

OP-ED

# The justices aren't 'umpires'

Brett Kavanaugh contends a judge's views don't matter. He knows that's not how the Supreme Court works.

By **Erwin Chemerinsky**

ONCE AGAIN a Supreme Court nominee has insulted the intelligence of the American public by likening justices to "umpires." Echoing the language used by John G. Roberts Jr. at his confirmation hearings in 2005, Brett Kavanaugh declared Tuesday before the Senate: "A good judge must be an umpire — a neutral and impartial arbiter who favors no litigant or policy.... I don't decide cases based on personal or policy preferences."

But justices are not umpires at all. Umpires apply rules and have little leeway in determining how those rules should be interpreted. The Supreme Court creates the rules and justices have enormous discretion in how to interpret the law. By likening himself to an umpire, Kavanaugh was contending that his views don't matter at all. That is false.

How a justice votes is very much a result of his or her ideology and views. Justices Clarence Thomas and Sonia Sotomayor disagree in virtually every major case entirely because of their differing ideologies. This is not new; Supreme Court decisions have always been a product of those sitting on the bench.

The Constitution was written — intentionally — in broad, open-ended language that rarely provides guidance for issues that must be resolved by the Supreme Court. Jus-

tices are obligated to give meaning to ambiguous words written almost 230 years ago. What is "speech"? For example, should spending money in an election campaign be regarded as a form of speech? This is the issue at the heart of whether campaign spending limits violate the 1st Amendment. The text of the Constitution cannot answer the question of whether spending money is speech. Nor did the founders think about this in 1789, when campaign spending did not exist as it does today.

One of the most controversial parts of the Constitution, the 2nd Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Is this a right to have guns only for militia service or does it create a more general right of individuals to possess firearms? On this question, the court split 5-4 exactly along ideological lines in *District of Columbia vs. Heller* in 2008 and declared unconstitutional a 32-year-old ordinance prohibiting ownership or possession of handguns. The conservative majority chose to read the 2nd Amendment as a right of individuals to possess handguns in their homes for the sake of security, while the liberals argued that the 2nd Amendment is a right to have guns solely for the purpose of militia service. Either is a plausible reading of the text supportable by the amendment's history.

No constitutional right is absolute and constitutional cases constantly involve balancing of the government's interest against the claim of a right. A justice's own ideology and life experiences inevitably determine how he or she strikes the balance.

To pick an easy example, the 4th Amend-

ment prohibits "unreasonable" searches and arrests. But what is reasonable or unreasonable cannot be answered from the text of the Constitution or any original understanding. When the court considered whether the police can take a DNA sample from a person arrested for a serious crime to see if it matches DNA from an unsolved crime in a police database, the court explicitly balanced the benefit to law enforcement of obtaining the information against the intrusion to privacy and ruled, 5-4, in favor of the government.

Under constitutional law, the court frequently weighs whether the government has a "compelling" or an "important" or a "legitimate" interest. For example, in cases involving affirmative action in college admissions, the central question is whether diversity in the classroom is a compelling government interest. In deciding the constitutionality of laws prohibiting same-sex marriage, the court had to decide, at a minimum, whether they serve a legitimate interest. But whether something is a "compelling" or an "important" or a "legitimate" government interest demands a value choice. It never can be answered by the text of the Constitution or its original understanding.

President Trump, senators and the public all know that justices are not like umpires, which is exactly why the confirmation of Supreme Court nominees are so contentious. Kavanaugh obviously knows this, too, and should not have presented such a misleading sense of constitutional law to the Senate Judiciary Committee or the American public.

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# No point in debate with Steve Bannon

By **Noah Berlatsky**

PUNDITS and opinionators like to think that political change comes through punditing and opinionating. To move the populace, all you need to do is wheel out sparkly and provocative arguments, and then those arguments will be honed and sharpened through free debate. It seems natural to people who generate ideas for a living that ideas are the motive force behind politics.

It's true that ideas can be powerful. But they aren't the only powerful thing. Often real change is brought about not by new ideas but by solidarity — the willingness of a group to take collective action.

This was illustrated Monday when David Remnick, editor of the *New Yorker*, announced that former White House chief strategist Stephen K. Bannon was slated to appear at the *New Yorker* Festival.

Until he stepped down in January, Bannon was the executive chairman of Breitbart News, which provides a platform to the so-called alt right. Bannon has been linked to white nationalism and has made a career of bringing its toxic rhetoric into the mainstream.

Perhaps anticipating the controversy to come, Remnick told the *New York Times*: "I have every intention of asking him difficult questions and engaging in a serious and even combative conversation."

But the backlash was fierce and swift. Legions of readers declared on social media that they were canceling their subscriptions to the *New Yorker*. The author Roxane Gay announced that she was pulling an essay she had been working on for the magazine. Kathryn Schulz, a *New Yorker* staff writer, said publicly that she was horrified by Remnick's decision. And a number of high-profile festival guests — Judd Apatow, Jim Carrey, Jimmy Fallon — said they would not appear at the festival if Bannon attended.

"I'm out," the comedian John Mulaney said on Twitter. "I genuinely support public intellectual debate, and have paid to see people speak with whom I strongly disagree. But this isn't James Baldwin vs William F Buckley."

So Remnick quickly disinvited Bannon, saying in a statement: "I don't want well-meaning readers and staff members to think I've ignored their concerns. I've thought this through and talked to colleagues — and I've reconsidered."

