

# **Assessment of Key Constitutional, Health and Public Health Policy Positions**

**Honorable Brett M. Kavanaugh**

**Associate Justice Nominee,  
U.S. Supreme Court**



**AS OF JULY 25, 2018**

On Monday, July 9, 2018, President Donald Trump **nominated** Judge **Brett M. Kavanaugh** as Associate Justice to replace the retiring **Justice Anthony Kennedy** on the U.S. Supreme Court. Judge Kavanaugh, a **Yale law** alum and undergrad, clerked for Justice Kennedy and practiced law privately and at the U.S. Solicitor General’s office. He worked for independent counsel Kenneth Star (investigating President Bill Clinton) and served in the White House for several years under President George W. Bush. He was nominated to the U.S. Court of Appeals for the D.C. Circuit by President Bush and subsequently confirmed by the Senate on May 26, 2006. Considerable, additional information on Judge Kavanaugh’s background is available from his **bio** and other sources, including a forthcoming evaluation from the **American Bar Association**.

This document provides concise, neutral assessments of Judge Kavanaugh’s known or prospective views on multiple constitutional, health and public health law and policy issues. These assessments are based on primary information garnered from his court opinions, scholarly publications, reports, memos or speeches. Secondary sources of information include media or other credible accounts describing his positions. Relevant sources are hyperlinked throughout the document.

## **U.S. CONSTITUTION**

Judge Kavanaugh’s extensive work on the bench, in scholarship and in legal classrooms contributes to his **reputation** as a serious constitutional jurist whose influence is already **reflected** in Supreme Court decisions. In his own **words** at his nomination on July 9, 2018, Judge Kavanaugh suggests his “[j]udicial philosophy is straightforward. A judge must be independent and must interpret the law, not make the law. A judge must interpret statutes as written. And a judge must interpret the Constitution as written, informed by history and tradition and precedent.”

Like many constitutional “**originalists**,” Judge Kavanaugh’s perspectives are often grounded in Framers’ views of the Constitution’s meaning. As he details in his **2014 address** at Notre Dame Law “[t]he precise text of the Constitution controls our structure, and we do not ignore the text of the Constitution simply because it was ratified 225 years ago, or may be outdated, or has not adapted to modern conditions. . . .” In a **2017 lecture**, he clarifies “the Constitution is primarily a document of majestic specificity [whose] specific words have meaning. . . [that] bind us as judges, legislators, and executive officials.” Despite his grounding as a **textualist**, Judge Kavanaugh’s views and judicial opinions on constitutional principles have **changed** over time.

### *Separation of Powers*

The constitutional principle of separation of powers refers to the distinct roles afforded to each of the branches of government — legislative, executive and judicial. Strong adherence to separation of powers principles lends stability to governmental interactions but can also restrict flexibility inherent in modern federal agency authority and oversight.

Judge Kavanaugh has opined and commented extensively on separation of powers principles, which he aligns with **principles of liberty**. He has targeted these views especially related to independent executive agencies. In his **speech** at Marquette Law in 2016 he asks “How do . . . independent agencies fit within the constitutional structure? Here’s the answer: uneasily.”

In 2018, he disagreed with the ruling of the D.C. Circuit Court of Appeals in **PHH Corp. v. Consumer Financial Protection Bureau**. The court upheld the constitutionality of the appointment of the Bureau’s director who can be removed only for cause. Corporate challengers alleged separation of powers violations because the president lacks the capacity to appoint or remove the director at will. Judge Kavanaugh argued that “independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.” He further **intimated** that

the Supreme Court's longstanding case on the constitutionality of independent agencies (*Humphrey's Executor v. U.S.* (1935)) was potentially flawed, a view he has also espoused in other decisions.

