



## Why a court with Kavanaugh is nothing to fear

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Brett Kavanaugh is Donald Trump's nominee to fill Justice Anthony Kennedy's "swing" seat on the Supreme Court, known as such for how often his vote was the deciding one on behalf of either the liberal or conservative cohorts of the court on issues ranging from same-sex marriage to the travel ban.

With the Kavanaugh pick, many on the left are now concerned that a more conservative Supreme Court could result in harm to civil liberties and the rolling back of federal programs. While those concerns are not unreasonable, they shouldn't be apocalyptic. The reality is that gay marriage isn't going anywhere, *Roe v. Wade* will probably not be overturned, and a court with a Justice Kavanaugh could help rein in an executive branch that has become too powerful.

I am a libertarian, and Kennedy's votes aligned with my philosophy more often than any other justice's -- albeit often accompanied by somewhat inscrutable judicial opinions. In addition to his stalwart defenses of free speech (*Texas v. Johnson*) and federalism (*NFIB v. Sebelius*) Kennedy was the swing vote in all the major gay rights cases of the past 25 years. When Kennedy arrived on the bench in 1987, same-sex intimacy was illegal in many parts of the country. When he left, gay marriage was legal everywhere. That's a legacy for which he will be justly celebrated.

Yet Kennedy did not so much lead that parade rather than join it. The growing social acceptance of gay rights is one of the great civil rights stories of all time, and it didn't happen because the Supreme Court told us to do it. According to Pew, in 2001, 57% of Americans opposed gay marriage; in 2017 only 32% did.

Those numbers matter to justices, even ones like Kavanaugh. Disrupting expectations and going against widespread public opinion is not something that any justice is likely to do. Overturning gay marriage would require invalidating hundreds of thousands of marriages, and it would wreak havoc with tax statuses, inheritances, property ownership and dozens of other legal relationships that extend from marriage.

Moreover, overturning gay marriage would cause public opinion to shift against the Supreme Court, imperiling the legitimacy of an institution that depends upon the perception of legitimacy to function effectively. According to Gallup, the court hasn't had an approval rating over 50% since 2010. While justices should theoretically do their jobs without concern for public opinion,

all the justices are aware that the court could suffer lasting institutional damage if public opinion falls to a level like Congress' dismal 19% approval rating.

No one is more aware of that than Chief Justice John Roberts, and there's no justice on the court that Kavanaugh resembles more than Roberts. Roberts' controversial vote upholding the Affordable Care Act could be explained as a vote to preserve the perceived legitimacy of the court. And, despite voting against gay marriage in Obergefell, Roberts joined a subsequent six-justice majority in smacking down the Arkansas Supreme Court when it seemed to be dragging its feet on implementing the decision. Obergefell was the law, even if he didn't vote for it, and Roberts thought it important that the court — his court — clearly tell the lower courts to follow it.

Even more conservative justices, such as the liberal bête noire Justice Antonin Scalia, were reticent to overturn settled precedent, disrupt expectations, and imperil the legitimacy of the court. Scalia had a theory that some precedents, even if wrong in his view, were so thoroughly a part of our law that justices shouldn't overturn them. As he quipped, "I am an originalist, not a nut." Kavanaugh is a judge who adheres to a similar mantra.

For all these reasons, Roe v. Wade is likely not in peril, either. Recent public opinion polls show that 57% of Americans believe abortion should be legal in all or most cases. Kavanaugh is perhaps the most mainstream conservative of any judge that Trump could have picked, and Scalia's philosophy of judicial restraint has become mainstream conservative thinking. Roe is likely safe.

So, if Roe and Obergefell are safe, what positives might we see from a more conservative court? For one, a more conservative court would rein in an out-of-control administrative state that empowers the executive branch to make sweeping changes in American lives. As it stands now, decades of settled practice can be overturned by just clicking "post." For example, the Obama administration nonchalantly suspended the Affordable Care Act's "employer mandate" in a blog post, despite the fact that the law passed by Congress required qualifying employers to provide health insurance or pay a fine by January 1, 2014.

The Obama administration also claimed that an unpublished opinion letter was sufficient to change the definition of "sex" to "gender identity" in schools all over the country. Whatever you think of transgender rights, and I'm a supporter, or the ACA, "government by blog post, unpublished letter, and tweet" is not something allowed by the Constitution.

And a more conservative court is likely to have less patience for possible Trump shenanigans domestically (although foreign policy is a different story). Last week, a federal district judge appointed by George W. Bush largely blocked the Trump administration's attempt to go after California's "sanctuary cities" laws. Judge John A. Mendez's ruling was quintessentially conservative, based on the constitutional principle that the federal government cannot command states to act. And last September, Reagan appointee Judge Harry Leinenweber ruled that the administration could not withhold unrelated funding from "sanctuary cities" to coerce them to change their policies, another ruling rooted in conservative constitutional principles. That ruling

was later upheld by an all-Republican-appointed three-judge panel on the 7th Circuit. Kavanaugh is likely to agree with those judges.

If you're a liberal, a Supreme Court with Kavanaugh is certainly going to disappoint you sometimes, and he'll disappoint me, too. But if he is confirmed, don't be shocked if you're pleasantly surprised by many of the rulings that get his vote.

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