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Daniel Epps

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Teacher for the Nation

DANIEL EPPS[†]

I've been asked to address Justice Kennedy's overall impact. Justice Kennedy's impact on American law . . . was large.

I'll stop there. Well, I'm tempted to, but I'm told I need to speak for a while longer. So I'll say a bit more. I want to talk about Justice Kennedy's impact on the country, but in thinking about his impact, the first thing that comes to mind is his impact on my life, which was tremendous. I remember getting the call from him offering me a clerkship as one of the most important days in my professional life.

The job itself was wonderful. We got to work on the biggest cases. We didn't really have to work on dissents. He really cared about what we thought; he genuinely wanted to hear opposing views and debate them. Being barely a year out of law school, and sitting around a table debating important legal issues with the man who had written the opinions I had read in school was incredibly surreal.

And he was the best boss I ever had. I think Justice Kennedy really understood he had the best job in the country. I struggle to think of instances where he ever got mad or upset about anything, even when particularly vituperative dissents came across his desk. I could only think of one example where he expressed any disapproval of my work. One of our duties as law clerks was to prepare binders with our bench memos and key statutes and cases so he would have the material at hand. As an enterprising young clerk eager to protect the environment and the public fisc, I took it upon myself to start preparing my binders using double-sided printing without asking the Justice for his preferences. Shortly thereafter, while we were sitting in his office discussing a case, the Justice was flipping through my latest binder. Noticing that the cases were printed on double-sided paper, he looked at me quizzically and said, "Oh. Are we . . . doing this, now?"

For someone as polite and genteel as Justice Kennedy, this was as close to yelling as things got. I got the message and the next binder was single-sided.

Indeed, clerking for Justice Kennedy was such a great experience that for years afterward, I would occasionally have dreams where he would call me back

[†] Associate Professor of Law, Washington University in St. Louis. The following are, with minor revisions, the remarks I delivered at a panel on "Justice Kennedy's Overall Impact" at *Hastings Law Journal's* 2019 Symposium about the jurisprudence of Justice Kennedy.

to clerk for him again, and I would wake up a little sad that it wasn't possible. Luckily, those dreams largely stopped once I stopped working at a big law firm and entered law teaching.

Probably Justice Kennedy's biggest impact on my life, though, was on my career after leaving. I can't think of the number of opportunities that I've had because I had the luck to be selected as his clerk. It changed the whole course of my career. One thing that I will miss now that he has retired: during those eight years between when I left and his retirement, people would always want to ask me about how he'd vote in the big cases. And when asked I would reflect on all the inside information I'd learned about him from clerking, and I'd lean in say, "You know . . . I have no idea."

And in thinking about the impact Justice Kennedy had on my life, I'm struck by all the essentially random events that played a role in my getting the clerkship. The right people made phone calls at the right time, and I just happened to luck out when many equally or more deserving people didn't get that opportunity.

And that brings me back to thinking about Justice Kennedy's career. As I think a lot of people know, some really random, unpredictable events played a huge role in Justice Kennedy ending up on the Supreme Court. As we've already heard today, he wasn't President Reagan's first nominee. That was Robert Bork, who was rejected by the Senate. He wasn't the second, who was Douglas Ginsburg, who had to withdraw after reports about his marijuana usage came to light. And President Reagan needed to nominate someone who was certain of confirmation, and he went to then-Judge Kennedy, who had had the good luck to have been one of Governor Reagan's lawyers back in Sacramento.

And you can imagine, as I think a lot of Republicans have, alternate universes in which things work out differently. Maybe President Reagan nominates Judge Bork in 1986, when Republicans still held the Senate, and he isn't blocked; maybe then he nominates Antonin Scalia (who was unanimously confirmed in our reality in 1986), for the seat vacated by Justice Powell in 1988.

If that happens, I think that the shape of American constitutional law over the last few decades would look quite different. Justice Kennedy wouldn't have written any of the important opinions he ended up writing; and it is a long list, that no doubt includes some of your favorite and some of your least favorite outcomes, regardless of your ideology.

Not all of those cases would have come out differently if someone else than Justice Kennedy had ended up on the Court in 1988. But a bunch of them might have. *Roe v. Wade*¹ might not have been upheld in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.² Sodomy laws might not have been

1. 410 U.S. 113 (1973).

2. See 505 U.S. 833, 846 (1992).

declared unconstitutional in *Lawrence v. Texas*.³ Gay marriage likely wouldn't have been held to be constitutionally required in *Obergefell v. Hodges*.⁴

And thinking about some of these cases I think should give you a sense of Justice Kennedy's tremendous impact. Now, there are some obvious rejoinders. People say that the swing Justice doesn't end up having great influence, because the compromises they reach in individual decisions don't end up being durable. People point to Justices Powell and O'Connor as examples. And there is reason to think that the new Court could end up rejecting some of Justice Kennedy's decisions, or at least refusing to extend them further.