In a **2017 article**, Judge Kavanaugh lauds former Chief Justice William Rehnquist for his role in "limiting the ability of agencies to make major policy decisions that belong to Congress at least unless Congress clearly delegates that authority." Judge Kavanaugh's additional **statements** regarding the **expansiveness of presidential authority** under separation of powers principles are consistent with these expressed views. Still, he observed in **2016** how his prior White House experience helps him appreciate ". . . when judges need to show some backbone and fortitude, in those cases when the independent judiciary must stand up to the president and not be intimidated by [his] mystique."

### *Administrative Law and Chevron Doctrine*

Federal executive agencies often work collaboratively with congressional legislators to determine the scope of public health policies. Conflicts can arise, however, when agencies attempt to create and administer complex regulations that may not be viewed to comport with legislative principles. As noted by the U.S. Supreme Court in *Chevron, U.S.A., Inc. v. NRDC, Inc.* (1984), delegations of legislative authority are constitutional so long as Congress articulates standards for issuance and enforcement of administrative regulations. To the extent *Chevron* allows greater deference to federal agencies' authority to regulate pursuant to reasonable interpretations of statutory law, the case has drawn considerable **consternation** (particularly among business actors in **environmental contexts**).

For years, Judge Kavanaugh has openly criticized the *Chevron* decision. In a 2016 publication in the **Harvard Law Review**, he classified *Chevron* deference as a "textual invention by courts" that represents "nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch." Judge Kavanaugh argued in *U.S. Telecom Association v. Federal Communications Commission* (2017) that FCC's net neutrality rule "is unlawful and must be vacated" in part due to lack of congressional authorization. Judicial retraction of *Chevron* deference may weaken executive agency authorities. In partial support of this position, the **White House** has lauded Judge Kavanaugh for overruling federal agency authority "75 times" while on the bench, including efforts to kill "President Obama's most destructive new environmental rules" (*discussed below*).

### *Precedents and Judicial Activism*

In multiple opinions and publications, Judge Kavanaugh has expressed disdain for existing precedence of the Supreme Court and lower courts, especially decisions where judges take an active role in statutory or regulatory interpretation. In two separate articles in **2016** and **2017**, he likened the role of a judge to that of an umpire whose primary purpose is to ascertain a statute's meaning "based on the words, context, and appropriate semantic canons of construction," and less so on its **legislative history**. Judicial activism resulting in innovative interpretations of constitutional rights is **inappropriate**, suggests Judge Kavanaugh, unless "the asserted right was rooted in the nation's history and tradition."

### *Federalism*

Federalism refers to structural facets embedded into the Constitution designed to distinguish federal and state powers and interests. The 10<sup>th</sup> Amendment provides that all powers not otherwise enumerated to Congress belong to the states. State powers, commonly referred to as police powers, are the bastion of many core public health powers (including delegated authorities from state to local governments). Healthy respect for principles of federalism helps preserve appropriate balances of power.

Judge Kavanaugh's positions on **states' rights** and principles of federalism are limited. In his **2017 lecture**, however, he noted Chief Justice William Rehnquist's influence in wielding federalism to control congressional power. As Judge Kavanaugh suggests, two key decisions of the Supreme Court during Rehnquist's tenure — *U.S. v. Lopez* and *U.S. v. Morrison* — “were critically important in putting the brakes on [Congress'] Commerce Clause and in preventing [it] from assuming a general police power.” Rehnquist, surmises Judge Kavanaugh, “is largely responsible for [this] important feature of modern constitutional law.”

### *Preemption*

As an embedded constitutional principle, **preemption** refers to how state or local laws may be averted, displaced or negated by conflicting laws at a higher level of government. Federal laws can thus preempt state or local laws in multiple ways that may help or hinder public health objectives. Federal preemption has been used positively to create a national floor for public health policies (e.g., menu labeling). Conversely, it can be used to thwart state or local legal and policy innovations to promote the public's health.

Judge Kavanaugh has not proffered extensive judicial guidance on preemption laws and policies, much less their impact on public health powers. In *Illinois Public Telecommunications Association v. FCC* (2014), he deferred to the Federal Communications Commission in a state-based challenge of its refund orders related to telecommunications providers. To the extent federal legislation (**47 U.S.C.S. § 276(c)**) expressly preempted state laws, Judge Kavanaugh opined, FCC could override contrary state practices.

