AFR Americans for Financial Reform Education Fund

THE KAVANAUGH NOMINATION

What's in it for Wall Street and Predatory Lenders?

Five big favors the Supreme Court could do for them if he's confirmed

BIG FAVOR #1: Undermine the independence of the Consumer Financial Protection Bureau – and the whole concept of an independent regulatory agency – by giving the President the power to remove its director at will.

The Dodd-Frank Act sought to insulate the Consumer Bureau from political pressure by saying its director could be removed only for inefficiency, neglect of duty, or wrongdoing. In 2017, Judge Kavanaugh was the author of an appellate court opinion – later overturned by his own court sitting *en banc* – declaring the bureau's structure unconstitutional and arguing that the President should have the power to remove the director at will.

In defense of his position, Kavanaugh cited a Supreme Court dissent in which Justice Antonin Scalia advanced what has come be known as the "unitary executive" theory, giving the President close to total control over all federal agencies and their leaders. The Supreme Court rejected Scalia's theory, just as the D.C. Circuit ultimately overruled Kavanaugh and the plaintiff in the case, a New Jersey mortgage lender. The company's complaint not only "flies in the face" of firmly established precedent, the D.C. Circuit said, but amounted to a "wholesale attack on independent agencies" and was based on a theory "uncabined by any principled distinction between this case and Supreme Court precedent sustaining independent agencies."

Regulatory independence, the Court went on to say, "shields the nation's economy from manipulation or self-dealing by political incumbents and enables agencies to pursue the general public interest in the nation's longer-term economic stability and success, even where doing so might require action that is politically unpopular in the short term."

During its first five years' of operations, the CFPB delivered nearly $12 billion in financial relief to some 29 million consumers who had been wronged by banks and other financial companies. This kind of tough enforcement becomes much less likely without an independent Director.

If the Supreme Court adopted Kavanaugh's "unitary executive" position, the Consumer Bureau's leaders (and other regulators) would be forever looking over their shoulders, worried about how far they could go without running afoul of powerful industry actors with friends in high places.

BIG FAVOR #2: Make it immensely more difficult for bank and financial regulators, including the CFPB, to write and enforce rules, tilting the playing field even more sharply in Wall Street's favor.

Judge Kavanaugh has been a radical skeptic about the need for regulation and the authority of regulators across the board. Dissenting from the DC Circuit's decision in a case involving safety practices at Sea World and a trainer fatally attacked by a killer whale, he questioned the jurisdiction of the Occupational Health and Safety Administration, pointing out that the law did not specifically cite sports and entertainment as an OSHA-regulated industry and that Sea World's trainers had in any case willingly accepted the risks of the job. In ruling for OSHA, his fellow judges had erred by failing to focus on when "we as a society paternalistically decide that the participants in… sports and entertainment activities must be protected from themselves," Kavanaugh wrote, adding that government efforts to raise safety standards could make it impossible to carry on some businesses.

Based on this and other opinions, Thomas McGarity of the University of Texas at Austin believes Kavanaugh would be likely "to interpret statutory language to require agencies to emphasize industry costs, rather than focusing primarily on the statute's protective goals and public benefits." Kavanaugh's attitudes also carry strong echoes of the arguments made by employers and conservative courts a century ago, when, as McGarity notes, "a Supreme Court committed to a limited government ideology overturned many protective Progressive Era laws." With Kavanaugh confirmed, McGarity fears that the Court could once again become "a bulwark" against new regulations that limit corporate power and protect the public interest.

Kavanaugh has also been a harsh critic of what's known as Chevron deference – the willingness of courts to step back and let agency experts resolve statutory gaps or ambiguities. If *Chevron* were repudiated or pared back, says the constitutional law expert and blogger Joshua Matz, agencies would "face a far more treacherous terrain when their actions and regulations are challenged in court."

BIG FAVOR #3: Dramatically raise the bar of proof in cases of discriminatory lending.

When powerful people and institutions discriminate on the basis of race, gender, or sexual preference, they don't necessarily come right out and say that's what they're doing. For more than 40 years, the federal courts have recognized a duty to look at the *effects* as well as the *intent* of worrisome practices in employment, housing, and lending. Across the country, multiple courts have upheld this concept, known as disparate impact, as a valid lens for examining discrimination cases brought under the Fair Housing Act and the Equal Credit Opportunity Act as well.

