Opinion

News



The United States Supreme Court in Washington, D.C. (Wikimedia Commons/Matt H. Wade, CC-BY-SA-3.0)



by Michael Sean Winters

View Author Profile

Follow on Twitter at @michaelswinters

Join the Conversation

Send your thoughts to *Letters to the Editor*. Learn more

July 6, 2018

Share on BlueskyShare on FacebookShare on TwitterEmail to a friendPrint

The president met with seven potential Supreme Court picks this week. Two of the most talked about potential nominees are Roman Catholics, Judge Brett Kavanaugh and Judge Amy Coney Barrett. Kavanaugh was appointed by George W. Bush to the D.C. Court of Appeals, a frequent step en route to the Supreme Court, given the vast number of government-related cases its judges take, and Barrett was appointed by President Donald Trump to the Seventh Circuit last year.

Barrett's nomination last year caused a bit of a stir when some Democratic senators engaged in a line of reasoning that Barrett's defenders thought was inappropriate and amounted to a violation of the Constitution's ban on any religious test for office in the United States.

Others criticized Laurie Goodstein at The New York Times for raising the issue of Barrett's membership in a group of charismatic Catholics called People of Praise. My colleague here at NCR, Heidi Schlumpf, looks at that group today as well, and it would be irresponsible not to ask questions about the independence we want in a judge, independence that membership in this group would seem to preclude. My colleague Jesuit Fr. Tom Reese is a judicious person, but if we want judges to be independent and have the appearance of independence, and know Father Tom has taken a vow of obedience to his superior, we need to clear that up. When someone at People of Praise scrubbed Barrett's name and photos from the group's website, well, that is a red flag to us journalists and it should be to senators as well.

Sens. Dianne Feinstein's and Dick Durbin's questions reflected a real ignorance of the history of anti-Catholic bigotry in this country. And they relied on misrepresentations of Barrett's positions made by interest groups that did not care overmuch about the truth. A former colleague of Barrett's at the University of Notre Dame Law School, Rick Garnett, pointed this out at his blog Mirror of Justice.

But Garnett engages in his own intellectual sleight of hand when he writes, "The senators would not have asked — and the senators' defenders would not have tolerated — repetitive and badgering questioning of this kind of a practicing Muslim

or Sikh (nor should they)." The blog Mirror of Justice says it is dedicated to "the development of Catholic legal theory." Even if there were a Muslim or Sikh equivalent, there are not five Muslims on the Supreme Court and there are no Sikh-sponsored universities with laws schools as we Catholics proudly boast, so the comparison does not ring true.

Not all Catholic legal scholars agreed with Garnett. Cathleen Kaveny, a professor of both law and philosophy at Boston College, wrote an op-ed in The Washington Post that questioned the wording, but not the intent, of the senators' questions. "The Constitution cannot reasonably be read to prohibit asking a candidate for public office how her moral commitments would affect her public service," Kaveny observed. "Religious believers don't get a free pass."

Now, David French, writing at the National Review, argues believers should get a free pass. "Why do some progressives single her [Barrett] out for *particular* scorn?" French asks. "It turns out she's a faithful Christian who lives a life very similar to millions upon millions of her fellow American believers. No, really, that's the objection."

I am not sure how similar Barrett's life is to "millions upon millions" of her fellow Catholics: Some of what I know about the "People of Praise" gives me the willies. But, more importantly, how convenient to throw the charge of religious bigotry at anyone who opposes Barrett. And, perhaps, to dissuade reporters from learning more about this group, which certainly lives its faith in ways that are unrecognizable to "millions upon millions" of other Catholics.

Many of us who are not what you would call ignorant of religion worry about Barrett for other reasons. If she is so great, why not let that greatness blossom for a bit on the Court of Appeals so that the case for her ascent to the Supreme Court is almost self-evident a few years' hence? I would oppose any nominee who is under 60 — is that an unconstitutional "age test"? — because I do not think any one person should have so much power for such a long time in a democracy.

