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## **Kavanaugh and the Culture Wars**

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**Donald Trump's Supreme Court nomination may give everyone a chance to step back from the political cliff.**

Donald Trump, the latest occupant of the polarized American presidency, has sent Brett Kavanaugh's Supreme Court nomination to a Senate so politically divided that the two parties rarely cast a vote for the other's legislation. Liberals believe that with Judge Kavanaugh's nomination, the Supreme Court is done as an institution of American government. Which leaves us with what for the conduct of politics?

The streets.

The American left is already there.

Impatient with the three branches of government established at the nation's founding, the left routinely takes its politics to the streets now to demand remedies for "inequality" or "injustice." Yet these inchoate demands have become so disconnected from the normal mechanisms of politics that no Congress, representing 535 elections, could possibly turn them into legislation.

For some on the left and indeed on the right, polarization has become a drug that produces a pleasurable political delirium. After Donald Trump's election, what emerged, even among senior congressional Democrats, wasn't just an opposition but "resistance," a word normally associated with armed underground movements.

Opinion polls began to note the intensity of political separation during George W. Bush's presidency. It widened through the Obama years. We know where we are now. Pew reported two years ago that 70% of politically active Democrats and 62% of Republicans say they're "afraid" of the other party.

Liberals are in no mood to believe this, but I think it is possible that the Kavanaugh Court may give everyone a chance to step back from the political cliff. This isn't an appeal to rediscover the political center. It's an appeal against flying irrevocably apart.

The Democratic opposition to any Supreme Court nominee from Mr. Trump in 2018 has been about virtually one thing: the *Roe v. Wade* decision of 1973. That was 45 years ago. And that is about the time the culture wars began in America. There have been casualties since then, a lot of them.

Whatever one thinks about *Roe*, the court for the first time involved itself in a subject that for many Americans was profoundly and overwhelmingly moral (some might cite *Engel*, the 1962 decision banning school prayer). Through the 1970s and '80s the religious right emerged as a politically active opposition to America's cultural direction. But its rise produced a more powerful, media-driven counter-movement of aggressive secularism.

More than ever before, many matters that entered American politics, such as racial preferences or various disputes over free speech, were rerouted away from legislatures and into the judicial system, with both sides contending that the opposition wasn't merely wrong but immoral.

The Obama presidency expanded the alternative battlefield. Explicitly identifying its impatience with the legislative branch, the Obama White House ordered administrative agencies to execute contentious policies affecting sex and race.

The Supreme Court, in its 2015 *Obergefell* decision, written by Justice Anthony Kennedy, established gay marriage as a protected right. In [a recent essay](#) on these pages, Walter Olson made a definitive argument that this decision will survive in a conservative Supreme Court. *Roe v. Wade* will survive, too, not least to avoid social upheaval.

Shortly after the *Obergefell* decision, something else of cultural and political significance happened. Within months, the left began to agitate for transgender rights, another moral claim whose substantive meaning is a mystery to most Americans.

Liberals remain incredulous at Mr. Trump's election. But nearly half the electorate voted for him, and among the reasons is that today a lot of people—across all income classes—feel they are really being jammed by the culture. Progressive jurisprudence had a lot to do with this. Liberals won their share of court decisions, but at a price: The courts in America became an agent of social discord.

It would be good for the country's stability if a Kavanaugh Court disincentivized the left from using the courts to push the far edges of the social envelope. This is not about turning back the clock. It is about how best to resolve bitter social and cultural disputes in the future. It is about no longer using the courts to make triumphal moral claims against the majority.

In the Kavanaugh Court, extending rights claims beyond their already elastic status is going to require more rigor than appeals to a judge's personal sensibilities or a theory of social organization developed in law journals.

Advocates for social change involving race, gender, identity and such will have to convince representative majorities, elected by voters, to agree with their point of view. Unlike in the past four decades, the high court will more often weigh in after, not before, the political process has happened.

The United States needs to settle down politically. Some day the sitting president may see the value in that for his own legacy. This nomination is a good start. A Kavanaugh Court will provide the country with a needed pause.