

Kavanaugh Confirmation Hearings: A High-Stakes Battle for a Constitutional Government

It is almost high noon in Washington, D.C., and there is going to be a showdown. All attention is now focused on judicial nominee Brett Kavanaugh and his possible addition to the U.S. Supreme Court.

The Democrats are gearing up for a takedown of Kavanaugh because they fear his perspective on the Constitution will endanger abortion rights, hurt gay marriage and limit government powers. In reality, the stakes are higher than just particular rulings of the Supreme Court.

The greater issue is whether lawyers should be deciding critical social issues that affect every citizen, or whether “We the People” keep the power to decide social and policy issues through elected representatives. The exceedingly unfair hyperbole has already begun with full gusto.

U.S. Senator Cory Booker, D-New Jersey, recently declared that supporting Brett Kavanaugh’s nomination to the Supreme Court was equal to being “complicit” in the participation of “evil.” He then quoted the Twenty-third Psalm—out of context—saying “the *nation* was walking through the valley of the shadow of death.”

What Booker really fears is that the nation has gone through the valley of decision in the 2016 election and has decided that balance needs to put on the judiciary’s unmoored exercise of power. Elections do have consequences.

Activists vs. Originalists

The left and the Democrat party for decades have sought to appoint jurists to the federal bench, who were willing to “interpret” the Constitution to expand the limited powers actually granted from the states. The left’s brand of judges is called “activist” because they want judges who will reshape the law or discover new rights, no one has seen before in the history of the Republic. The activist school of the left holds to the “Living Constitution” philosophy, which simply means they believe the Constitution, through judges, can be changed and adapted to meet the evolving new realities in American society.

Here is an over simplistic example of how the “living Constitution” philosophy works. We know that a Constitution is the supreme law that sets out the arrangement of how our government works. Until a few years ago, we understood that the institution of marriage was between—one man and one woman—“until death do us part.” Marriage is a fundamental institution that is core to a civil society.

But, suppose a husband gets up one day, and believes his needs have changed; there really is more of him to go around. He informs his wife that in order to pursue happiness, he needs to take on a second wife. Subsequently, he proceeds to pursue one. His first wife has no say in the changing arrangement, even though she went into the marriage with the belief that in their union he would be her only husband and she would be the only wife.

In reality, this unfair and radical change in the hypothetical marriage has been happening for decades as the U.S. Supreme Court has (mis)used its power to change the law and make up new rights as it saw fit. The most recent example is how the federal judiciary at every level, from the district courts, appellate courts and U.S. Supreme Court, used their powers to impose gay marriage overruling the votes of over 50 million Americans in 35 states, under the Obergefell v. Hodges decision in June 2015.

While some states had voted to approve gay marriage, the overwhelming majority voted to reject the redefinition of marriage. However, the Obergefell Court, made up of predominantly activist judges, decided "one size fits all" and imposed the new definition of marriage on all 50 states.

On the flip side, "originalist" judges believe the Constitution should be interpreted as the Framers intended in 1787 which means, Constitutional law is frozen in time, and judges are to apply those established legal principles to the situation they are adjudicating. If the Constitution needs to be changed, then the terms of Article V control, which provides that amendments can be introduced through Congress and approved by two-thirds of the states. Additionally, a convention of states can be called by the states to make changes to the Constitution.

Is the Constitution an antiquated document? On the contrary. Given the restrictions on free speech that governments and state-run universities have made in recent years in the name of "sensitivity," the wide breadth of protection offered by the First Amendment's Free Speech clause looks very enlightened. The Second Amendment right to bear arms gives the individual the right to defend themselves, which is better than waiting five to six minutes for the police to get to your home after you have called 911.

The Bill of Rights protections are still essential for today.

Originalists judges take the position that even if they do not personally like a law, if it is constitutional, they will let it stand. In reality, it is not the judge's role to change or make law, but to apply the law as written by Congress or the state legislative body. Making the law is left up to "We the People" as originally intended.

As we look at the mounting tension over Judge Kavanaugh's nomination, we can see why. His overall stated philosophy and

record suggests that he is in the originalist camp.

However, if he is confirmed to the Supreme Court, and if there are modifications on abortion rights, it will have to come through legislation. Don't look for the Court to overturn *Roe v. Wade* and *Planned Parenthood v. Casey* overnight. Rather, the newly composed Supreme Court is more likely to affirm reasonable restrictions on abortion, which hollow out the impact of *Roe*.

An example of a restriction that could be approved is a current bill pending in Congress () that would severely curtail abortion on demand past the 20-week gestation period where an unborn child can feel pain. The bill passed the House in October 2017 and awaits action by the Senate. If that bill is passed, or a similar bill is passed in a state legislature, the issue of the state's compelling interest to protect life and prevent suffering, will clash with abortion rights, once again.

Justice Kavanaugh along with Justice Gorsuch, Alito, Thomas and Chief Justice Roberts will have to decide if fetal pain merits restricting abortions at 20-weeks. The other four, Justices Ginsberg, Breyer, Sotomayor and Kagan, will have already predetermined the outcome against any restriction, because they follow the orthodoxy of the left that abortion must go unfettered.

If our Constitutional government is to survive, with power reserved to the American people, then originalist judges are a front-line protection for individual liberty.

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