



## Don't worry (too much) about Kavanaugh changing the Supreme Court

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Readers to the left of me are probably apoplectic — or at least sad — about Justice Anthony Kennedy's retirement and his replacement by someone more conservative. Allow me to provide some facts that, hopefully, will calm such concerns, at least about the main things progressives seem to worry about.

That's not because Judge Brett Kavanaugh is going to move left like Justices David Souter and John Paul Stevens did, or be an inscrutable moderate like Kennedy was, but because his vote won't change that much, for two reasons: Social issues aside, Kennedy voted with conservatives a lot; and Chief Justice John Roberts, a minimalist and incrementalist, is the new median justice, a minimalist and incrementalist.

Having said that, let's take up the concerns I most commonly see in my Twitter feed:

Abortion. *Roe v. Wade* is safe because there's no way Chief Justice Roberts will vote to overturn it when he can simply nibble at its edges — allowing certain marginal restrictions to stand while not touching this “super-duper precedent.” Indeed, the court may effectively strengthen *Roe*'s trimester-based scale rather than using *Planned Parenthood v. Casey*'s nebulous “undue burden” standard. (An “undue burden” has been described as something that gave Justice Kennedy a headache.)

Same-sex marriage. There is no chance that *Obergefell v. Hodges* will be overturned. My colleague Walter Olson has [detailed the myriad reasons](#) why, but perhaps the most important are that reliance interests are too great and the country has moved on. Unlike with abortion, opposition to same-sex marriage is a clear minority position (32 percent in 2017, according to [Pew Research](#)) and dropping.

ObamaCare. The existential threats to ObamaCare are long past. Recall that Roberts was the one who (in)famously transmogrified the individual mandate into a tax and, along with Kennedy,

rewrote the law's premium-subsidy provision to allow federal exchanges to be treated the same as exchanges "established by the state." Kavanaugh, meanwhile, would have dismissed the individual-mandate suit on technical grounds and ruled against a subsequent challenge involving the Origination Clause (which requires tax bills to originate in the House). ObamaCare may well be gutted, but it won't be by judges or justices.

Campaign finance. Kennedy was the biggest defender of free speech that the Supreme Court has had, especially political speech. He wrote *Citizens United*, in which Roberts was decidedly the swing vote, agreeing to strike down precedent only after having been pushed along in several earlier cases. Kavanaugh will still vote with conservatives most of the time, but he's no Kennedy.

Corporate power. Relatedly, the Roberts Court often gets assailed as being pro-business at the expense of the "little guy." Truth be told, most business cases are unanimous or nearly so — and in the controversial 5-4 ones, typically involving class actions and arbitration, Kennedy was with the conservatives. No change with Kavanaugh.

Workers' rights. A few hours before Kennedy announced his retirement, the Supreme Court struck down state laws that allow public-sector unions to charge "agency fees" to non-members (about 80 percent of the cost of standard dues). This seems like a big win for workers, as opposed to unions. In any event, 28 states already banned such practices; the main difference is that unions there focus on workers' interests rather than national politics. Regardless, in these and other labor cases, Kennedy was with the conservatives.

Criminal justice. This is perhaps the most interesting area. Even in cases that produce 5-4 decisions, those splits tend not to be on ideological lines but, rather, combine the left and right against the middle. Call it the principled against the pragmatic. Kavanaugh, like Kennedy before him, is more in the latter category — as is Merrick Garland, by the way, who rarely meets a government action (including law enforcement) to which he doesn't defer. If this is your principal issue, however, you should be thrilled with Justice Neil Gorsuch.

Affirmative action. This is the high-profile area of law most likely to change. Kennedy never closed the door on the use of race in college admissions but, until 2016, had never voted to uphold such a program — and that was in the *Fisher II* case where the post-Scalia court simply lost appetite for the finer points of University of Texas-Austin's unusual system. Roberts, meanwhile, wrote in the context of school busing that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Racial preferences will almost certainly be thrown out on equal-protection grounds, possibly even sooner than the expiration of the 25-year shot-clock that Justice Sandra Day O'Connor set in 2003.

In only one of eight key areas that come up again and again as reasons to despair will a Justice Kavanaugh make that much difference. And that's before we get to the possible upsides, such as replacing Kennedy's votes for developers over poor people's property rights in *Kelo v. New London* and for federal regulation of plants one grows for personal consumption in *Raich v. Gonzalez*. In an age of sanctuary cities and marijuana legalization, Kavanaugh's commitment to the Constitution's structural protections for liberty should assuage fair-weather federalists. (Welcome!)

And then there's Kavanaugh's pushback on the administrative state: Do you really want executive agencies led by the likes of Betsy DeVos, Rick Perry or (formerly) Scott Pruitt to have more unchecked power?

Of course, this isn't really about Kavanaugh, and both sides should be honest in recognizing that. While the people on the list of potential nominees differ in various ways that I described previously, they're all in the conservative/originalist/textualist mainstream. These are not "Trumpy" judges, whatever that means; there's no Michael Cohen, Rudy Giuliani or Judge Judy.

The opposition to Kavanaugh is just a refusal to accept the 2016 election. It's not a fear of the apocalypse — at least not among reasonable observers — but a frustration that Hillary Clinton isn't making the pick. It's a lamentation of a lost opportunity to move the court in a progressive direction.

I get that, which is why I would never tell senators to vote for a nominee they think will do damage to the Constitution and the rule of law. But precisely because Democrats forced the elimination of the filibuster when the stakes were lower — I've never been a fan of the judicial filibuster, so I'm glad Sen. Mitch McConnell (R-Ky.) ended in 2017 what Sen. Harry Reid (D-Nevada) started in 2003 — the only thing that matters is having a bare Senate majority. And it's up to voters to evaluate their senators' decisions on this important issue in November — a month after Brett Kavanaugh becomes the junior justice.

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