

NATIONAL REVIEW

Now's Not the Time to Go Wobbly, Brett

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Brett Kavanaugh is the new man in the middle.

Once Anthony Kennedy retired in the summer of 2018 — he hated being called the “swing vote,” but his inscrutability made it inevitable — John Roberts was finally supposed to lead the Supreme Court from the squishy commanding heights. And he did, the first chief justice to be the Court’s median vote in half a century. But then Ruth Bader Ginsburg’s passing changed the jurisprudential calculus. So after just two years of the “true” Roberts Court, Amy Coney Barrett’s confirmation made the chief the “sixth man” and all eyes turned to Kavanaugh.

This is a man who’s both part of the conservative mainstream and so politically cagey as to make many on the right worry that he’s closer to Roberts than he is to Clarence Thomas and Samuel Alito. Nearly three years after his explosive confirmation hearings — highly charged even before the eleventh-hour sexual-assault allegations (recall the rolling Democratic filibuster at the start, including Senator Cory Booker’s “Spartacus moment”) — the jury’s still out on that question.

That’s not necessarily surprising, as it takes a while for even experienced jurists to settle in at the highest court in the land, a moniker particularly apt for the former basketball star. But Kavanaugh faces the additional burden of suspicion from both sides in our judicial wars: progressives who feel threatened by any Republican nominee but also think of this one (against all evidence) as a would-be rapist and conservatives who still feel that he has to prove himself given the choices that Donald Trump passed up and the political capital spent on him. It must be tremendously frustrating to a member of the clubby legal establishment who gained a reputation on the D.C. Circuit for scholarly, judicious, and influential opinions. And one who’s both personable and hard-working, trying to keep his head down after a confirmation crucible and be one of a “team of nine,” as he put it at his Senate hearing.

Now, in the annual “dog days” of the Supreme Court term, after the last April arguments and before the major opinions are released at the end of June, the drumbeat of strategy and psychoanalysis resumes. Earlier this month, McKay Coppins asked in a major reported feature for *The Atlantic*, “Is Brett Kavanaugh Out for Revenge?” (The title in the print edition read “Whose Side Is Kavanaugh On?”) In other words, will Kavanaugh become like Thomas, who after his similarly searing confirmation turned his back on official Washington? Or will he instead bend over backwards to try to win over the media and legal elites who went after him? As Coppins describes the dynamic:

“While Kavanaugh’s allies insist that [his angry hearing remarks that “what goes around comes around”] were misinterpreted, they also say that he still privately seethes over the “smear campaign” he believes he endured. “He’s made an effort to say, ‘Look, I’m not bitter about this. I’m moving forward,’” one friend told me. “But I assume, when he’s lying in bed at night, it’s hard not to think about it.” Another friend put it more bluntly: “He was really angry at Democrats for what they did to him and his family.” And yet, those same friends also describe a competing impulse in Kavanaugh — a burning desire to gain readmission into polite society and enjoy all the perks associated with one of the world’s most prestigious jobs.”

Those who know him insist that all this speculation is overblown. Kavanaugh knows who he is, was a judge for a dozen years before being elevated, and will stay true to the law as he sees it (about which more in a moment). I’ve met him a few times and have found him to be both gracious and genuine, an impression reinforced by his former clerks and associates. Whatever he feels about his confirmation process, and those who made him run that gantlet for ignoble reasons, won’t affect his work one way or another — other than perhaps in the claying apologetics he sometimes attaches to opinions that may not play well in our politically correct culture.

Ironically, Kavanaugh was nominated in part because he was thought to be a safe pick, with a long public career that had been vetted numerous times. The fact that he wasn’t a consensus first choice shows the depth of the Republicans’ bench. It was also telling that the worry was never that Kavanaugh would be a David Souter (a stealth candidate who moved left) or a Kennedy (an inscrutable moderate), but rather a Roberts (an institutionalist trying not to rock the boat). As an appellate judge, Kavanaugh had hundreds of opinions enforcing constitutional text, but conservatives still felt heartburn over Roberts’s Obamacare betrayal. “There’s a difference between a home run and a grand slam,” wrote David French of the baseball-fan jurist.

Replacing the predictably unpredictable Kennedy, Kavanaugh seemed poised to move the Court to the right. But looks can be deceiving. In a few high-stakes cases during his first term, but especially petition rejections and other votes on the Court’s “shadow docket” (as opposed to fully briefed and argued cases), Kavanaugh demonstrated a pragmatic — not wholly originalist/textualist or “conservative” — jurisprudence. And he tried to keep a low and agreeable profile, easily becoming the justice most often in the majority, doing so in 91 percent of cases.

Moreover, Kavanaugh actually aligned himself as much with Justices Stephen Breyer and Elena Kagan as with Neil Gorsuch. The two voted together less often in their first term together than

any other two justices appointed by the same president, dating back at least to JFK. Probably the starkest difference emerging between them is in constitutional criminal procedure, where in close cases Gorsuch occupies the Scalia role as a friend of criminal defendants caught up in sloppy government action or legislation, while Kavanaugh sometimes slides toward a pragmatic deference to law enforcement.