Nor do I think law professors make great justices. And I have long advocated for the appointment of someone with lived experience of one of the other branches to the high court. President Barack Obama still missed a great opportunity when he did not even consider former Vice President Al Gore for the court in 2009.

Related: Prospective Supreme Court nominee puts spotlight on People of Praise

Religious conservatives like to have their cake and eat it too (and not share it with the LGBT community, but that is a different story). They tell us that faith has to matter and that we should most certainly bring our faith into the public square. But when it comes time to nominate a Catholic judge, they say, "Well, a judge shouldn't bring any personal considerations to their task; their job is to apply the law not to make it."

What then, precisely, is meant by the term "Catholic legal theory"? All judges make sense of the cases before them and the relevant law with recourse to some kind of legal theory. Could Barrett, who worked for so long at the nation's iconic Catholic university, really have not been affected in the least by the Catholicity of the place?

It is possible. Barrett clerked for Justice Antonin Scalia, and while he embodied a distinctive type of ethnic Catholic personality, his Catholic faith had no impact on his judicial philosophy. Scalia embraced the doctrine of textualism or originalism, the idea that "the Constitution means no more or less than what it meant to those who originally wrote and ratified it." That is, he subscribed to a kind of textual idolatry akin to Martin Luther's *sola scriptura* approach to the Christian faith, and a fundamentalist hermeneutic akin to the Rev. Jerry Falwell's understanding of how to interpret the Bible.

Scalia's theory has not even a passing similarity with our Catholic intellectual traditions. Setting aside the challenge all Catholics face in a constitutional order premised on a negative conception of liberty, our Catholic traditions recognize diverse schools of thought; the development of doctrine over time; the need to apply general principles to concrete situations through the exercise of an informed conscience, all the while recognizing the importance, not to say exclusive importance, of teleological questions of meaning; and the ultimate recognition that, as a certain first-century itinerant Jewish preacher put it, "the Sabbath is made for man, not man for the Sabbath" (Mark 2:27).

Besides, if Scalia was right, Barrett should most definitely decline any prospective appointment to the high court. If originalism is the proper way to interpret the Constitution, the president should appoint historians, not lawyers, to the court.

Scalia was seeking a bit of solid ground at a time when he and others perceived constitutional law to have become too fluid and inconstant. After Justice Harry Blackmun went hunting among the "penumbras" of the Constitution in search of a

"fundamental right" to an abortion, thus imposing the standard of strict scrutiny on all government regulation of what had long been considered a moral infamy, as Vatican II deemed abortion, one can sympathize with Scalia's desire for more solid ground upon which to stand.

But if he was the great scholar people thought he was, he should have come up with something better than originalism, the limits of which were so obvious as to be just as laughable as Blackmun's penumbras.

Advertisement

For example, the Second Amendment could only guarantee a right to bear a musket, yet Scalia supported decisions to strike down laws that regulated post-18th-century weaponry. On what grounds? Another time, the court heard a case about restrictions on the sale of violent video games and after Scalia interjected a question that struck the room as anachronistic, even his fellow Justice Samuel Alito joked that what Scalia really wanted to know was what James Madison thought of video games.

Catholic intellectual life understands that our moral life, even our moral absolutes, exist in time, not beyond it. Scalia's approach pretended to deny that most obvious of human realities.

I understand there was a need to move beyond the fuzzy constitutionalism of Blackmun. But originalism as a response to Blackmun is, to my mind, like the space shuttle. We sent a man to the moon and, for an encore, instead of heading to Mars or somewhere amazing, we threw a large, complicated tin can into orbit. Originalism is to constitutional law what the shuttle was to the space program, kind of a letdown, as if Columbus had discovered America and the next step was a massive colonization of the Isle of Wight.

Without doubt and with much irony, originalism would have no grounds for dismissing questions about Barrett and Kavanaugh's religion as violations of the Constitution's prohibiting religious tests for office.

