

# POLITICO

## Is Brett Kavanaugh damaged goods?

October 6<sup>th</sup>, 2018

Against a blue background, a silhouette of the the state of Illinois is interrupted by the black-and-white face of J.B. Pritzker, who appears to be peeking outside of the state.

After a divisive confirmation fight, Brett Kavanaugh will be a Supreme Court justice—and he leaves a trail of bitterness on both sides of the political aisle. Democrats are furious at what they see as a sham FBI investigation of allegations that Kavanaugh mistreated women; Republicans are equally outraged at what they're calling the attempted character assassination of a decent and qualified judge. One thing seems clear: The wounds opened by the Kavanaugh battle won't heal anytime soon.

We asked a panel of legal scholars to assess whether Kavanaugh will be able to move past the rancor and establish his credibility on the high court—or whether he'll be forever damaged by how he got there. Here's what they told us:

'The public deserves better'

Deborah Rhode is the Ernest W. McFarland professor of law at Stanford Law School.

There was so much not to like about the confirmation of Brett Kavanaugh as a justice of the Supreme Court that it is easy to lose sight of the issues that matter most. Is this someone with the character and judicial temperament necessary for the position? And was this a confirmation process designed to answer that question and to inspire public confidence in the integrity of the court?

Judge Kavanaugh's conduct during the Senate hearings leaves little doubt about his unfitness for the position. His documented misrepresentations, repeated lack of candor, partisan tirades and vitriolic tone raise obvious concerns. In several breathtakingly belligerent exchanges, he shot back questions at Democratic senators about their drinking behavior, as if they were the ones seeking confirmation. There was no evidence to suggest that women who accused him of misconduct were, as he asserted, part of an "orchestrated political hit." None had a partisan agenda or an obvious motive to lie; indeed, given the personal vilification and death threats they endured, they had every reason to remain silent. The FBI's failure to thoroughly investigate credible claims of abuse sends a troubling message to survivors of sexual violence as well as other potential witnesses in future confirmation hearings.

Although we can all sympathize with someone who believes he has been treated unjustly, we want judges, particularly Supreme Court justices, to display restraint and civility. By definition, their role calls for them to deliver opinions that will sometimes unleash vicious partisan attack. They are nonetheless expected to stay above the fray and act, as court decisions and the Code of Judicial Conduct demand, "in a manner that promotes public confidence in the independence,

integrity, and impartiality of the judiciary.” Judge Kavanaugh’s inability to do so prompted some 2,400 law professors to sign a letter opposing his confirmation and caused the American Bar Association to reopen its rating of his qualification for the office.

The public deserves better in a confirmation process. Even before these hearings, less than half of Americans thought that Supreme Court justices were doing a good job. Much of the reason has to do with perceived partisanship. The sorry spectacle of Kavanaugh’s confirmation hearings can only compound the public’s mistrust.

‘Kavanaugh’s confirmation may come at a high price’

Ilya Somin is a law professor at George Mason University, and an adjunct scholar at the Cato Institute. He is the author of *Democracy and Political Ignorance: Why Smaller Government Is Smarter*.

Judge Brett Kavanaugh’s confirmation is a victory for the right that may come at a high price for both him and the country.

It is difficult to remember now, but when he was nominated in July, Judge Kavanaugh was a respected pillar of the legal establishment, held in high regard by many liberal legal elites, as well as conservatives. The sexual assault accusations against Kavanaugh fundamentally changed his image.

We may never really know whether the accusations have any validity. If he is indeed innocent, Kavanaugh’s best chance for potential vindication may have been destroyed by his backers in the White House, who ensured that the FBI investigation into the claims was tightly limited. Even the best possible investigation might have been inconclusive. But this severely truncated version, followed by a quick vote, helped ensure that millions of people will continue to see Kavanaugh as a sexual predator whose confirmation was improperly rammed through.

Kavanaugh may be on the court for many years, during which time perceptions could change. But it will be difficult for him to escape the shadow of Christine Blasey Ford’s accusation.

Even more important than Kavanaugh’s future is that of the Supreme Court as an institution. Public approval of the court has bounced back from previous events that many pundits thought would generate a devastating backlash. Perhaps history will repeat itself.

