

Commentary: As Maine goes, so may go the nation on Kavanaugh confirmation

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By Akhil Reed Amar

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If Sen. Susan Collins supports Brett Kavanaugh, he will almost certainly win confirmation as America's next Supreme Court justice. If Collins opposes Kavanaugh, his pathway narrows. As Maine goes, so may go the nation.

Collins and Maine should go with Kavanaugh for the simplest of reasons: He is the best person for the job compared to all other realistically imaginable nominees. Anyone who says differently should name the supposedly better candidate and explain how that candidate would actually get nominated by President Trump and then confirmed.

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Supreme Court justices must correctly interpret the Constitution. Kavanaugh has studied the document more carefully and has written more thoughtful things about it than anyone else on the list of approximately 20 potential nominees that Trump has been publicly circulating

for the last year.

I myself voted against Trump and previously supported all of Bill Clinton's and Barack Obama's court nominees – Ruth Bader Ginsburg, Stephen Breyer (my former boss), Sonia Sotomayor, Elena Kagan and Merrick Garland.

Republicans stonewalled Garland in 2016 – wrongly, in my view – and many leftists now want Senate Democrats to stonewall Kavanaugh as payback. But the situations are not symmetric. Garland needed lots of Senate Republican votes because of filibuster rules then in place, but Kavanaugh does not need any Senate Democratic votes. Republicans controlled the Senate in 2016 and control it today. Elections have consequences, and math is math.

Suppose Democrats successfully block Kavanaugh, with help from Republican moderates like Collins. What then? Trump would still be president; the court vacancy would still exist; and – to repeat – the others on President Trump's long list are less constitutionally impressive.

Nor has anyone else on Trump's list shown as much willingness as Kavanaugh to respectfully engage thoughtful moderates and liberals. Kavanaugh, a stalwart Republican, has often hired Democrats and independents to assist him as law clerks. This is exactly the sort of jurist who free-thinking Mainers from Collins on down should applaud.

Collins cares deeply about women's reproductive rights. (So do I; unborn human life is precious, but pregnancies and potential pregnancies can raise intricate medical and moral complexities, and in this domain I generally trust women more than I trust government officials.) On issues of reproductive choice, there are no guarantees that a future Justice Kavanaugh would rule the same way that Sen. Collins might prefer. But that is equally or more true of all the other would-be nominees on Trump's long list. If Collins were to sink Kavanaugh, Trump could easily nominate someone else who would likely be less open to Collins' vision of reproductive rights, but harder for senators to torpedo. Consider, for example, Judge Amy Coney Barrett, an earnest acolyte of Antonin Scalia with a compelling life story but less personal exposure to liberals and a less distinguished judicial track record. Moderates and liberals should be careful what we wish for.

Sen. Collins has repeatedly spoken of the importance of selecting jurists who respect precedent. Precedent is indeed important, but more so for lower-court judges, who must faithfully follow what the Supreme Court has decreed in past cases. As a lower-court judge, Brett Kavanaugh has generally been a dutiful deputy with an excellent record of affirmance by the Supreme Court.

But precedent operates differently on the Supreme Court itself. The justices can and at times must overrule or narrow their own previous rulings if it becomes clear that these rulings incorrectly interpreted the Constitution itself. The Constitution – and not the case law – is America's supreme law of the land. In the greatest judicial decision of the last century, the

Supreme Court in Brown v. Board of Education buried the erroneous segregationist ruling of Plessy v. Ferguson and instead faithfully followed the Constitution itself, which promises racial equality.

Aligning precedent with the true meaning of the Constitution's words and spirit requires consummate legal skill and judgment. Over many years and on many issues, Kavanaugh has shown just this sort of legal acumen. Other lower-court judges may call themselves "originalists" – jurists who pay special attention to the original meaning of the Constitution's words – but Kavanaugh has demonstrated in his decisions and other writings that he actually has studied the Constitution and its history in impressive detail. He has also shown that he is an originalist who understands the role of precedent.

No other would-be justice realistically on the horizon has shown comparable skill at harmonizing strong fidelity to original meaning with proper respect for precedent and tradition. Sen. Collins should say "yes" to Kavanaugh, and Mainers should say "amen."

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