

# NATIONAL REVIEW

## A New Balance on the Supreme Court Won't Be the End of American Democracy

February 1, 2018

Reilly Stephens

Realities both political and actuarial fuel speculation about when Supreme Court Justice Anthony Kennedy — for more than a decade the deciding vote on issues from abortion and gay marriage to campaign-finance regulation and gun rights — might hang up his robe. Conservatives hope that a Trump-appointed replacement might roll back decisions such as *Obergefell v. Hodges* and *Planned Parenthood v. Casey*. Progressives, for the same reason, root for him to keep at it till at least January 20, 2021.

Here at National Review, Michael Brendan Dougherty comes to a dire conclusion on the matter: “Anthony Kennedy Can’t Be Allowed to Die.” Kennedy, Dougherty believes, is more or less the last rivet keeping the wings on our political 747 attached. The Supreme Court’s role has evolved from simply deciding cases; it now must “moderate and restrain the ambitions of each party.” On this view, the fact that Kennedy “swings” from right to left from case to case keeps each side on board. And since any replacement would probably conform more closely to one faction or the other, “if the Court soon consolidates to the left or the right, partisans on the losing end of that bargain will swiftly lose faith in democracy itself.” In our current hour of political craziness, the Court must keep swinging, the way kids must clap to sustain Tinker Bell.

The good news is that there are reasons to doubt this prognosis. To begin with, it does not address how the Court functions in practice: There is *always* a median justice, so the effect of any change is felt on that margin. Justice Sonia Sotomayor is a far more solid progressive vote than was Justice David Souter, but her appointment merely shored up the outer flank of that coalition. Chief Justice John Roberts is a more reliably conservative vote than was Chief Justice William Rehnquist, but this difference was dwarfed from the beginning by the gap between Justice Samuel Alito and the justice he replaced, Sandra Day O’Connor (Kennedy’s predecessor as median vote).

So how will Kennedy’s would-be replacement adjust the Court’s equilibrium? If President Trump replaces Kennedy with someone on the model of Neil Gorsuch, then the most likely applicant for median-vote status would become the chief. A few years from now, the sort of replacement one would expect from President Oprah Winfrey would shift the center to Justice Kagan (or perhaps Breyer, or his replacement) in the same manner.

The latter scenario represents a greater “swing” in the equilibrium, but the system would also adjust dynamically: What cases are brought depend in large part on what cases might be won. Over the past decade, gay-rights and campaign-finance cases proliferated, because the Left and the Right felt that these offerings would best please Justice Kennedy, whereas cases addressing the scope of the Fair Housing Act were repeatedly scuttled because of progressive fears (ultimately unjustified) that its expansion would be stifled. Now and then activists get out ahead of their skis — it remains baffling that anyone thought the current Court would declare

affirmative-action programs not just permissible but constitutionally *required* — but the bar generally understands that it goes to court with the justices it has. The Left has found ways to win cases in front of an overall hostile court, and not just via justice Kennedy, from *Gonzales v. Raich* to *King v. Burwell*. The Right would do the same.

The most likely scenario, that Kennedy's replacement moves Chief Justice Roberts into pole position, might not take much swing out of the Court's step in any event. What the chief lacks in self-conception — Kennedy views himself as “the Tolkeinesque protagonist of the American story,” in Dougherty's rendering — he makes up for with an institutionalism that has long rankled the Right. The keystone here is Roberts's opinion upholding Obamacare's individual mandate. Rather than join either faction in *NFIB v. Sebelius*, he split the baby, saving the statute with a creative reading often interpreted as an attempt to wiggle out of a political vice that might have damaged the Court, and therefore the American system, in exactly the way Dougherty fears.

Some now speculate that Roberts is swinging toward the center in any event, a pattern that characterized other justices, including his mentor Rehnquist, who was once the *Miranda* rule's greatest opponent but became its protector. Whether or not one thinks the transfiguration of the individual mandate preserved some abstractly defined “legitimacy,” one doubts that Roberts will be disabused of the notion.

But beyond how the Court functions internally, is it clear that the rhythmic distribution of bipartisan morsels satiates either side? Progressives already consider the Court the “the cat's-paw” of the Republican party, “gutting” protections for voting rights and legalizing “bribery” in the service of their ideological patrons. Social conservatives consider the edicts from One First Street as nothing less than licenses to murder and to debauch sacred institutions (at National Review, the Court has been called “Ayatollah Roberts and His Sharia Council”). Each view is hyperbolic, but the point is that rather than supplicating for meager rations, partisans more often react to each taste with increased appetite.

History is bereft of much evidence of the Court as a moderating influence. *Brown v. Board* was not met with respectful acquiescence; enforcement required the 101st Airborne. *Roe v. Wade* turned a previously minor debate into a multigenerational litmus test. For as long as the Court has been with us, it has been an effigy for political angst. Teddy Roosevelt ran against the Court; later his cousin Franklin tried to pack it. Nixon campaigned to replace the retiring Earl Warren much as Trump did for the late Antonin Scalia — except Nixon's vow was to condemn a justice's legacy, not protect it. “This time is different” is an irrefutable argument, easily asserted, and the burden should be on those making it to overcome our skepticism.

The Court doesn't moderate our differences; it reflects them. It is formed out of the institutions that determine its membership, and to the extent a machine is broken, you rarely expect its output to make the repairs. The metronomic dispersal of outcomes right and left is the result of our current schism, not a salve for it.

The Court can't save us from ourselves, but that's not what it's there to do. It's there to interpret laws and decide cases. There are strong disagreements about how this should be done. Barack Obama privileged “empathy,” while Scalia championed rigorous adherence to text, wherever it may lead. Political posturing infects this conflict enough without the added demand that the Court maintain a patronage system that doles out trinkets to keep the factions in line.

— *Reilly Stephens is a legal associate at the Cato Institute.*