## **HEALTH CARE**

A **compelling series** of prior and current health-related legal issues dominate discussions of Judge Kavanaugh's ascendancy to the Supreme Court. Multiple issues are currently being litigated in lower courts. In *Texas v. U.S.* (2018), 20 states' attorneys general have contested the constitutionality of numerous provisions of the Affordable Care Act. In a **letter** to Congress, the Department of Justice indicated it will not defend the federal government's interests related to the constitutionality of ACA's key provisions. In other cases, significant provisions governing Medicare reimbursement and Medicaid coverage (pursuant to **Social Security Act §1115** waivers) are challenged. Against this backdrop, Judge Kavanaugh's perspectives on health law and policy may implicate the **health of millions of Americans** if he is appointed to the Supreme Court. Consequently, his views on **health law and policy issues** may **factor extensively** into ongoing Senate confirmation proceedings.

### *Affordable Care Act*

Judge Kavanaugh's assessments of the constitutionality of the ACA are incomplete at best. Concerning the ACA, he has focused more to date on its enactment than its actual substance. In a **2016 article**, for example, he describes the Supreme Court's consideration of ACA tax credits for health exchange consumers in *King v. Burwell* (2015) as basically “. . . about how to interpret statutes.”

In *Seven-Sky v. Holder* (2011) (later abrogated by the U.S. Supreme Court), Judge Kavanaugh dissented to his court's holding that the ACA's individual mandate fell within Congress' Commerce Clause authority. He admonished the court for ruling on Congress' commerce authority, suggesting the court lacked jurisdiction under the federal **Tax Anti-Injunction Act**. In *Sissel v. Department of Health and Human Services* (2015), the constitutionality of the ACA was challenged on grounds its passage failed to follow proper congressional protocol. Judge Kavanaugh dissented again, arguing this time in favor of the ACA that it was properly introduced in the House of Representatives as a revenue-raising bill under the Origination Clause of the Constitution.

## Contraception Coverage

In *Priests for Life v. HHS* (2015), Judge Kavanaugh sought unsuccessfully to rehear claims that the ACA's contraception coverage requirements violated the federal **Religious Freedom Restoration Act**. President Obama's administration allowed religious employers who objected to providing contraception coverage to seek an exemption from HHS, thus bypassing direct payments to employees for such services. While acknowledging that "[g]overnment has a compelling interest in facilitating access to contraception for the employees" of religious employers, Judge Kavanaugh averred to requiring such employers to submit exemption forms. He saw this requirement as an overly restrictive means of effectuating government's interests.

## Abortion Care

President Trump previously **vowed** to appoint Supreme Court Justices who will overturn *Roe v. Wade* (1973). At his 2006 judicial nomination hearing, Judge Kavanaugh **indicated** he "would follow *Roe v. Wade* faithfully and fully." His expressed views have since changed. At a September 18, 2017, **speech**, Judge Kavanaugh praised former Chief Justice Rehnquist's dissent in *Roe* for "stemming the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition. . . ." A month later, in *Garza v. Hargan* (2017), Judge Kavanaugh joined a three-judge panel order delaying abortion care for an undocumented minor in federal custody to allow more time for HHS to locate an immigration sponsor. Such delay, he deemed, was not an "undue burden" provided HHS' sponsor search was expeditious. When the minor petitioned for a rehearing, the D.C. Circuit Court of Appeals **vacated** the order, resulting in her release to access abortion care. Judge Kavanaugh dissented, chastising the court for creating a "radical . . . new right to immediate abortion on demand" for undocumented immigrant minors in federal detention.

## Medicare

In June 2018, in *Saint Francis Medical Center v. Azar*, Judge Kavanaugh concurred in a decision against HHS that allows hospitals to challenge Medicare reimbursement determinations after HHS acknowledged using inaccurate data over many years. He argued that HHS' regulations limiting reimbursement challenges (to no more than three years) were "arbitrary and capricious" and thus subject to reconsideration. One year earlier, in *Allina Health Servs. v. Price* (2017), Judge Kavanaugh concluded that HHS violated federal legislation when it changed its Medicare reimbursement adjustment formula without providing adequate notice and opportunity for comment.

