



Matters of principle: Judge Kavanaugh's confirmation

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The recent controversy over the appointment of Judge Brett Kavanaugh to the US Supreme Court served to highlight, among other things, a problematic relationship between politics and the judiciary, one that relies on a view of politics as a zero-sum game. 'The emergent and increasingly dominant view of politics dismisses the aspects of common goods shared between majority and minority, and empowers the victorious while dismissing the concerns of the defeated,' writes Patrick Riordan SJ.

President Trump has taken to the campaign trail again to support Republican Party candidates for the Senate and the House of Representatives. In two years' time, he will be campaigning for his own reelection as president. Some say that campaign has already begun, since his favoured style of communication is more at home in campaigning than in leadership. It encourages the 'us versus them' mentality that proved successful in gaining him the White House. It allows him to portray the confirmation of his candidate for the Supreme Court, Judge Kavanaugh, as a victory for his side and a defeat for his enemies.

Many are aghast at the state of American politics. Francis Fukuyama has long seen the politicisation of the judiciary as one of the key components in the disintegration of American democracy. That the Supreme Court is highly politicised became evident when, in his final year in office, President Obama was faced with the task of finding a successor to [Supreme Court Justice Scalia](#). Socially conservative Republicans wanted the appointment to be left to the incoming president, who could appoint a judge more amenable to his policy preferences. Similar issues have appeared in the recent controversies surrounding the confirmation of President Trump's choice of Brett Kavanaugh for the Supreme Court.



There is an irony in the emergent relationship of the political and the judicial. The conventional understanding espoused by some liberal philosophers such as Ronald Dworkin is of a division of labour between the two domains. In his book, *A Matter of Principle*,¹ Dworkin relies on a contrast between the level of debate in politics and the level of debate in the Court to uphold the need for a Supreme Court. According to this view, debates in political

forums are about the conflict of interests, even if these are formulated in the legalistic language of rights. Each contender is assumed to seek the victory of his or her own interests. By contrast, the judges of the Court are said to have no interests to secure or defend, but instead are assumed to argue from principle. In their deliberations they provide rational grounding for the decisions arrived at, which citizens might rely on as transcending the cut and thrust of the battle for power and for domination.

The experience of Supreme Court appointments shows how unrealistic this view is. Judges are recognised as representing party interests, and the division of views is settled by a head count, a majority vote, and not by principle. The unintended consequence of such an idealistic perspective on the Supreme Court is that it conveys a very negative understanding of politics. The contest of opposed interests each seeking

victory for their own cause over their opponents is presented as a standard account of normal politics, whether conducted on the street, so to speak, or in the legislative chamber. In order to reserve to the Supreme Court the respectability of high principle and value, these are denied to the ordinary processes of politics. This is a slander. Do politicians never act for the common good; parties never attempt to achieve arrangements intended to benefit all members of the community; citizens never calculate in voting not 'what is best for me', but 'what is best for us all'? The attempt to gain respectability for the Court's deliberations is at the expense of the understanding and valuing of what is involved in democratic politics. This is demeaning and contributes to the crisis in contemporary politics.

Jeremy Waldron has challenged the view of politics as necessarily unprincipled.² He uses the example of the debate about abortion law. It is trivialising to maintain that the pro-choice and pro-life campaigns are different interest groups in competition, and that the intensity of their disagreement over rights is due to an underlying conflict of interest. The moral issues about the permissibility of legal abortion, 'involve deep and challenging questions about the way we value life and its relation to the way we value autonomy and individual control'.³ The disagreement is about the principles of social life, and not about the pursuit of interests.

There is another view beyond the clash of claims to satisfaction of interests. Votes can be seen, not as assertions of interest, but as representing 'an individual opinion on a matter of common concern including, where appropriate, an opinion on the proper balance to be maintained among the various individual and minority interests'.⁴ It is easier for people to cope with defeat when the matter of debate is one of common concern, and not a struggle of competing interests. Written in 1990, Waldron's essay is prophetic of what Fukuyama maintains twenty years later. 'If we say to one another often enough that courts are the forums of principle, and legislatures and elections are simply processes in which interests confront one another in an unprincipled way, then we may end up with legislators and voters who answer to this denigration of their political capacities.'⁵ Has it been indeed a self-fulfilling prophecy?

