



Looking Past the Wreckage of a Disgraceful Confirmation Process

“A NATIONAL DISGRACE.” That’s how Brett Kavanaugh chose to describe the process by which the United States Senate considered his nomination to the Supreme Court. By the time that process had concluded, there were few on either side of the debate who disagreed. As this issue of *Education Next* goes to press, a deeply divided Senate has just voted 50–48 to confirm Kavanaugh for the seat left vacant by Justice Anthony Kennedy’s retirement. The consequences for education are likely to be more far-reaching than anything else the Trump administration has done or will do during its time in office.

By securing a conservative majority on the court for the foreseeable future, Kavanaugh’s confirmation can be expected to accelerate ongoing shifts to the right in constitutional doctrine. In 2017, for example, the Supreme Court ruled that the state of Missouri could not bar a Lutheran preschool from participating in a reimbursement program for playground improvements. Multiple cases underway in federal and state courts could provide an opening for the court to extend that logic and rule that religious schools cannot be excluded from programs that aid families sending their children to private schools. Kavanaugh, who in a 2017 speech praised former Chief Justice William Rehnquist’s efforts to lower the wall of separation prior courts had erected between church and state, seems likely to welcome such an opportunity.

Or consider the topic of agency fees for public-sector unions, which were collected from employees who declined to join. In the *Janus* decision this past June, a 5–4 majority ruled that such fees violate the First Amendment rights of teachers and other government workers. A liberal majority on the court could have placed that precedent at risk. With Kavanaugh on the bench, the odds have increased that the court will instead go further in curtailing union power, perhaps by making it easier for workers to opt out of membership.

In addition, Kavanaugh’s confirmation has thrown cold water on nascent attempts to move the court’s doctrine in education cases in a progressive direction. Efforts to get the court to reconsider its 1973 *Rodriguez* decision, in which justices ruled that the Constitution does not include a right to education, or to place affirmative action in college admissions and K–12 school-assignment policies on a more solid legal foundation, might have gained traction with a liberal majority. Now, they seem far-fetched (see “Good Advice,” *legal beat*).

And what of the confirmation battle itself? Debate ultimately centered on Christine Blasey Ford’s testimony that Kavanaugh had assaulted her while both were in high school—an allegation that even President Trump initially deemed “credible” but ultimately was not corroborated before the Senate. Coincidentally, as the Senate Judiciary Committee heard testimony from both parties, education secretary Betsy DeVos’s team was finalizing draft

regulations on how colleges receiving federal aid should investigate and adjudicate claims of sexual assault.

Under President Obama, the Department of Education issued guidance that expanded the definition of sexual harassment under Title IX and lowered the standard of proof required for students accused of harassment to be disciplined (see “Where Title IX Went Wrong,” *book reviews*). The move won praise from advocates for survivors of sexual assault, but was simultaneously criticized for limiting the due-process rights of the accused. Twenty-eight professors at Harvard Law School went so far as to publish an open letter opposing their university’s policy changes in response to the guidance.

Shortly after her own confirmation, DeVos vowed to start anew with a fresh set of regulations centered on two principles: “Every survivor of sexual misconduct must be taken seriously. Every student accused of sexual misconduct must know that guilt is not predetermined.”

Kavanaugh’s contentious path to confirmation seems likely to stiffen DeVos’s resolve to protect the rights of the accused, even as it heightens the controversy surrounding whether institutions fairly handle allegations of assault. The consensus on the left holds that allegations are underreported, improperly investigated, and widely disbelieved. Yet among conservatives, as *Education Next* executive editor Michael Petrilli recently told the Associated Press, “the sympathy right now is very strong with the concern that some men are wrongly accused.” It is no surprise that the lone Democratic senator to vote “Yes” to elevate Kavanaugh was Joe Manchin of West Virginia, who is running for reelection in a state that voted overwhelmingly for Trump in 2016.

There is little doubt that Title IX needs another look, but let’s hope that those seeking to draw lessons from the Kavanaugh confirmation process do not stop there. Setting aside the alleged assault, the window the hearings provided on the hard-partying, sexual-conquest-claiming culture at elite private schools—and presumably many other schools nationwide—was beyond disturbing. As an alum of one of Georgetown Prep’s crosstown rivals, I found aspects of that picture all too familiar. If the battle over Brett Kavanaugh’s nomination leads American high schools to ensure that fewer students find reason to “cringe” when they look back at their yearbooks—and, more importantly, at how they treated those around them—an otherwise disgraceful episode could yet have a positive legacy.

Martin R. West

MISSION STATEMENT In the stormy seas of school reform, this journal will steer a steady course, presenting the facts as best they can be determined, giving voice (without fear or favor) to worthy research, sound ideas, and responsible arguments. Bold change is needed in American K-12 education, but *Education Next* partakes of no program, campaign, or ideology. It goes where the evidence points.