Article VI provides, "but no religious test shall ever be required as a qualification to any office or public trust under the United States." The founders knew something about religious establishments and tests. In the early part of the 18th century, British politics had been convulsed by the Tories' repeated efforts to pass a law

against "Occasional Conformity." You could not hold office in England unless you were a member of the Church of England. Dissenters, in order to stand for office, would take the sacrament in the Church of England once a year, and worship at their Calvinist chapels the rest of the year. Such evident hypocrisy disturbed the conscience of the prickly Queen Anne and, depending on the political needs of the moment, and whether the duchess of Marlborough or Mrs. Masham had her ear, the queen would lend her support to these Tory efforts.

The ascent of the Whigs after Anne's death led to the heyday of 18th-century English republicanism, with Bishop Benjamin Hoadly instigating the Bangorian controversy and John Trenchard and Thomas Gordon penning *Cato's Letters*, which were widely read in the colonies. This "Country Whig" republicanism was the river of political ideology from which the founders drew most heavily.

Conversely, the founders made no stipulations about which questions it is appropriate to ask or to answer during a Senate confirmation hearing. For most of our history, there were no such hearings. There is a book to be written, that I would very much like to read, about how the legal profession as a whole became so ideologically fraught in such a relatively short time.

> No one is asking about how a Catholic might view Trump's immigration policies. No one is asking how four of the five Catholics on the Supreme Court could have become routinely and aggressively pro-business and anti-worker.
>
> Tweet this

But back to the main point: I do not see how an originalist can object to being asked any particular question, and I can't imagine a line of questioning that would amount to a "religious test." The questions might be bigoted, but our nation's first chief justice, John Jay, was a notorious anti-Catholic bigot. Originalism indeed.

Again, Republicans want to have it both ways. On "Fox News Night with Shannon Bream" Monday night, former Arkansas Gov. Mike Huckabee seemed to apply a "religious test" of his own. Speaking of Barrett, he said, "I'd hate for someone to say, 'You know, I'm a Christian, but I'm not much of one because I don't really believe that stuff.' Well then, don't be one. Then I would say she's a phony, I don't want her

as a justice. I like that she's sincere and genuine."

Whether a person is a religious phony or not is a legitimate question, no? But is it that different a consideration from Feinstein's wondering how dogmatic Barrett is?

Social conservatives are now attacking Kavanaugh, who clerked for Justice Anthony Kennedy and shares some of his more libertarian views. I suspect such views are closer to those of the president, but they are not the views of the Trump base and, in the end, there is little evidence Trump cares about ideas per se. I would deprecate having another libertarian on the bench, even though it would throw a complication into the GOP legal establishment, a complication that would play out over the years. Whatever Kavanaugh's judicial philosophy, I would vote against him for the same reason as I'd vote against Barrett: too young.

A final thought. Once again, the role of Catholics in public life is reduced to the issues of pelvic theology. No one is asking about how a Catholic might view Trump's immigration policies. No one is asking how a majority with four of the five Catholics on the court could have become routinely and aggressively pro-business and anti-worker.

The conservative Catholic legal establishment is largely responsible for this singular focus on neuralgic sexual issues (with the recent addition of an almost paranoid fear about religious liberty), an establishment that was only too willing to view this deformation of the church's public witness as necessary collateral damage in their quest to align their religion with their politics.

Barrett is not responsible for this deformation of the Church's public witness but she is a product of, and has been groomed by, the conservative Catholic legal establishment that is responsible. She is part of it and, having been groomed, is now the face of that establishment. Just so, I hope she is not nominated and if nominated that she is not confirmed.

We will know on Monday whom the president has selected. It is difficult to perceive a turn of events that would prevent that nominee from being confirmed. But the hysterical cries of anti-Catholicism coming from Barrett's defenders are overkill. I worry about many things but an anti-popery riot is not on the list. I wish for many things too, and one of those things is to see the day when the full range of Catholic intellectual and moral life plays a part in our public discourse.

[Michael Sean Winters covers the nexus of religion and politics for NCR.]

Editor's note: Don't miss out on Michael Sean Winters' latest: Sign up to receive free newsletters and we'll notify you when he publishes new Distinctly Catholic columns.