Francis Fukuyama, writing in 2013, was responding to an earlier crisis in American politics during the Obama administration, when the failure to achieve compromise on the budget led to a shutdown of government. Instead of the tradition of making deals, achieving compromise, a negative style of political action has developed, one that is less focused on what can be achieved together and more directed at thwarting the opponent's programmes. In his analysis of 'The Decay of American Political Institutions', reflecting on this experience of shutdown he coined the term 'vetocracy' to name the dominant style of politics.⁶

He does not find one single cause of the supposed decay but identifies three factors that play a role. First, with Americans' traditional distrust of government, people have turned to the law to find judicial solutions for administrative problems. If there's a problem, make a law to solve it. This has resulted in an imbalance, with too much power given to the legislature to make law and to the judiciary to decide cases, in comparison with the executive, the president and the cabinet. Second, the growth of lobby and interest groups and the strengthening of their capacities to mobilise support has eroded the capacity of government to operate efficiently. The third factor is the change in the nature of politics itself. In Fukuyama's words, 'the American system of checks and balances, originally designed to prevent the emergence of too strong an executive authority, has become a *vetocracy*. The decision system has become too porous – too democratic – for its own good, giving too many actors the means to stifle adjustments in public policy'. With the ideological polarisation reflected not only in the two main parties but also in the many single-interest groups lobbying for their cause, the multiplication of veto points in the system has made collective decisions almost impossible. Fukuyama can see the problem, and he proposes some counter measures – reduce the number of veto points, limit the role of money, and cultivate the acceptability of compromise – but he is not optimistic and fears that a complete breakdown of the system may be the necessary catalyst for change. This anxiety about long-term prospects for democratic systems will be shared by many who recognise the phenomenon of 'vetocracy' in their own countries.

There is a popular view that consensus, agreement and harmony are desirable in social affairs, and that democratic processes of deliberation and debate are ways of achieving the desired consensus. This idealised view persists despite the undeniable experience that conflicts are managed or handled, but hardly ever finally resolved, in politics. And in every case, the minority, the losing side, must have sufficient reasons to support the outcome and the system. Those reasons must take them beyond their immediate interests and convictions. The emergent and increasingly dominant view of politics ignores the need for such reasons, dismisses the aspects of common goods shared between majority and minority, and empowers the victorious while dismissing the concerns of the defeated.

Here we find an inversion of the frequently quoted aphorism of von Clausewitz: 'war is a continuation of politics with other means'. Many now believe that politics is war with other means. One positive interpretation recognises that war, like politics, is a way of handling conflict. But it is an unsatisfactory way of managing conflict as the resentment and insurrection of defeated or colonised peoples testify. The commitment to handling conflict by political means is often motivated by the desire to avoid armed hostilities and to achieve some way for enemies, divided by opposed interests, to cooperate in maintaining a regime that allows each to achieve some – if not all – of their objectives. This was the achievement of the Belfast Agreement and the creation of the power-sharing executive in Northern Ireland. Former enemies can now face each other across a parliament chamber. That is the plausible, positive meaning for the notion that politics is war with other means.

Those who now see democratic politics as war think of war as a zero-sum game, with winners and losers, and they bring that mentality to their conduct of politics. Victory by one side requires the defeat of the opposition. 'To the victor the spoils, winner takes all!' These are the axioms guiding some people's engagement in political contest. The reaction following the outcome of the [UK's EU referendum](#) in June 2016 might be taken as an example. Although 48% of the electorate had voted to remain in the EU, the wave of euphoria of the success of the 'Leave' campaign found expression in the assertion that 'the People had spoken', and that 'the will of the People' had to be respected. In other words, the will of the 52% was

entitled to prevail as the whole. It may be pointed out that referenda lend themselves to this kind of reaction, all the more so when the precision of formulation of the question to be decided in a referendum reduces complex matters to a 'yes' or 'no' answer. There is a trophy to be won, the election is the contest, and the winner takes all. There is no room for nuance, subtlety, ambivalence. But it is not only in the case of such plebiscites that the dynamic operates, as seen in the controversies surrounding the appointment of Supreme Court Justices in the USA. Where the conflict is deliberately polarised so that it appears as a zero-sum game, each side is motivated to campaign in such a way as to deny the opposition the victory, and to grasp the spoils as victor.

Conflicts must be managed, and the resort to majority decision in democratic politics is one reasonable way of managing. But instead of 'winner takes all' it would be much more satisfactory if the opponents, losers as well as winners, who must continue to live together and share the same political space, could emerge from the contest with their self-respect and dignity intact. Is this not why we insist on respect for fundamental human rights as the essential condition for all political systems?

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¹ Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985).

² Jeremy Waldron, 'Rights and majorities: Rousseau revisited' in J. Waldron, *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993) pp. 392-421.

³ Waldron, 'Rights' p. 410.

⁴ Waldron, 'Rights' p. 413.

⁵ Waldron, 'Rights' p. 419.

⁶ Francis Fukuyama, 'The Decay of American Political Institutions' *The American Interest* 9.3 (2013) <https://www.the-american-interest.com/2013/12/08/the-decay-of-american-political-institutions/> accessed 23/06/17.