Justice Kennedy will almost without fail ask to make a surprise teaching appearance. No matter the class, he will demonstrate his prowess as a teacher, as well as his mastery of a broad range of legal topics, advancing the conversation on any legal subject at hand. If a visit includes a more formal address, his remarks (never with a note or written text in sight) will offer erudite and insightful thoughts, as one might expect. Yet at Pacific McGeorge, another side of Justice Kennedy is also in evidence. At home in Sacramento, he becomes a witty raconteur. The master of self-effacing humor with an excellent sense of timing, he draws on his store of early McGeorge experiences to charm, captivate, and inform. Justice Kennedy’s teaching and frequent visits are thus a special legacy, which have greatly benefitted the Law School and its community.

Arriving as the new dean of Pacific McGeorge in 2002, however, all of this was unknown to me. Curious to understand the origins of Justice Kennedy’s long-standing relationship with the Law School, which then centered on his teaching in the Salzburg Summer Program, I visited him in his Washington, D.C. chambers. Justice Kennedy’s explanation was memorable. One day, Dean Schaber paid a surprise visit to the young Justice’s Sacramento law office with a request to join the new faculty in these words: “Get on the McGeorge faculty or get out of town!” For Pacific McGeorge and legal education more generally, both offer and acceptance were certainly fortunate. Beyond this, however, our conversation made clear that Justice Kennedy’s relationship with the entire academic world was far deeper than I had understood, the product of an intellectual commitment, from which Pacific McGeorge had benefitted for almost fifty years while maturing as an institution.

The offer and resulting relationship was certainly fortunate, but perhaps fortuitous as well. When Justice Kennedy, then an aspiring young commercial lawyer, accepted Dean Schaber’s offer, he claims to have proposed teaching contracts. With wry humor, he now maintains that Dean Schaber rejected that idea, insisting that he teach constitutional law instead. Whether Dean Schaber, later a figure of considerable significance in both political and national legal education circles, had a premonition about the importance that constitutional law would play in the future of the young Justice Kennedy would be speculation at this point. Still, years of preparation for his McGeorge constitutional law classes must have been useful once Justice Kennedy arrived first on the Ninth Circuit

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Court of Appeals and later on the United States Supreme Court, during President Ronald Reagan's term of office. As might be imagined, both appointments were the focus of intense celebration within the Sacramento and Pacific McGeorge communities, culminating in a welcoming high tea reception at the United States Supreme Court to which the entire community was invited. Dean Schaber's appreciation for Justice Kennedy and the mutual respect they held for one another was again on display when Justice Kennedy delivered remarks at the 2002 courthouse dedication in Dean Schaber's memory. There could be no doubt of the importance of the friendship, encouragement, and support of the former Pacific McGeorge dean.

My initial conversation with Justice Kennedy piqued my interest to learn more about his on-going relationship with the Law School and its Sacramento community. And so, over a decade as dean at Pacific McGeorge, I took advantage of the opportunity to learn about this relationship, which, I was surprised to discover, had also included teaching at the former McGeorge campus by both his father and brother. Beyond founding father, highly regarded professor, and always welcome visitor, I came to appreciate Justice Kennedy as a highly placed friend and advisor—and sometimes critic—who could be counted on to provide suggestions, advice, and wisdom, always animated by a deep commitment to global legal education. In this regard, Justice Kennedy's involvement in the international rule of law efforts of the State Department was often in evidence. He traveled the world in response to their invitations, sometimes interrupting his time in Salzburg. Often he took advantage of these opportunities to augment the international presence in his summer classes. One never knew when the phone might ring and Justice Kennedy might ask for help with a rule of law activity. On one occasion, for example, he called to advise that he was on his way to the White House where he intended to “spend a bit of McGeorge money” by inviting the President of Afghanistan to send two professors to the Salzburg summer program on full scholarship. Other suggestions and ideas that he passed along in periodic phone calls or during visits to his chambers stimulated faculty interest in a wide variety of international projects. Indeed, Justice Kennedy could always be counted on for his lively interest in international legal education and a warm welcome when I visited him in Washington, D.C.