Previously, in *Hall v. Sebelius* (2012), Judge Kavanaugh rejected patients' efforts to disclaim their Medicare Part A benefits to secure private insurance. "[C]itizens who receive Social Security benefits and are 65 or older are automatically entitled under federal law to Medicare Part A benefits," noted Judge Kavanaugh. "There is no statutory avenue [for such persons] to disclaim their legal entitlement. . . ."

In *Northeast Hospital Corp. v. Sebelius* (2011), Judge Kavanaugh concurred with the court's holding favoring a hospital's request for review of Medicare reimbursement practices. He argued that HHS wrongfully applied a disproportionate share of hospital adjustment provisions retroactively. Judge Kavanaugh disagreed with hospital patients receiving Medicare benefits under Parts A and C contrary to their specific choices of coverage. In *Action Alliance of Senior Citizens v. Sebelius* (2010), he deferred to Congress in allowing the Centers for Medicare and Medicaid Services to recover mistaken Medicare Part D prescription drug premium refunds through the participants' Social Security benefits rather than allowing the participants to avoid recovery through waiver.

## *Food and Drug Administration*

Judge Kavanaugh has shown FDA deference regarding its science-based decisionmaking but has also interpreted its regulatory authority narrowly. In *Cytori Therapeutics v. FDA* (2013), he supported FDA's finding that devices intended "to harvest and concentrate stem and regenerative cells from fat" did not meet the agency's standards. Judge Kavanaugh concluded that "[a] court is ill-equipped to second-guess [FDA's] scientific judgment" consistent with the **Administrative Procedures Act**. However, in *Ivy Sports Med., LLC v. Burwell* (2014), he ruled against FDA's efforts to reconsider a dissolvable mesh used in knee replacements after the agency erred in its approval process. Judge Kavanaugh ruled FDA could not "rely on a claimed inherent reconsideration authority" to circumvent statutory processes and "revoke its prior substantial equivalence determination." (See also *Vaccines below*).

## **PUBLIC HEALTH**

The unique jurisdiction of the D.C. Circuit Court of Appeals (compared with other federal appellate courts) limits direct reviews of many core public health powers, duties and issues. As Judge Kavanaugh has **described**, his court primarily hears cases on the "interpretation of statutes, usually when deciding whether an agency exceeded its statutory authority or statutory limits." As well, Judge Kavanaugh has no known work history or scholarly manuscripts directly addressing public health issues. However, his jurisprudence entails select public health topics as noted below.

### *Vaccines*

When a group sued to halt FDA's approval of vaccines containing thimerosal in *Coalition for Mercury-free Drugs, Inc. v. Sebelius* (2012), Judge Kavanaugh dismissed the case. He found the group lacked the capacity to bring a cause of action because its members had not actually used vaccines containing thimerosal. His opinion did not specifically evaluate evidence about the safety of thimerosal or other vaccine-related issues.

### *Treatment*

In *Doe v. DC* (2007), Judge Kavanaugh upheld a D.C. policy enabling local government to authorize surgery for persons deemed to have never had the mental capacity to make medical decisions on their own. He rejected any notion of due process violations given that consideration of the patient's wishes under the circumstances (1) "does not make logical sense and could cause erroneous medical decisions" and (2) is not "deeply rooted in this Nation's history and tradition." In the same year, in *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, Judge Kavanaugh joined the court's majority opinion concluding that terminally ill persons lack constitutional or other legal rights to access experimental drugs unapproved by FDA.

### *Tobacco and E-cigarettes*

Judge Kavanaugh **concurred** with the majority opinion in *Competitive Enterprise Institute v. Department of Transportation* (2017) upholding DOT's rule prohibiting use of e-cigarettes on commercial flights. In what Judge Kavanaugh labeled a "close call," he suggested that relevant federal law banning "smoking" could be reasonably interpreted to cover e-cigarettes, even though the law was enacted well before the emergence of e-cigarettes.