In 2015, the Supreme Court heard a case, *Texas v. Inclusive Communities*, challenging the entire validity of disparate impact theory. Justice Kennedy was the author of the majority opinion and a crucial vote in upholding this long settled legal precedent. Because discrimination is often hidden or disguised, he wrote, disparate impact analysis is a crucial tool in combating it. “Recognition of disparate impact liability under the FHA also plays a role in uncovering discriminatory intent,” Kennedy noted. “It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.”

Unlike Justice Kennedy, Kavanaugh’s record shows a disregard for precedent and an evident hostility towards disparate impact claims. In *Greater New Orleans Fair Housing Action Center v. HUD*, Kavanaugh joined a decision harshly striking down a disparate impact claim. A fellow judge, while agreeing with the outcome, criticized the opinion Kavanaugh endorsed for “meander[ing] into disparate impact theory – without citation to authority – and into benchmark suppositions not briefed by the parties much less argued in the district court, and set up only to be rejected without record evidence on either side of the new constructs while ignoring support for plaintiffs’ evidentiary proffer… One might well wonder what purpose these meanderings have other than to posit hurdles for future disparate impact claims.”

As Justice Kennedy recognized, discrimination does not necessarily wave a banner. Often it comes disguised in policies and procedures that appear neutral even as they exclude and cause harm to protected classes of people, denying them access to some things and making them pay extra for others.

BIG FAVOR #4: Help lenders dodge laws against predatory loans involving rent-a-bank schemes.

National banks can charge as much interest as they want without regard for the interest rate limits of their customers’ various states of residence. But in a 2015 case known as *Madden v. Midland*, the U.S. Court of Appeals for the Second Circuit ruled that banks cannot pass that immunity on to other lenders who buy loans originated by banks. The ruling stops 300% APR consumer lenders from using “rent-a-bank” schemes where banks nominally issue loans that are then immediately sold to payday or car-title lenders.

Online lenders and banks that rent out their charters have been battling hard to undo Madden. Industry lawyers now hope to achieve that result in the courts. “If you have a more conservative court, they are more likely to look at Madden when the loan was made versus when the loan was sold,” a prominent Wall Street lawyer told the American Banker after Kavanaugh’s nomination was announced.

Such a ruling would invite payday lenders, debt buyers, online lenders, and so-called fintech companies to routinely resort to “rent-a-bank” deals as legal cover for their debt-trap loans. The result would be to destroy the effectiveness of protections in the three-quarters of the states that limit interest rates for at least some loans, while undermining the continued efforts of consumer and civil-rights advocates, faith leaders, and others to persuade more states to protect people against predatory lending.

BIG FAVOR #5: Make it harder for defrauded consumers to bring financial wrongdoers to court.

When banks and lenders defraud or overcharge, the effects often fall on tens or hundreds of thousands of customers, but the dollar cost to any one person is rarely large enough to justify the expense of taking the company to court. The only practical recourse, therefore, is for the victims to band together in a class action lawsuit. Because class actions are brought on behalf of everyone harmed, even those who cannot afford an attorney or lack access to one can also benefit.

It was a series of class-action lawsuits, for example, that led to court decisions ordering Wells Fargo, Bank of America, and JPMorgan Chase to return more than $700 million to customers over unfair overdraft fees. Those lawsuits also played a key role in convincing a series of banks to abandon their practice of posting large debits first in order to maximize the number of overdraft fees, instead of handling transactions chronologically.

As a judge, Kavanaugh has heard a relatively small number of such cases, but his rulings suggest a scornful view of class actions. In a 2011 case, Kavanaugh not only dissented from a majority opinion allowing the lawsuit to go forward, but took the opportunity to criticize the plaintiffs and their lawyers for pursuing what he called a “class-wide jackpot.” As Brian Fitzpatrick of Vanderbilt Law School told the National Law Journal, “He basically goes on a minor diatribe against class actions. He just put it in there for color. And why would you do that unless you have some hostility?”