But I think this is beside the point. Whatever happens to his decisions, Justice Kennedy had a huge impact; his decisions had a huge impact on American law and American history, regardless of what happens going forward.

And that brings me back to my theme of random events having a big impact. Because of a series of really random events, we end up with Justice Kennedy on the Court, and he gets to advance his own, somewhat idiosyncratic vision of constitutional law.

In terms of that vision, you hear a lot about his views of the importance of liberty and dignity, and I'm not going to say more about that. I want to draw attention to a slightly different theme I see in his opinions. It's the idea of the Court as teacher for the nation. Eugene Rostow in 1952 once described the Justices as "teachers in a vital national seminar."⁵ I see this vision echoed in a lot of Justice Kennedy's decisions and in how he talks about the Court.

To give a couple examples, in *Obergefell* he said that the Court needed to act then because, "Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most basic compact."⁶ And in the joint dissent in *National Federation of Independent Business v. Sebelius*,⁷ in language that I would put money on being written by Justice Kennedy, the dissent says:

It should be the responsibility of the Court to teach otherwise, to remind our people that the Framers considered structural protections of freedom the most important ones, for which reason they alone were embodied in the original Constitution and not left to later amendment. The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril. Today's decision should have vindicated, should have taught, this truth; instead, our judgment today has disregarded it.⁸

As someone who has chosen to spend my life teaching, I'm struck by this vision of the Court as teacher. I think it helps explain why Justice Kennedy seemed to see a robust role for the Court in striking down legislation. And I find

3. 539 U.S. 558 (2003).

4. See generally 135 S. Ct. 2584 (2015).

5. Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

6. *Obergefell*, 135 S. Ct. at 2606.

7. 567 U.S. 519 (2012).

8. *Id.* at 707 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

it interesting given that teaching has played a big role in Justice Kennedy's life; he taught at McGeorge School of Law in Sacramento for many years, and he has continued to teach in the summers in Europe while serving on the Court. And, of course, I think all of his clerks, including me, would say they learned a great deal from Justice Kennedy. I learned a great deal from seeing him exercise good judgment, and I remained awed by open-mindedness and his careful engagement with arguments and ideas that might not have accorded with his first-order preferences. Those traits are far too rare at the highest levels of government today.

It is interesting that a lot of his former clerks, like me, became law professors—became teachers. At breakfast this morning he was wondering why that's so. Maybe one explanation is that his clerks want to have jobs that give them platforms from which they can take potshots at his decisions. And so I'll exercise that prerogative here. If the Court is a teacher, in a democracy the people are very unruly students. And the cases where the Court has tried to teach the people a lesson they were not ready to learn have not always gone well for the Court.

For example, in language from another joint opinion that I strongly suspect Justice Kennedy wrote, *Casey* says that it is the Court's role to "call[] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."⁹ Whatever you think about the outcome in that case, I don't think anyone can say that that decision ended our national division on abortion.

Likewise, I think the Court narrowly avoided a major mistake in *Sebelius*; striking down the Affordable Care Act would not, in my view, have taught the public anything, but it would have greatly diminished the Court's prestige and power.

But though I have reservations about Justice Kennedy's view of the role of judicial review, that's not really my focus here. Instead, I want to come back to my theme of random events making it possible for individual people to have really big impacts, as Justice Kennedy did.

And I've been thinking about that a lot in the last couple years as the membership of the Supreme Court has changed. So much about the Court's membership turns on random, unpredictable events that don't have much to do with democratic politics. Who dies when. Who gets sick when. Who decides to retire when. And those largely random events end up determining who gets on the Supreme Court. Right now everyone on the left is terrified about Justice Ginsburg's health. For the last few years, we were all watching Justice Kennedy very closely; those of us on the left were worried he would retire, and people on the right were hoping he would.

9. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992).

And his decision about when to retire is going to itself end up shaping constitutional law for decades.

Now, this system, in which the membership of the Court ends up turning on so many random events, and in which single people exercise massive power for the rest of their lives, might have been tolerable for most of American history. But I think that system is really starting to show its flaws. And part of what has changed, I think, is the rise of polarized, competing judicial philosophies that line up with party identification. And I think Justice Kennedy will be remembered as one of the last Justices who came of age before thinking about law became so rigid and polarized. That fact, I think, partly explains why the decisions he reached were so ideologically unpredictable.

Going forward, though, I suspect we won't see more Justice Kennedys on the Court. I think we are going to see a Court in which voting lines up with party identification far more than it ever has. And that development, I think, raises really hard questions about our current system, in which who controls the Court, and who is on the Court, and who serves on the Court for decades, and who is able to have a massive impact on the law and the country more generally, turns on so many random events.

I don't have time in these remarks to talk about how to solve that problem. But I do think considering Justice Kennedy's career, and the tremendous impact he had—even though I think he did a great deal of good in his decisions over the course of his career—it is a good time for us to ask hard questions about whether a system that allows individual people to have such a large impact makes sense.
