

What Justice Kennedy's Legacy Could Mean for the Future of the Supreme Court



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Like the drop of the hat at a county fair, Justice Anthony Kennedy's [announced resignation](#) on Wednesday has already set off a mad dash for political advantage heading into November's midterm elections. As Americans turn their eyes to the judicial and political horse race that has now begun in earnest, we should not lose sight of the man with the hat.

Anthony Kennedy is many things — a sunny California intellectual, an earnest

public servant, the bi-partisan pivot and voice of the modern Supreme Court, an idealistic proponent of the rule of law, and perhaps the last great Lincoln Republican of our era. He is also a shinningly decent human being — a dedicated family man, a gifted mentor and a true friend to those of us who have been fortunate enough to see him up close.

As Americans reflect on Kennedy's legacy and ponder his successor, we should recall the process by which he himself came to the Court — and what it might mean for the future.

Notably, he won his seat in 1987 by running a bi-partisan gauntlet: After winning the nomination from another sunny Republican Californian (then-President Reagan), Kennedy succeeded in getting a strong yes vote from a Democrat-controlled Senate (who, months earlier, had said [no to Reagan's first choice for the slot](#), Robert Bork).

The bipartisan appointment process that brought Kennedy to the Court is unusual in modern America. Four of the current Court's other justices (Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan) are Democrats who were nominated by Democratic Presidents and confirmed by Democrat-controlled Senates; and three (John Roberts, Sam Alito and Neil Gorsuch) are Republicans who were nominated by Republican Presidents and confirmed by Republican-controlled Senates. Apart from Kennedy, only Clarence Thomas was appointed by a president of one party and confirmed by a Senate controlled by the other party, and that confirmation was as close and [as ugly as it gets](#).

Once on the Court, Kennedy compiled a record notable for its bipartisanship. In most of the big cases in which the Court has sharply and neatly split along partisan lines, Kennedy has sided with Republicans — for example, on the Second Amendment, campaign finance, the voting rights act, the Trump

travel ban, public-sector union dues and even the notorious *Bush v. Gore* case. But in several of the landmark cases that will define his legacy, he joined Democrat-appointees to allow modest diversity-based affirmative action; to invalidate abortion regulations that imperiled women's health; and, [most famously](#), to proclaim the liberty and equality of LGBT people to claim the legal blessings of marriage.

In each of these cases, Kennedy was the only Republican who crossed party lines. *And without at least one Republican crossover, Democrats on the Court would always lose: For nearly a half-century Democrats have never had more than four seats on the Court.*

If Joe Lieberman was once the Republicans' favorite Democrat, then surely Anthony Kennedy has long been the Democrats' favorite Republican. But Lieberman of course no longer sits in the Senate, and today almost no Senator truly swings. No leading congressional Republican voted for Obamacare, and no leading congressional Democrat voted against it. On almost every important issue facing America today, the most liberal congressional Republicans are to the right of the most conservative congressional Democrats.

Anthony Kennedy is thus a national treasure: a powerful official who sometimes swung, and on big issues.

It might be thought that there will always be such a person on a nine-member Court: Someone, after all, has to sit in the middle ideologically. But the Court has not always had a clean and consistent unidimensional continuum. In some eras, Justice X was the pivot in various landmark cases; Justice Y in others; and Justice Z in still others. And even when the Court did have a consistent axis, that axis did not always parallel partisan politics: For much of the last century, the Court had at least one liberal Republican and/or

conservative Democrat. And the Court has not always been closely divided between the two parties. On a Court with, say, seven Republicans and two Democrats, the swing justice would typically not swing between the two parties but between moderate and intense Republicans.

Or maybe the median Justice wouldn't really swing, but split. I've been told (though never directly by Kennedy himself) that he does not love being labelled the Court's "swing justice." But let's compare him to Justice Sandra O'Connor, who likewise often found herself in the middle of the Court. O'Connor often sought to split the difference between the contending extremes. On the other hand, Justice Kennedy often truly swung—all in with liberals on same-sex marriage; all in with conservatives on campaign finance. This is what one might expect of an earnest thinker propelled by the logic of his own principles.

For what it's worth I think that Kennedy was right both times; the Constitution really does allow even corporations to urge voters how to vote, and America truly is dedicated to the proposition all persons are created equal and thus marriage laws should not be confined to whites or to straights.

But even if you disagree with Justice Kennedy about all this, please note how truly rare and special he is: No one else on the Court except Kennedy was on the prevailing side in both *Citizens United* (on political ads and editorials) and [Obergefell](#) (on gay marriage). Kennedy penned both landmark decisions. Likewise, no one else on the Court has strongly supported both the rights of gun owners to have firearms in their homes *and* the rights of pregnant women to make critical reproductive choices for themselves.

Justice Kennedy is a serious Catholic, but he is also a serious judge, who has worked hard follow the rule of law as he understands it. Often there is simply

no conflict between God's law and man's law, and indeed the two may happily overlap. For example, both man's law and God's law as Kennedy understands these things are premised on the dignity and worth of each human, and in everything he has done as a Justice, he has been a model of respectfulness toward others and a passionate exponent of the centrality of human dignity.

Two of his most important opinions have involved weddings — the rights of gays to wed each other, and the requests of others (such as a religiously conscientious baker in Colorado) to be allowed to opt out these weddings. Over the years, I've been to a couple of weddings with Justice Kennedy and his wife, Mary. On each occasion, we were seated at the same table and I was struck both times at his friendliness and joie de vivre.

Alas, his resignation is likely to bring out a lot of political nastiness on both sides in the months ahead. The melee will be far from respectful or dignified — not at all worthy of the man who is bidding us adieu or of the Court that he has served so earnestly. Inspired as I am by Kennedy's own example of always treating his colleagues and the Court itself with the utmost courtesy and respect, I end with a few nice — and true — things to say about the Court and its members.

The justices do much of their own work. They read the briefs, they think for themselves, and they are closely involved in the drafting and editing of the Court's written product. They are talented public servants who did extremely well in many years of study at highly respected colleges and universities. Given their talents, they could be earning lots more money doing other things, but they have instead opted for demanding careers of public service. Before coming to the Court, they all toiled away in less glamorous niches of government. They do not spend their days dialing for dollars or posturing for cameras. They tend to think very carefully before they pronounce anything in

public. They are not partisan hacks, and they have not been afraid to rule against politicians and parties who put them in power. True, each Justice tends to see the world through his or her own ideological lens, but each also tries to see other points of view. They are as a rule extremely polite and respectful toward each other, toward litigants, and toward other branches of government.

Justice Kennedy has been and remains a national treasure, but so is the Court itself, and so are its other members. I suspect the Justice would want us all to keep these things in mind in the raucous days ahead.