But the deeply divisive Kavanaugh confirmation comes on the heels of other developments that have generated immense anger among Democrats, most notably the GOP’s refusal to consider President Barack Obama’s nomination of Merrick Garland. Even before the Ford accusation, some progressives advocated radical measures to retake control of the Supreme Court, such as “court packing.” These ideas are likely to gain momentum now.

In my view, court-packing would be a dangerous escalation of the judicial nomination wars, one that could destroy judicial review as an effective check on government power. That is why I opposed both liberal court-packing plans and that proposed by prominent conservatives last year. But, right now, it doesn’t really matter what I think. What matters is that progressives increasingly believe that court-packing and similar measures are justified payback for the misdeeds of the right. That perception may lead them to take drastic action as soon as they next control of both Congress and the White House. The right would then surely escalate further the

next chance they get, potentially gutting judicial review. It would be better to channel understandable liberal rage into more productive, or at least less dangerous directions.

Can the conservative majority on the court do anything to forestall the dynamic of escalation? It is hard to say. Some experts believe that Chief Justice John Roberts will try to avoid controversial decisions that arouse public hostility.

The conservative justices should also consider taking more cases where legal rules favored by conservative jurists translate into policy outcomes attractive to liberals. Such cases are more common than many think, arising on issues ranging from sanctuary cities to criminal justice, among others. The more the justices can show they really are the impartial “umpires” they claim to be rather than foot soldiers in Team Red’s war against Team Blue, the better their odds of avoiding a legitimacy crisis.

‘Ultimately, it will be just noise’

Eugene Kontorovich is professor at George Mason University’s Antonin Scalia School of Law.

The confirmation of Judge Brett Kavanaugh to the Supreme Court will certainly be met with claims that his decisions lack legitimacy. This may have happened absent the drama of his confirmation hearing. Many on the left question the legitimacy of the appointing president, and the legitimacy of the vacancy: Remember Merrick Garland! Given the importance of his vote, attempts to put a question mark on it are inevitable.

These attempts will last for years. It will be loud—House Democrats are already talking impeachment—but ultimately, it will be just noise. Power has a strong gravitational force, and those wielding it will not long be excluded from polite society. The best proof is that quite genuine liberal despair and dismay over his confirmation: If he were indeed fatally compromised, surely some Democrats would be happy to see him on the court, as this means President Trump wasted a precious appointment.

Justice Kavanaugh, I believe, will write his opinions and cast his votes just as he would have previously; it’s the way he knows. And he will most likely be on the court for decades, long after the current vitriol has been forgotten by all but a few bitter clingers to an anti-Kavanaugh gospel.

Ultimately, it is not Kavanaugh’s confirmation process that is the cause of these actions. Those who now insist that the reason he should not be on the court is his lack of “judicial temperament” love Ruth Bader Ginsburg, who is feted as the “Notorious RBG”—a seemingly unjudicial sobriquet—and declared “the face of Trump Resistance” by CNN. Justice Ginsburg has publicly and repeatedly lamented Trump, and her partisan outbursts cannot be written off.

Imagine if Justice Kavanaugh pulled a John Paul Stevens and become a consistent liberal vote on the court, albeit appointed by a Republican president. Liberals would be ensured a majority on the Court — and the taint of Kavanaugh would suddenly be forgotten. This thought experiment—one can, of course, fight the hypothetical and insist liberals would not gladly take Kavanaugh’s fifth vote—shows that it is not Kavanaugh’s personal conduct that is behind the “damaged goods” claim, but his likely future opinions.

‘This isn’t over’

John Culhane is distinguished professor of law at Delaware Law School, where he teaches courses in constitutional and family law.

Turn off the sound, and just watch Brett Kavanaugh's opening statement, when he was called back before the Senate Judiciary Committee to respond to the allegations that he'd sexually assaulted Christine Blasey Ford. His facial expressions and body language belong to a person unhinged; what he actually said only underscored what the images make clear.

