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The Kavanaugh Hearings Were a Missed Opportunity—For Both Sides

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Comments

By now you've heard about the combative spectacle that was last week's Senate Judiciary Committee hearing for President Trump's nominee to the U.S. Supreme Court, Judge Brett Kavanaugh. This momentous event was characterized not by political acumen, wit, cunning, or prudence, but by partisan obstruction, lawlessness, tantrums, hysteria, ignorance, frenzy, and anger.

Protestors screamed vulgarities and trite slogans, proving they were not interested in Kavanaugh's responses or in substantive intellectual debate. Seventy of them were arrested on Tuesday alone. If anything, their recurring interruptions and crude histrionics gave Kavanaugh time to pause and think about his responses rather than tire out and let down his guard.

Online left-wing rabble-rousers peddled an absurd conspiracy theory about Zina Bash, a former clerk for Kavanaugh—only shortly before *right-wing* conspiracy theorist Alex Jones was banned from Twitter. Senator Cory Booker, a Democrat from New Jersey, publicly released documents that were allegedly confidential, claiming full knowledge of the possible repercussions of his act—namely, expulsion from the Senate. "Bring it," Booker taunted Senator John Cornyn, who warned about the consequences of the supposed confidentiality breach. With unintended levity, Booker announced his "I am Spartacus" moment. Only the documents weren't confidential after all; they'd already been approved for public release. Thus, Booker's Spartacus Moment was merely a political stunt of faux bravery.

Why this hostility? Why these shenanigans?

A Deep Philosophical Clash

For starters, the midterm election cycle is upon us and the Mueller investigation appears to be nearing an end. Politicians like Booker are grandstanding for political gain as they consider running for president. Kavanaugh has been tapped to replace Justice Anthony Kennedy, moreover, who was the court's so-called swing vote, whereas Justice Gorsuch filled Justice Scalia's seat. Gorsuch's appointment did not tip the balance of the court the way Kavanaugh's might. Democrats also remain angry that Republicans did not act on President Obama's nomination of Merrick Garland.

But something more is going on. We're witnessing a philosophical clash regarding the proper role of the judiciary.

Kavanaugh identifies as an originalist and a textualist. Originalism comes in different permutations, having evolved since the days when it sought principally to recover the original *intent* of an author or authors. Its most prominent adherents today see it as an interpretive approach to the *original public meaning* of a text. It maintains that the words of the law should be construed according to their ordinary meaning as understood by a reasonable person at the time they were enacted.

Textualism, similarly, interprets words without resort to extratextual factors such as authorial intent or legislative history, focusing instead on the ordinary meaning of words as written. For the purposes of this piece, I use the term *originalism* without drawing distinctions between it and its close cousin textualism.

Getting Kavanaugh's Originalism Wrong

Originalism so described seems uncontroversial on its face, but you wouldn't get that impression from activists who have opposed Kavanaugh's nomination. "Originalism conflicts sharply with American reality and American ideals," writes Alan Brownstein, a retired law professor. He labels originalism "unamerican," saying it accounts for the views of "only the people who were here in the 1780's and 90's or when specific constitutional amendments were adopted," not for the views of the "vast new diversity of the American people today."

This, I think, is wrong. Originalism properly understood is depolarizing, isolating judges from the political process rather than injecting them into it. The Constitution contemplates internal modifications, chiefly through the amendment process, which is, by design, difficult to facilitate. If originalism limits changes in law to those processes contemplated in the Constitution, as Brownstein alleges, then Brownstein has inadvertently labeled the Constitution "unamerican." How can this founding document, which sets forth the basic framework of government for the United States, be "unamerican"?

Brownstein seems to imply that the amendment process, being slow and onerous, should not be the sole avenue for reform—that the courts ought to be a driver of progress when legislative solutions stall. The implication here is that the Constitution ought to be a "living" document that can be updated or improved through judicial correction and adaptation in cases. Judges should, accordingly, exercise quasi-legislative powers, promulgating binding rules and opinions to achieve justice or equality or to align with evolving standards of decency.

5 Reasons Everyone Wins with Originalism

Here's why Brownstein is mistaken and why now more than ever a commitment to originalism would benefit both the left and the right.

First, originalism does not guarantee a particular political result. As Scalia, one of the original originalists, remarked, "If you're going to be a good and faithful judge, you have to resign yourself to the fact that you're not always going to like the conclusions you reach. If you like them all the time, you're probably doing something wrong." Scalia sometimes reasoned to conclusions that favored Democratic or liberal policies because the operative text so required.

Second, originalism fosters trust in democratic systems. Legislatures and the public need to know that newly enacted laws stand a chance to last as long as they comport with the Constitution. People lose confidence in their governing institutions if they believe the laws they passed can be easily tinkered with or discarded by unelected and hence unaccountable judges.

Third, although originalism may lead to harsh results in certain cases, it leaves it to the collective wisdom of the people, acting through their representatives, to alter the law to achieve fairness or justice. Concentrating revisionary lawmaking power in one judge or group of judges increases the probability that an uncommon or idiosyncratic conception of justice that does not represent the conception of the people will become binding over them.

Fourth, originalism makes the law clearer and more predictable, not subject to the unpredictable or arbitrary considerations of a judge or group of judges. When the law as written is applied, parties to a case and the general public can with reasonable sureness predict a range of possible outcomes. But if judges do not apply the law as written, the range of possible outcomes multiplies to the extent that the law itself becomes uncertain, and parties cannot rely on the law when they make everyday decisions. Vagueness in the law causes arbitrary exercises of governmental power. Clarity in the law restrains government actors from exercising powers in a manner that has not been formally approved by the legislature.

Finally, originalism ensures the independence of the judiciary. Kavanaugh has insisted that he is an independent judge. Democrats may dispute that claim, but they can't dispute that originalism itself operates to secure judicial independence. Originalism is nonpartisan and does not consistently yield results that can be easily classified as conservative or liberal. Even jurists on the left have embraced originalism. Justice Kagan famously declared, "We are all originalists now."

A week after politicos and activists celebrated the bipartisan spirit of Senator John McCain, the Kavanaugh hearings broke down into partisan pandemonium. Originalism should have been a unifying feature of the Kavanaugh hearings. It wasn't. So here we are today, approaching the midterm elections in a country that's as divided as ever. God help us.

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