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The price for making Justice Kennedy the top court's kingmaker

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The throne has fallen vacant.

Anthony Kennedy is retiring after 30 years on the Supreme Court, and we'll soon learn who will don his all-but-ermined robes in resolving the social conflicts of an oft-divided nation, from abortion to zoning.

My own personal opinion is that if someone had to reign from the court's swing seat, I'm glad it was Kennedy. A champion of individual liberty and strong constitutional restraints on government, Kennedy has been a staunch guardian of the Bill of Rights, including both First Amendment and Second.

"Most terms he agreed with Cato's position more than any other justice," writes my Cato Institute colleague Ilya Shapiro, though usually it's more the Californian's results than the reasoning he has used to get there that merit the label of "libertarian."

But even after a king we regard as benign steps down, we might want to reflect whether kingship is a good thing.

The court's varied constituencies were to Kennedy as iron shavings to a magnet. Lawyers for both sides in the partisan gerrymandering cases this year adjusted their pitches to fit his past pronouncements. Briefs in a 2016 abortion case, reported Time, "seem to be directly aimed at Kennedy." Advocates in the Fisher II affirmative-action case in 2016 spent much of oral argument trying to master Tony-talk.

Courts themselves joined the game: The late Ninth Circuit Judge Stephen Reinhardt was said to have crafted his opinion striking down California's Proposition 8 to appeal to Kennedy. Even presidents get drawn in: Some advised Barack Obama to choose nominees for court vacancies who might skillfully woo Mr. Middle.

Kennedy wasn't the first to play this role on the high court. During the reign of his predecessor Sandra Day O'Connor, professors Susan Estrich and Kathleen Sullivan wrote a law-review article announced by its title to be directed at an "audience of one" — the Arizona-born justice. Now that Kennedy is stepping down his scepter is likely to pass to Chief Justice John Roberts, at least assuming President Trump's second pick is a staunch conservative like Neil Gorsuch.

For years, Roberts has been drifting toward the court's center, most famously joining the liberals to uphold as constitutional a key provision of ObamaCare. Last week, he sided with them to rule that cops need to get a warrant if they want extended access to cellphone-location records.

Court gossip suggests Roberts did not discourage Kennedy from retiring, perhaps relishing the chance, enjoyed by neither O'Connor nor Kennedy, to combine the case-deciding power of the swing justice with the managerial clout of the chief.

Given Roberts' famously strong interest in guarding the court's legitimacy by keeping it from looking too partisan or political, he might be especially open to the sort of overture associated lately with Justice Elena Kagan, in which she, often joined by Stephen Breyer and sometimes others on the left, agree to join an outcome pleasing to conservatives so long as the grounds for it are narrow, potentially helpful to future liberal causes, or both.

That was the formula behind the 7-2 outcomes this term in Masterpiece Cakeshop and Lucia v. SEC(independence of in-house judges at federal agencies) and the 9-0 punt on partisan gerrymandering, as well as such earlier rulings as the one knocking down as coercive toward states the Medicaid provisions of ObamaCare.

But back to the problems of having a judicial Sultan of Swing. Both Kennedy and O'Connor were famously reluctant to lay down clear rules for future cases, preferring to leave options open for the exercise of their sense of fairness.

Yet a sense of fairness provides no steady and stable basis for future cases. In the old courts of equity run by England's Lord Chancellor, it came to be said that "Equity is as long as the Chancellor's foot." As John Selden explained in the 17th century: "One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a Chancellor's conscience."

In the end, too much depends on what the Supreme Court does because law looms too large in our lives, because there is too much legislation and because too many issues are resolved in Washington that the Constitution would have left to state and local workings.

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