During that nakedly partisan screed, this man, who will soon be a justice on the United States Supreme Court, spewed forth a crazy stew of conspiracy-laced nonsense (including something about "revenge on behalf of the Clintons") and added—astonishingly—that "what goes around, comes around." It isn't clear whether this was a reference to how he'll rule once confirmed, or a more general statement about the process of judicial confirmations, but that hardly matters. It was inappropriate in either case. And his effort to reapply the mask of judicial neutrality and even-handedness in a recent Wall Street op-ed was unavailing. We've now gazed upon his true countenance, and it's not one belonging to someone who should sit on the nation's highest court. Or on any court, to speak plainly. Kavanaugh's performance led retired Supreme Court Justice John Paul Stevens, who had initially supported him, to change his mind. The American Bar Association expressed a similar concern, sending a letter to the Judiciary Committee withdrawing its endorsement of the judge. The organization cited "new information of a material nature regarding temperament." No litigant to the left of center can now approach the Supreme Court with confidence that they're going to get a fair shake from Kavanaugh.

Although Kavanaugh's tantrum, which later included interrupting and inappropriately throwing questions back at the senators, is disqualifying, it didn't stop the Senate from confirming him by the narrowest margin. So now they'll have to deal with 2019—when the House is sure to launch hearings on the transparently incomplete FBI investigation into the sexual assault charge (for which new evidence is coming out by the day), and into the very serious possibility that the judge committed perjury during the hearings. As I wrote for Politico, impeachment by a Democratic-controlled House of Representatives is a likely possibility, and senators would then have this colossal error right back in their laps. This isn't over.

'Profound mistrust will fester for years to come'

Reva Siegel is Nicholas deB. Katzenbach professor of law at Yale Law School.

In this time of hyperpolarization, there is no way to gauge the cost of the Republicans' attack on the Supreme Court—an institution we have looked to help us live together despite our disagreements. With the direction of the court hanging in the balance, the majority in Congress embarked upon a confirmation process perfectly designed to erode trust in the court's judgments. The majority refused to permit full public access to the nominee's record and conducted a sham FBI investigation, despite the many questions of credibility character, and temperament that emerged in the first and second hearings. It was a thoroughly partisan process intended to push through Brett Kavanaugh's appointment, whatever its costs to the court. The defects in the process will yield profound mistrust that will fester for years to come.

The potential for mistrust is compounded by the majority's decision to confirm a nominee who characterized an allegation of sexual assault as "a calculated and orchestrated political hit," "anger about President Trump and the 2016 election," and "revenge on behalf of the Clintons."

In using this language to attack Christine Blasey Ford's testimony, "the left" and "the Democratic members of this committee," Kavanaugh was not simply defending his honor or venting his emotion, as he subsequently claimed. The text and tenor of Kavanaugh's statement divided America into friends and enemies in ways his targets will never forget. How can those against whom he railed hear his judgments as grounded in the Constitution rather than as political payback?

President Trump promised voters he would appoint justices to the Supreme Court who would roll back women's constitutional rights—"pro-life justices" whose appointment would lead "automatically" to "the court overturn[ing] *Roe v. Wade*." After savaging the hearing in which Dr. Ford testified as a "circus," was Judge Kavanaugh holding himself out as a justice who would decide cases in the name of the Constitution—or revealing himself as an ally of those who chant "lock her up" at Trump's rallies? Kavanaugh's dissenting opinion in *Garza v. Hagan* demonstrated a chilling readiness to override the will of a 17-year-old girl in immigration detention who sought an abortion. While the court judged the girl competent and constitutionally entitled to make on her own decision, Kavanaugh's dissent called the girl's claim to decide for herself after weeks of compelled pregnancy in government detention "abortion on demand"—more precisely, as he repeatedly put it, "immediate abortion on demand." This gendered attack sent a clear message to all concerned, and likely helped put Kavanaugh on the White House's nomination short list. How does *Garza* read now, through the prism of the second hearing? How should Americans—especially American women—view Justice Kavanaugh as he votes to deny them rights the Constitution now protects?

'Justice Brett Kavanaugh will serve with distinction'

Ilya Shapiro is senior fellow in constitutional studies at the Cato Institute.

There are no winners here—our political discourse and faith in institutions continue to deteriorate—but Susan Collins' statesmanlike speech was a bright spot at the end of a malignant process. I was skeptical about the delay for what I expected to be a nothingburger of an FBI investigation, but ultimately it assuaged moderates (voters even more than senators). While the final vote was the narrowest approval of a justice since President James Garfield's nomination of Stanley Matthews was confirmed 24-23 in 1881, at least it wasn't purely party line. It's better that Lisa Murkowski (R-Alaska) was opposed and Joe Manchin (D-W.Va.) a yes than vice versa.