And so I began to wonder: in his commitment to global legal education and the international rule of law, might Pacific McGeorge have contributed to the evolution of Justice Kennedy's thinking and jurisprudence? Might a quarter century teaching about comparative fundamental rights law in Salzburg explain why Justice Kennedy would be the first Supreme Court Justice to reference international law in an opinion? Could his exposure to foreign colleagues and students explain his receptivity to State Department offers to visit counterparts overseas? These conjectures are for others to answer. What is certain, however, is that Justice Kennedy's continuing friendship, concern, and increasing

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commitment to global rule of law topics, have dramatically influenced Pacific McGeorge. Having a Supreme Court Justice as a colleague made teaching a three-week summer course very attractive to the Pacific McGeorge faculty. As year-by-year each enjoyed teaching a comparative law class as part of the Salzburg program, the entire faculty was “internationalized.” No surprise, then, that when one Pacific McGeorge faculty member proposed a book series, *Global Issues*, other faculty colleagues quickly responded. Their efforts resulted in a series of over twenty books that now provide the teaching materials needed to support law faculty throughout the United States who seek to teach domestic legal subjects in the global context so necessary for twenty-first century legal education. By rights, this series is Justice Kennedy’s personal contribution to American legal education.

Yet Justice Kennedy’s stewardship of Pacific McGeorge encompassed more than intellectual matters alone. I soon learned that little missed his attention during his frequent campus visits. In my decade as dean, one focus was updating many of the buildings on the Pacific McGeorge campus. Here, I came to appreciate Justice Kennedy as a keen student of architecture. This should not have come as a surprise. His stories about McGeorge’s successful efforts to obtain federal funding support for its “courtroom of the future” were important hints. Justice Kennedy often regaled us about building, and then, using a full-scale wooden model to demonstrate the operation of the proposed courtroom, intended to be the first courtroom “in the round.” Then, too, Justice Kennedy has been active with the facilities committee of the United States Supreme Court. This, his reaction to new structures now dominating Capitol Hill, and his ability to read architectural drawings, all indicated a more-than-average interest in design.

Perhaps Justice Kennedy’s sensitivity to aesthetics was inherited from his mother, a significant force behind Sacramento’s Crocker Art Museum, whose gift of a pony express rider statue is on prominent display in our new Legal Studies Center. In fact, to honor the Crocker’s recent expansion, Justice Kennedy phoned one morning and pledged me to secrecy about a plan to develop a surprise lecture on “Painting the Law,” which he hoped to offer to the community in the Pacific McGeorge lecture hall, if his schedule would allow. A standing room only crowd appeared with virtually no notice, filling the lecture hall in September 2010 as a last minute addition to the Crocker opening festivities.

Thus, a memorable feature of my term as dean has been Justice Kennedy’s keen design insights—and sometimes criticisms. Proud of my first remodeling efforts (two amphitheater-style classrooms, with five more identical rooms planned), in my second year as dean, I rushed to show them to Justice Kennedy during an annual visit. His enthusiasm was guarded. Several weeks later, I learned why. The real point of the conversation became immediately clear. It was to convey concern for the new “sterile” decor—“like an operating theater,” he offered, moving quickly to his conclusion, “Dean, I think you need a new

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decorator.” Not the advice I wanted, but unquestionably the advice I needed. Indeed, the wood color choice had displeased everyone when initially installed without consultation by our architects. Needless to say, adjustments followed.

This exchange came painfully to mind during last minute preparations for the 2011 ribbon cutting ceremony for our new Legal Studies Center, my last project as dean. Justice Kennedy had been invited to preside and, escorting him on his first visit to the new building, I realized that I had forgotten to show him the final drawings. Too late, I realized, I was risking the same negative reaction for my last project as I had received for my first, the offending classrooms. To my relief, Justice Kennedy was sufficiently pleased with the new building to permit us to house his official portrait temporarily in the central reading room until its permanent installation in the Supreme Court at the conclusion of his service. It hangs there today, a symbol of Justice Kennedy’s importance to Pacific McGeorge and a visual reminder that Justice Kennedy continues “on watch” on behalf of the Law School and its evolution. Thus, in a small way, this celebratory symposium issue is also an effort to acknowledge and thank Justice Kennedy for his ongoing concern for and commitment to the Law School and its community.