His second term saw more of the same, with Kavanaugh in the majority in 93 percent of cases — second only to Roberts’s astounding 97 percent, the highest rate for a justice not named Kennedy in more than 50 years. Moreover, Kavanaugh and Roberts agreed with each other more than any other two justices.

But the last two terms were unusual, and not just because they were the first and last with Roberts in the ideological center. The 2018–19 term, coming on the heels of Kavanaugh’s confirmation, had a small spread between winners and losers and no real ideological dominance. The justices least in the majority were still on the winning side 70 percent of the time. And for all the doomsday prophesying from progressives, of the 20 5–4 rulings, only seven had Republican appointees versus Democratic appointees, while eight others saw a “conservative” justice cast the deciding vote alongside the “liberals” and another four were beyond characterization.

The 2019–20 term, meanwhile, had fewer opinions than any year since the Civil War, the pandemic causing argument cancellations that shifted a dozen cases into the current term. More notably, it was Roberts’s defections on three key cases, involving LGBT rights, DACA, and abortion, that overshadowed anything Kavanaugh did. In addition to that, Gorsuch’s *writing* the opinion in *Bostock v. Clayton County*, the Title VII sexual orientation/gender-identity case — wherein Kavanaugh wrote a convincing dissent — set off a circular firing squad on the right as so-called common-good constitutionalists went after originalists and textualists. (Never mind that it was actually a decent term for conservatives; of the 13 5–4 decisions, nine had the conservative justices together and only three had a conservative defect to join the progressives.)

But Kavanaugh is now leaving his mark in emergency appeals of pandemic-related church-gathering restrictions — more of that “shadow docket” action — splitting with Roberts (and the then-four liberals) in a California case in May 2020 and a Nevada case in July. After Barrett replaced Ginsburg, those 5–4 losses became 5–4 wins, in a New York case in November and another California case last month.

As of this writing, the Supreme Court has released little more than half the opinions for its current term, but Kavanaugh has solidified his position as the indispensable justice, sitting at 97 percent in the majority (followed by Barrett and Gorsuch, showing the importance of Trump’s nominees). He wrote the majority opinion in a 6–3 ruling on the constitutionality of sentencing juveniles to life without parole and he (along with Roberts) sided with the three liberals in a ruling about what constitutes a seizure under the Fourth Amendment.

Kavanaugh’s willingness to push back on the excesses of the regulatory state also makes him a man for the moment — and here he’s very much with Gorsuch, albeit on slightly different grounds. Whereas Gorsuch wants to pare back the scope of judicial deference, Kavanaugh has

focused on reducing the occasions in which deference is applied in the first place. For example, in *Kisor v. Wilkie* (2019), the majority, in an opinion authored by Kagan and joined by the other liberals and Roberts, declined to overrule the so-called *Auer* doctrine — whereby courts defer to agencies’ reinterpretations of their own ambiguous regulations — and instead tightened the evaluative rubric that judges should apply before deferring. Gorsuch’s concurrence was a dissent in all but name and was joined by the remaining conservatives, including Kavanaugh. Gorsuch argued that the majority “has maimed and enfeebled — in truth, zombified” *Auer* deference, keeping it “on life support” in a way that deprives lower courts of clarity and litigants of independent judicial decisions. Kavanaugh wrote a separate concurrence minimizing the distance between the Kagan and Gorsuch opinions.

But this term’s biggest rulings lie ahead, especially on Philadelphia’s ban of Catholic Social Services from its foster and adoption programs, California’s forced nonprofit-donor disclosures, and a California property-rights dispute about compelled union access. And of course next term, we already have cases concerning abortion and the Second Amendment, with affirmative action likely to join them. These six cases will define Kavanaugh, whether he likes it or not.

I’m cautiously optimistic, because Kavanaugh has in both judicial and other writings expressed a dedication to the Constitution’s protections for liberty and that, as he put it at his nomination ceremony, a judge “must interpret the Constitution as written, informed by history and tradition and precedent.” He has a long track record of enforcing the separation of powers and civil rights, including the freedom of speech, religion, and armed self-defense. Moreover, unlike Roberts, Kavanaugh has long been involved with the Federalist Society, which signals a commitment to ideas rather than mere careerism or party loyalty.

Wherever he ends up, it should be for principled reasons rather than out of concern for “legitimacy” — be it his own or the Court’s. Although the rightward turn that many had expected from the Court after his confirmation, whether out of hope or fear, has yet to materialize, there has still been plenty of hand-wringing over judicial integrity. The justices are now working in the shadow of a presidential commission on the Supreme Court, one that’s considering everything from Court-packing to docket management.

But the reason we have such bitter judicial fights isn’t that the Court is partisan. It just can’t be divorced from the larger political scene, whereby divergent legal theories map onto ideologically sorted party preferences. It’s when justices try to avoid controversy by acting on strategic impulse instead of legal principle that they act most illegitimately. We can certainly debate Brett Kavanaugh’s legal principles, but I do hope that he continues to apply them rather than trying either to exact revenge or to curry favor.

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