

Anarchism and Kavanaugh

Regarding Brett Kavanaugh, I've been wondering how I can blame the state for what we've endured these past weeks. I can safely say that without the state, we would have been spared the Kavanaugh episode.

Natural-law, pro-market anarchists are not utopians. To paraphrase the old hit: we beg your pardon; we never promised you a rose garden. Anarchism refers to a set of means — persuasion, consent, and voluntary cooperation — and not an end. It permits the emergence of solutions through a range of cooperative activities as opposed to the state's imposition of one-size-fits-all alleged solutions from on high — from, say, Capitol Hill, our Mount Olympus.

But some things are less likely to occur in a stateless society than in a state-saturated one. And the Kavanaugh problem is one of those things.

Let's start with the basics. Kavanaugh has been nominated for a seat on the U.S. Supreme Court. Supreme Court justices have lifetime jobs. While an impeachment process exists, it is close to impossible to remove a high official. Second, the Court's rulings are the "supreme law of the land." It takes just five of nine justices to set binding precedents, which lower federal and state courts obviously must apply. Third, parties who elect to take cases to the Court are stuck with whoever happens to be on the Court at the time. If a party has doubts about the character of one or more of the justices, tough luck. (This doesn't mean the government's courts are unavoidable for some people, as the popularity of private arbitration demonstrates.)

In light of these facts, I can't think how a situation like the one created by Kavanaugh's nomination could arise in a stateless society. No supreme court would exist because no monopoly legal system would exist. (See my "Of Bumblebees and Competitive Courts.") Judges would not have guaranteed lifetime jobs. Nor would their rulings serve as binding (as opposed to persuasive) precedents. (On the emergence and downside of *stare decisis*, the doctrine of binding precedent, in the common law, see Todd Zywicki's "The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis.") Parties to disputes would, through mutually agreed-to procedures, choose anyone they wanted to hear their cases. This could happen *ad hoc* in one-off disputes, but the more common practice would likely be prospective arrangements among associations of various kinds, insurance, defense, and so on.

As I say, it's hard to imagine how the Kavanaugh situation could arise under anarchism. Parties looking for members of an arbitration panel usually could strike from consideration anyone about whom they had any doubts whatever. Other parties who had no concern

about someone under a cloud like Kavanaugh's could choose that person, subject to the conditions agreed to with fellow disputants. But, crucially, the choice to include or exclude such a person would have implications for *only* the parties to the specific dispute.

Obviously, prospective arbiters' reputations, especially for fairness and honesty but not only those traits, would matter immensely. In effect, prospective arbiters would face a confirmation review — by disputants or their representatives — every day. A Supreme Court nominee does so just once. If the Senate errs, too bad. As mentioned, under the Constitution, justices "shall hold their offices during good behavior." But in 229 years, Congress has never removed a justice. Only one, Samuel Chase in 1804, was impeached by the House, but he was acquitted by the Senate. In the 20th century, William O. Douglas and Abe Fortas escaped House impeachment votes, though hearings were either held (twice in Douglas's case) or almost held (Fortas). Under anarchism, no impeachment process would be necessary because no one would be appointed to any judicial role except by parties to their own particular cases or by the associations or communities with which they chose to affiliate.

So a big advantage to anarchism is that it would blessedly spare us from the sort of repulsive spectacle we've lived through these last weeks — repulsive in an assortment of ways. I'm thinking now of that band of self-righteous frauds called senators and that amoral boor with the "really, really large brain" who imagine themselves to be guardians of the people's welfare when in truth they are impediments to it. Imagine a society in which, for most of us, nothing much hinged on whether Brett Kavanaugh or Christine Blasey Ford is telling the truth.

Anarchism's looking pretty good now, isn't it? I know that some people are frightened by that word, but they ought not to be. Rather, they ought to think of anarchism as Roderick Long presents it in his critical look at the recent exchange over anarchism that took place at *Reason*. Long tells us that anarchism amounts to little more than an expansion to all areas of life of the manner in which we typically deal with one another today, thereby shrinking the sphere of coercive relationships until it disappears. He draws on earlier thinkers to make the point:

Recall Gustav Landauer's famous formulation: "The state is a condition, a certain relationship between human beings, a mode of behavior; we destroy it by contracting other relationships, by behaving differently toward one another." And another anarchist, Paul Goodman, has noted: "A free society cannot be the substitution of a 'new order' for the old order; it is the extension of spheres of free action until they make up most of social life."

So, just imagine a world where you could ignore, among many others I could name, Lindsey Graham, Jeff Flake, Dianne Feinstein, and Donald Trump. To quote Louis Armstrong, "What a wonderful world it would be."

(For discussions of law under anarchism, see Roderick Long's essays "Why Objective Law Requires Anarchy," "Libertarian Anarchism: Responses to Ten Objections," and "Market Anarchism as Constitutionalism"; John Hasnas's "The Myth of the Rule of Law," "The Depoliticization of Law," "Toward a Theory of Empirical Natural Rights," and "The Obviousness of Anarchism"; and David D. Friedman's "A Positive Account of Rights." Also see the chapter "The Constitution of Anarchy" in my *America's Counter-Revolution: The Constitution Revisited*. and Gary Chartier's *Anarchy and Legal Order*.)