Justice Brett Kavanaugh will serve with distinction, because he has a long record of scholarly, influential opinions focusing on constitutional and statutory text and structure. But he arrives under a cloud, similar to the one that accompanied Justice Clarence Thomas in 1991 but in an even more polarized age accentuated by social media. Of course, progressives also see Justice Neil Gorsuch as illegitimate for occupying a "stolen" seat, so it's unclear whether Kavanaugh is any more "damaged" than had he been confirmed in a similarly tight vote but without the late-breaking sexual allegations.

There's no easy fix—term limits are appealing, as would be a larger court so each seat matters less—but the root cause is too much power in Washington. If policymaking for our large, diverse country weren't so centralized, the Supreme Court wouldn't be resolving several big political issues every year and fewer people would care about its composition.

'Pandering to the extreme political left demeans and delegitimizes the court'

Elizabeth Price Foley is professor of law at Florida International University.

Opponents of Brett Kavanaugh will proclaim that the sky is falling and the Supreme Court will now decline in legitimacy because of his confirmation. They will demand his impeachment, as they have with Justice Clarence Thomas. But it is precisely these hyperpartisan, emotional lamentations and demands—pandering to the extreme political left—that demean and delegitimize the court. It is, in other words, the radical left's inability to accept the outcome of established legal processes that creates fissures in the foundation of our most important constitutional institutions

Because they cannot accept the outcome of a presidential election or a Supreme Court confirmation process, the radical left's only response—like an angry toddler—is “resistance,” a tactic designed to undermine respect for the rule of law, fuel political division and possibly trigger violence.

Americans see such “resistance” for what it is: a dangerous rejection of our values and our institutions. Anger or disappointment with the outcome of an election, or a Supreme Court confirmation process, is understandable. But openly rejecting our fundamental values—such as the presumption of innocence, due process and the belief that individuals are not to be judged by their gender, skin color or economic status—and proclaiming that institutions (or members thereof) with whom we have political disagreements are “illegitimate” is not a civilized or productive response.

‘I fear the country will reap the whirlwind’

Michael Waldman is president of the Brennan Center for Justice at NYU Law and author of *The Fight to Vote*.

Brett Kavanaugh's Fox News-style eruption before the Senate Judiciary Committee will indelibly mar his tenure. “The left.” “Pent up anger about President Trump.” “Revenge on behalf of the Clintons.” “What goes around, comes around.” All of it was unprecedented, appalling, deeply improper for a judge. His semi-apology didn't help much. The problem was not only “tone,” as he put it, but content.

Many issues before the court are political at their core. Voting rights cases, the Census, redistricting challenges, campaign finance law—all have political ramifications. When Kavanaugh is the fifth vote to strike down voting laws or allow unbridled big money in politics, will the public simply accept that as umpires calling balls and strikes?

The circumstances of his confirmation, too—the unpardonable treatment of Christine Blasey Ford, the sham investigation, Donald Trump's misogyny—will make any rulings on *Roe v. Wade* and other issues of women's rights and bodily autonomy even more painful.

We are now hours into a new era in American constitutional history. A hard-right majority controls the Supreme Court for the first time since the early 1930s. That's happened before, from *Dred Scott* to the *Lochner* era (where judges routinely blocked social legislation) to the early New Deal. Those periods were marked by an epic conflict between the court and the country. We must hope we are not there again.

To quote Brett Kavanaugh: “For decades to come I fear the country will reap the whirlwind.”

‘I have trouble these days treating any of the three branches as truly legitimate’

Sanford V. Levinson is professor of law at the University of Texas Law School and professor of government at the University of Texas, Austin.

There is so much that could be said about the general issue of legitimacy (and how one, in fact, defines and even measures it, if a social scientist). I want to concentrate on what may be a parochial aspect of the broader question: How should those of us who teach constitutional law, either to undergraduates or law students, address the question? For better or worse (I think the latter), we’re often expected to teach our students to respect the court even, or especially, if we disagree with particular decisions. They are, it might be said, duly appointed honorable and able men and women who are doing their best to resolve hard issues.

