

Widener University Delaware Law School

From the Selected Works of Alan E Garfield

Summer September 16, 2018

Courts should protect powerless, Kavanaugh would do the opposite

Alan E Garfield



Available at: https://works.bepress.com/alan_garfield/143/

Courts should protect powerless, Kavanaugh would do the opposite



Your Turn

Alan Garfield
Guest columnist

I don't think that the Senate should confirm Brett Kavanaugh for a seat on the Supreme Court.

It's nothing personal. He seems like a great guy – a devoted husband and father and an active member of his community. And there's no denying his stellar credentials.

But intelligence and collegiality are only the bare minimum requirements for a Supreme Court justice. The real question is how Kavanaugh would use his power as a justice.

The power I'm referring to is the power of "judicial review" – the power to declare laws and other government actions unconstitutional. The Constitution nowhere says that judges have this power. Chief Justice John Marshall simply proclaimed that they do in the landmark *Marbury v. Madison* decision in 1803.

Judicial review is highly controversial in a democracy. That's because it allows a small group of life-tenured justices to overturn laws enacted by the people's elected representatives.

Usually, in a democracy, we expect policies to reflect the majority's will. But

when the Supreme Court declares a law unconstitutional – and it takes only five justices to do so – that overrides the political process and removes the issue from public control.

Think about it. If the Supreme Court had not decided *Roe v. Wade*, legislators could choose whether to ban or permit abortions. Likewise, if the Supreme Court had not decided *Citizens United*, elected officials would still be free to limit independent campaign expenditures by corporations.

As the late Yale law professor Alexander Bickel put it, judicial review is a "deviant institution in American democracy."

Yet most Americans recognize that in some contexts judicial review is not only desirable but vitally important.

While most policy choices should reflect the majority's will, some should not. The majority should not choose which ideas may be expressed or what religion someone must profess. The majority should not prefer one race over another. And most Americans agree that the majority should not dictate whom an individual may marry or whether a woman may terminate an early pregnancy.

In deciding whether Judge Kavanaugh should be confirmed, I have asked myself how he would use the power of judicial review. To my mind,

the justices use this power wisely when they protect weak, vulnerable, and unpopular members of our society who would be trampled by a purely democratic process. This includes protecting the poor, minorities, and unpopular speakers (whether from the left or the right) and ensuring that criminal defendants are fairly prosecuted.

My fear is that Kavanaugh would use his power to do the opposite – he would protect the most powerful members of our society, the ones who are most capable of protecting themselves and least in need of special judicial protection.

For example, it seems almost certain that Kavanaugh would join with the other conservative justices in striking down legislative efforts to rein in the influence of big money in politics. This is so notwithstanding the abundant evidence that this money distorts our democracy and leads to laws that favor large corporations and billionaires over the public at large.

Kavanaugh would also likely join the conservative justices in invalidating legislative efforts to protect the rights of poor and minority voters. That's what the conservatives did when they gutted the Voting Rights Act and what they failed to do when they upheld an Ohio voter-purge law that, as Justice Sonia Sotomayor noted, disproportionately affected poor, minority, disabled, and

veteran voters.

Making matters worse, Kavanaugh would likely join the other conservative justices in refusing to use judicial review to rein in incumbent politicians who manipulate the electoral process to entrench themselves in office. The conservative justices have shown no desire to strike down voter ID laws that supposedly prevent voter fraud but actually disenfranchise poor, elderly, and disabled voters who are less likely to have a driver's license or passport.

Likewise, conservative justices have refused to rein in extreme partisan gerrymandering even though this reduces elected representatives' political accountability and denies large groups of citizens adequate representation of their interests.

Time and again, conservative justices have used their power of judicial review to protect the powerful rather than defend the weak. I fear that, if Judge Kavanaugh is confirmed, the Supreme Court will continue comforting the comfortable and afflicting the afflicted.

We'll have the best democracy money can buy. It just won't be a democracy of the people, by the people, and for the people.

Alan Garfield is a distinguished professor at Widener University Delaware Law School.