Predictably, some journalists and pundits hurried to defend Remnick, including Malcolm Gladwell, who wrote on Twitter: "I would have thought that the point of a festival of ideas was to expose the audience to ideas. If you only invite your friends over, it's called a dinner party."

Bannon called Remnick "gutless." Critics are now arguing that by dropping Bannon from its festival, the *New Yorker* is impeding the free exchange of ideas. What they miss, though, is that Remnick's hand was forced. And it was forced by that other hallmark of a free society — the right to organize.

Remnick didn't really choose to pull Bannon. The other people who had been asked, or hired, to appear at the festival essentially staged a work stoppage. On Labor Day, no less.

When people think about collective action, they don't typically think about Jim Carrey refusing to appear at the *New Yorker* Festival. But he and the others are, in this context, working. And refusing to do the job comes with potential risks — possibly the loss of a fee, in some cases, but also potential blacklisting, negative publicity and on-line harassment from Bannon's fan base.

Had only one speaker refused to appear at the festival, Bannon may not have been dropped. As with all collective action, what turned the tide was solidarity. When people act together, they have more power than any one of them has alone.

Remnick said he intended to challenge Bannon's ideas in open debate. But is there any point in debating Breitbart's "black crime" vertical? What is gained by challenging Bannon to admit that when he says "globalists," he means "Jews"?

You can't argue down bigots, because bigotry has no logic. But you can take a stand against bigotry with your colleagues and fellow citizens. Rather than relying on a brilliant pundit to refute fascism, the other festival guests chose the latter path.

Driving Bannon from the *New Yorker* Festival is a small but meaningful victory. Bigots and aspiring authoritarians like him are trying to create a country in which immigrants, black people and other marginalized groups face daily terror, violence and imprisonment.

The abandonment of liberty and justice for all isn't an idea we should debate. It's an idea we should reject together.

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STEVE RINGMAN McClatchy-Tribune

**MARINE SCIENTISTS** study the effects of carbon dioxide on marine life off the coast of Papua New Guinea.

# Rising acidity in our seas

By **James B. McClintock**

AS THE NEW acting chief of the Environmental Protection Agency, Andrew Wheeler, pushes ahead with the Trump administration's plan to weaken fuel economy standards to levels that give even the auto industry pause, Americans should consider the ramifications of the rollback.

Most of us are aware that auto emissions contribute significantly to the pool of atmospheric greenhouse gases. Scientific studies show that nearly one-fifth of the atmospheric carbon dioxide gas generated in the United States each year comes from the combustion of fossil fuels by cars and trucks. Many citizens also know that the product of this combustion process is primarily carbon dioxide, a colorless gas that traps heat within the atmosphere, contributing to the ongoing warming of Earth.

Much less common, however, is an understanding that the emissions spewing from our tailpipes are also acidifying the world's oceans. Since the first coal-burning fires of the Industrial Age, about 30% of the atmospheric carbon dioxide produced by humans has been absorbed by our surging seas.

Oceanic absorption of carbon dioxide varies somewhat with latitude. The colder the water, the more readily carbon dioxide will dissolve in it. The Southern Ocean, which surrounds Antarctica, absorbs about 10% more carbon dioxide than other seas.

When carbon dioxide combines with seawater, it undergoes a series of chemical reactions that increase the acidity of the water. The same chemical reactions also reduce the availability of calcite and aragonite, two carbonate minerals that are needed for the shell-building process.

Marine life is reacting to the acidification of our oceans, and not in a good way. In some coastal regions, oysters, clams and snails are struggling to produce and maintain their shells. The tiny offspring of these animals are particularly vulnerable.

Coral reef ecosystems are also at risk. Half of the coral in the Great Barrier Reef has died since 2016 in a catastrophic bleaching event exacerbated by acidification.

Marine biologists and chemists have established that ocean acidification influences not only the ability of marine organisms to make and maintain a shell, but also their capac-

ity to grow, reproduce and navigate.

Researchers at the University of Tasmania, led by Dr. So Kawaguchi, found that the tiny eggs of krill are less likely to hatch when exposed to ocean acidification. The shrimp-like crustaceans provide sustenance for the majority of fish, seals, penguins and baleen whales that dominate Antarctic food webs.

A scientist at the University of Oregon, Dr. Julie Schram, determined that some species of Antarctic amphipods — small, insect-like crustaceans — die after prolonged exposure to ocean acidification, perhaps because they have trouble shedding their exoskeletons.

And a team of scientists at the Australian Research Council Center of Excellence for Coral Reef Studies, led by Dr. Philip Munday, observed that in acidifying conditions, juvenile clownfish lose the ability to relocate their natal reef, a process required for their reproduction.

Even sharks are affected. Dr. Danielle Dixon at the Georgia Institute of Technology discovered that sharks are less likely to smell their food when exposed to elevated acidification.

Ocean acidification could cause a substantial loss of biodiversity within some of the most diverse ecosystems on the planet. Complex marine ecosystems, including the seafloor communities surrounding Antarctica and tropical coral reefs, provide habitat and nutrients for a rich array of bacteria, invertebrates and fish. As ocean acidification begins to eliminate the most vulnerable species, their loss risks disrupting these interdependent communities. Not to mention that some of these ecosystems may provide cures to a variety of human diseases.

While the Trump administration works to freeze car pollution rules, Americans need to weigh the full costs of such a move. We have collectively made the connection between fossil fuels and the atmosphere. We need to understand what fossil fuels are doing to our oceans before it's too late.

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## From tailpipe to coral reef, CO2 is killing the ocean