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Title: Judge Kavanaugh Doesn't Have a Judicial Philosophy: Only Randy Barnett Does

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10/3/2018—Randy Barnett published a very thoughtful 1000 words in [The Volokh Conspiracy](#) arguing both that judicial philosophy is relevant to Senate votes on a judicial nominee and that Senators who vote against a candidate have an obligation to say for the record what it is about that philosophy they don't agree with.

Randy also implied that a vote against Merrick Garland would have been justified by the Republican-majority on this basis. This is probably a bad idea because it means that no nominees will be confirmed unless the President and the Senate are controlled by the same Party.

But Randy's idea is also unworkable for a simpler reason—judges don't have judicial philosophies in the sense of “a proper method of interpreting our written Constitution.” Only legal academics like Randy have such a thing—because we don't actually decide cases.

Judge Kavanaugh's alleged legal philosophy is originalism—interpreting the Constitution according to its original public meaning and not changing that meaning until there is a constitutional amendment. But Kavanaugh would have voted the same way that Justice Gorsuch—another alleged conservative—voted in his first big case, *Trinity Lutheran Church*, in which the Court held that denying a taxpayer-funded grant for a playground to a church that was available to other nonprofits violated the Free Exercise Clause.

Without doing any research, I'm pretty sure that to the framers, Free Exercise just meant that government could not interfere with religious practice. It would not have required affirmative help by government. So, Justice Gorsuch changed the original meaning of the Free Exercise Clause without a constitutional amendment.

The reason he voted this way is that interpretations of the Constitution have to make sense today to the American people. Government involvement in the economy is now so vast that excluding churches from government programs really does deny Free Exercise. *Lutheran Trinity Church* was therefore a proper decision, but it was an example of the Living Constitution in action. (The Living Constitution is not a method of interpretation in Randy's sense either).

Trinity Lutheran Church is just one example, but it is important because this claim to have a “method” of interpretation sometimes is used to absolve judges from having to defend their decisions morally. If a judge is perpetuating an injustice, that judge should have to answer for that and not pretend that some method forces the decision.

On a whole range of commitments—forced unions membership violates the First Amendment, corporations have rights, advertising is more than a contract offer, property restrictions are a taking, Equal Protection bars gender discrimination—Judge Kavanaugh will predictably vote in ways that either clearly violate the original meaning of the Constitution or at least will vote without really worrying about whether such outcomes violate original meaning or not. In other words, Kavanaugh was picked because he would “simply reach all the outcomes that a [conservative Republican] would like the Supreme Court to reach... .” Not because he has some kind of philosophy.

I don't want a judge who allows the government to violate fundamental rights whether or not the framers would have recognized the right as fundamental. The Ninth Amendment suggests that maybe the framers agree with me about that. My vote on Kavanaugh would in part depend on how he answered that question. Of course, neither I nor Randy are considering how the personal issues now also before the Judiciary Committee regarding Judge Kavanaugh will ultimately play out.