But is that really true? Were Thomas, Gorsuch, and now Kavanaugh duly appointed? There’s a lot of retrospective analysis going on about the Anita Hill hearings. She was clearly treated unfairly, and Judiciary Chair Joe Biden just as clearly botched the hearings. Clarence Thomas, a militant opponent of affirmative action, unabashedly played the race card by complaining of the “high-tech lynching.” Would he be confirmed today under a fair hearing process? One can certainly have doubts. Neil Gorsuch occupies a seat stolen by the hyperpartisan Senate Majority Leader Mitch McConnell (R-Ky.), who of course refused even the courtesy of a hearing to the superbly capable Merrick Garland. And now Kavanaugh has revealed himself in a number of ways to be a dissembler, if not outright perjurer, about aspects of his background that conflict with his carefully honed self-presentation. All of these justices are smart and able. I have no doubt that Kavanaugh is often likable and was a good teacher at Harvard and Yale. But there is also the darker side, including his elemental lack of candor about important aspects of his past. So the question is why we should teach our students to respect these justices’ consistently far-right opinions that we believe take us farther away from achieving the magnificent aspirations of the preamble to the Constitution, especially if they constitute the decisive votes on a bitterly divided court.

I have trouble these days treating any of the three branches as truly legitimate. Should I and other teachers who agree with me keep those doubts hidden from my students?

Geoffrey R. Stone is Edward H. Levi distinguished professor of law at the University of Chicago.

With the confirmation of Judge Brett Kavanaugh, the Supreme Court will have a more rock-solid conservative majority than at any time in living memory. Since the end of the Warren Court half-a-century ago, and despite the fact that Democratic candidates for president have won the popular vote in seven of the last 13 presidential elections, Republican presidents have made 14 of the 18 appointments to the Supreme Court. Throughout that time, Republican presidents have sought to move the court ever further to the right.

But two factors prevented the majority of the court from being as right wing as it will be now and in the future. First, for much of this time the Republican nominees to the court were “conservative” in a much more modest sense than they have been lately. Justices like Harry Blackmun, Lewis Powell, Warren Burger and William Rehnquist, for example, were certainly “conservative” by the standards of the day—that is, they believed in judicial restraint. But, unlike

the coming majority, they were not eager to strike down laws that offended their own political or ideological values.

Second, Republican nominees like John Paul Stevens, Sandra Day O'Connor, Anthony Kennedy and David Souter were “conservative” on most issues, but sometimes voted in a more liberal manner—for example, on issues like abortion, gay rights and affirmative action. Thus, although the court for the past half-century has certainly been quite “conservative,” and sometimes aggressively so, this has not invariably been the case.

But the five “conservative” justices now on the court, like Antonin Scalia before them, are hard-line “conservatives” who are not in any way advocates of judicial restraint. To the contrary, they will eagerly invalidate all sorts of laws that violate their own ideological values, including laws regulating guns, affirmative action, the Voting Rights Act, campaign finance and so on.

On the other hand, following their political and ideological values, they will exercise “judicial restraint” when it comes to upholding laws that they like, for example, laws that restrict the voting rights of minorities, that gerrymander political districts, that restrict the reproductive rights of women, that limit the rights of criminal defendants, that restrict the rights of gays and lesbians, and so on.

Now, for the first time in living memory, there will be five justices on the court who embrace this highly results-oriented, often unprincipled, and profoundly politically conservative approach. This takeover of the highest court in our nation will in all likelihood turn it into an entity governed by partisan political interests rather than neutral principles. It will therefore undermine the credibility and integrity of the Supreme Court in our democratic system, particularly because all five of these justices—John Roberts, Clarence Thomas, Samuel Alito, Neil Gorsuch and Brett Kavanaugh—were appointed by Republican presidents.

It is possible that Chief Justice John Roberts will exercise a moderating influence. Perhaps he will encourage narrow decisions when he is in the majority and perhaps he will persuade his conservative colleagues not to take on certain cases—at least for a while. I think he is likely to do that, at least for a while. But within a few years, if not sooner, the reality of the Mitch McConnell Supreme Court will, sadly, come into view. The result, across a broad range of issues, will be a devastation of many of the fundamental constitutional principles on which our nation was founded.