

Widener University Delaware Law School

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Make It Count: Your Vote Is Vital in Determining the Future of the Supreme Court

Alan E Garfield



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Your vote is vital in determining
the future of the Supreme Court



ALAN GARFIELD

The Constitution begins with “We the People,” not “We the Supreme Court Justices.” That’s a reminder that in the United States the people are sovereign. We set the nation’s policy agenda by electing representatives to carry out our will. We hold these representatives accountable when they come up for re-election.

That’s the theory. The reality is messier. Many of us don’t bother to vote. And when we do, we frequently don’t appreciate the importance of our action. Rather than inform ourselves so we can exercise our franchise wisely, we allow ourselves to be influenced by facile arguments, demagoguery and unspoken prejudices.

These problems are not unique to American democracy. Just think of those people in Britain who waited until after the Brexit vote to search for the answer to the question, “What is the EU?”

If our government is one “of the people, by the people, (and) for the people,” what is the role of Supreme Court justices? Why can this tiny cabal of unelected judges overturn laws enacted by our elected representatives?

The answer lies in the Constitution. True, the Constitution is designed to facilitate popular rule.

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CONSERVATIVE MINORITY



Chief Justice
John G. Roberts
Appointed by
G.W. Bush



Associate Justice
Clarence Thomas
Appointed by
G.H.W. Bush



Associate Justice
Samuel Alito
Appointed by
G.W. Bush

MODERATE



Associate Justice
Anthony Kennedy
Appointed by
Ronald Reagan

LIBERAL MAJORITY



Associate Justice
Ruth Ginsburg
Appointed by
Bill Clinton



Associate Justice
Stephen Breyer
Appointed by
Bill Clinton



Associate Justice
Sonia Sotomayor
Appointed by
Barack Obama



Associate Justice
Elena Kagan
Appointed by
Barack Obama

Court

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But it is also meant to guard against the excesses of democracy.

By enforcing the Constitution, the justices ensure that the majority does not suppress dissenting voices or trample on minority rights. That's certainly important, but finding the sweet spot between majority will and minority rights is no simple task.

The justices also need to ensure that the structural checks in the Constitution are respected.

It may be more efficient to concentrate power in a single place, but excessive aggregation of power threatens our liberty. Here, too, the justices need to find the sweet spot between hampering efficient government and preventing dangerous accumulations of power.

Whether the justices hit a sweet or sour spot is in the eye of the beholder.

For those on the right, the justices hit sour spots when they protected abortion rights or held that Congress could require individuals to purchase health insurance.

For those on the left, the justices hit sour spots when they gave corporations the right to spend unlimited sums on political campaigns or held that Congress lacked the power to regulate gun posses-

sion near schools.

What can we do if we're unhappy about how the justices use their power?

In theory, we could push for a constitutional amendment to override any decision we don't like. That has happened on four occasions, but it is extremely hard to do: It requires approval by two-thirds of both houses of Congress and three-fourths of the states. (Keep in mind that the Constitution couldn't effectively protect against majority abuse if it were easy for the majority to change it.)

More typically, citizens can try gradually to influence the direction of the court by electing presidents who will appoint justices more to the public's liking. But to do that, we need to educate ourselves about whom a presidential candidate is likely to appoint.

If ever there was a time to do so, this upcoming election is one.

When Justice Antonin Scalia was still on the court, there were five conservative-leaning justices (Chief Justice John Roberts, Scalia, Anthony Kennedy, Clarence Thomas and Samuel Alito) and four liberals (Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan). In many of the more politically charged cases, this meant there was a reliable conservative majority.

The conservatives' dominance was limited, however, by Justice Kennedy, who sometimes swings left to form a majority with his liberal colleagues.

This occurs most frequently on cases

involving gay and lesbian rights (hence last year's decision finding a right to same-sex marriage), abortion rights (hence last month's decision to invalidate onerous Texas regulations on abortion clinics), and limits on the death penalty (hence decisions limiting the imposition of the death penalty on minors and the intellectually disabled).

Kennedy also surprised some court watchers in the last term by joining with the liberal justices to uphold affirmative action at the University of Texas.

On other issues, Kennedy has been reliably conservative. These include cases involving separation of church and state (hence the decisions upholding the right of for-profit corporations to be exempted from the contraception mandate and allowing a local town board to begin its meetings with overtly sectarian prayers), campaign finance (hence Citizens United), and limits on congressional power (hence the invalidation of the preclearance rule in the Voting Rights Act).

So do the math. With Justice Scalia's retirement, there are now four reliably liberal justices, three reliable conservatives, and Justice Kennedy, who usually swings right but occasionally swings left.

President Obama's nomination of Merrick Garland is going nowhere, so the next president will likely fill Justice Scalia's seat. If a Republican president replaces Scalia with another reliable conservative, we'll be back to where we

were before his death.

On most issues, the court would lean right, with Kennedy holding the key to a liberal majority. (Occasionally other justices do vote in unexpected ways, as when Chief Justice Roberts twice joined the liberals to uphold Obamacare.)

If a Democratic president replaces Scalia with a liberal justice, there would be a solid five-justice liberal majority even without Kennedy's vote.

But that's just talking about Scalia's replacement. Think about the justices who are most likely to retire over the next four years. The three oldest justices are the liberals Ginsburg (83) and Breyer (turning 78 in August) and the swing-voting Kennedy (turning 80 later this month).

If a Republican president replaces not only Scalia but one or more of these justices, the court could have a rock-solid conservative majority. By contrast, a Democratic president who secured a liberal majority by replacing Scalia could ensure the court stayed that way by appointing a liberal to replace Ginsburg, Breyer or Kennedy.

So think about the implications of your vote in November on the makeup of the Supreme Court.

Don't be the kind of person who, the day after the election, inquires on the Internet, "Who is Donald Trump (or Hillary Clinton) likely to appoint to the Supreme Court?"

Alan Garfield is a professor at Delaware Law School.

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