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Kavanaugh's political leanings likely will be written into law

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Senate hearings on United States Supreme Court nominee Brett Kavanaugh will occur late this summer or early fall. These events have become more like kabuki theater than hearings designed to make rational choices. The denouement of these theatrical performances, for Republican and Democratic nominees alike, is the following brief dialogue:

Senator: "Do you believe that judges should make or follow the law?"

Nominee: "I firmly believe that judges should faithfully follow, not make, the law."

Such an exchange is a version of what Plato called the Noble Lie. Noble Lies are the myths we create to tell ourselves about the world we live in and about the world as we wish it to be. Regarding the Supreme Court, the Noble Lie is that candidates for the court should be "highly qualified," committed to following the law, and, most emphatically, be above politics. We recognize that matters of constitutional importance should be decided "on the law" and not on the basis any justice's personal politics. C'est impossible!

The reason the dialogue is false is the very reason that the Supreme Court exists. Of the millions of cases filed annually, 8,000 to 9,000 seek court review and roughly 85 of those cases result in written opinions. If the answers were clear, then all decisions would be unanimous. The more truthful answer to the question about following or making law is that justices try to follow the law, but when the law is uncertain, it is their job to make it and most of those 85 opinions consider issues that have no clear legal answer. So, then, where does Judge Brett Kavanaugh fit?

When Kavanaugh was nominated for the next U.S. Supreme Court seat, I read his energy and environmental law opinions, and they seem to be written by two different judges.

Kavanaugh's energy decisions are admirable. They are keenly analytic, written with enviable clarity, and follow a very traditional approach. His decisions grant due deference to agency decision-making and hold agencies to the law. Further, they are models of instruction. Kavanaugh explains the facts of the case, identifies the applicable rules of law, decides how the law should be applied to the facts, and then explains the reasons for the decision. This is a traditional approach to judicial decision-making. Energy law cases typically involve two business interests, therefore, deciding which should prevail generally has little to no ideological or political impact.

Kavanaugh's environmental decisions are notably distinguishable. These cases rarely involve two businesses. Instead they pit corporate interests against the public interest for a clean and

healthy environment. Here, Kavanaugh's "hands-off" approach to policy is jettisoned. In his opinions, Kavanaugh is unafraid to strain the interpretation of statutes, engage the judiciary in policymaking, and, on occasion, give mini lectures on constitutional law and government. His environmental law opinions, then, directly involve policy and politics. In other words, Kavanaugh is unafraid to make, not follow, the law.

The matter of most concern about Kavanaugh on the Supreme Court involves more than his particular political preferences, it also involves his approach to judicial decision-making. His energy decisions are textbook examples of judicial decision-making, a restrained judicial decision-making. His environmental opinions, though, reject restraint and embrace activism. The concern should be obvious. Brett Kavanaugh is someone willing to go beyond the record, address issues not squarely presented before the court, and write his own constitutional law. Kavanaugh is the epitome of an activist judge whose political preferences will invariably be written into the law.

Every vote, up or down, on a judicial candidate is a political choice. If you believe that the country is better served by a pre-New Deal government that protects corporate power with the assistance of a compliant Supreme Court, then Kavanaugh is your man. If you believe the government has a role to play in advancing social justice, protecting the disadvantaged, and serving the general welfare, as the U.S. Constitution aspires to do, then do not look to him to advance that sort of government.

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