### *Marijuana*

To date, Judge Kavanaugh has not specifically addressed federal or state laws governing marijuana distribution, possession or use (outside specific criminal settings). A prevailing **question** of federal law concerns the possibility of DOJ

prosecutions of marijuana producers or distributors following state law in **30 jurisdictions** that allow use for medical or recreational purposes. On this issue, Judge Kavanaugh has offered more general guidance. He asks in a **2016 speech**, “[d]oes the executive branch have the duty to enforce every such law against every known violator of the law?” He responds in the negative, but ponders where to draw the line. “Can the executive branch decline to enforce a law only because of resource constraints, . . . ? That’s [a] question of prosecutorial discretion.”

### *Food Labeling*

In *American Meat Institute v. U.S. Department of Agriculture* (2014), meat companies raised a First Amendment commercial speech challenge to a regulation requiring their products to carry country-of-origin labels. Judge Kavanaugh concurred that (1) USDA’s interest in supporting domestic ranchers and farmers was substantial; and (2) “the disclosure is purely factual, uncontroversial, not unduly burdensome, and reasonably related to [USDA’s] interest.” Specific food safety considerations were not addressed.

### *Tort Liability*

In the 2007 case *Mills v. Giant of Maryland, LLC*, Judge Kavanaugh rejected a class-action tort liability claim of a group of lactose-intolerant individuals against nine milk sellers. The group sought damages for temporary injuries related to their ingestion of milk, which could have been avoided if the sellers had placed lactose intolerant warnings on the labels. Neither the lower district court, nor Judge Kavanaugh’s court, accepted the group’s claim. As Judge Kavanaugh surmised, “Tort law does not provide protection from the obvious or ‘widely known’ risks of consuming a particular food.... A bout of gas or indigestion does not justify a race to the courthouse.... [O]therwise, a variety of food manufacturers as well as stadiums, bars, restaurants, convenience stores, and hot dog stands throughout the country would be liable to millions... every day.”

### *Gun Violence Prevention*

In 2011, the D.C. Circuit Court of Appeals upheld a local D.C. ordinance banning most semi-automatic rifles and requiring firearm registration. Judge Kavanaugh **dissented** primarily to the court’s use of an intermediate level of scrutiny to assess the D.C. law. Judge Kavanaugh concluded that the U.S. Supreme Court’s prior ruling in *DC v. Heller* (2008) stood for the notion that semi-automatic rifles are also constitutionally protected by the Second Amendment, and their legality thus should not be based on balancing tests. In *Rollins v. Wackenhut Services, Inc.* (2012), Judge Kavanaugh concurred with the court when it dismissed a wrongful death case brought by a mother against an employer who provided a gun to her son/employee for work purposes. The son/employee (who also was taking prescription medications) subsequently used the gun to kill himself.

### *Climate Change and the Environment*

While **acknowledging** the existence and urgency of global warming, Judge Kavanaugh has repeatedly ruled against laws and policies designed to combat it. In several cases, he has invalidated Environmental Protection Agency regulations on grounds the agency lacked congressional authority to act. In 2012, Judge Kavanaugh decided in *E.M.E. Homer City Generation v. EPA* that the Cross-State Air Pollution Rule (setting emissions reduction responsibilities for 28 upwind states) violated the **Clean Air Act**. In *Coalition for Responsible Regulation, Inc. v. EPA* (2012), he dissented from the court’s upholding on the Clean Air Act’s Prevention of Significant Deterioration provisions. Judge Kavanaugh suggested EPA’s specific greenhouse gas provisions “went well beyond what Congress authorized.” Similarly, in *Mexichem Fluor, Inc. v. EPA* (2017), he invalidated EPA’s restrictive rules regarding the manufacturer of products containing hydrofluorocarbons (which contribute to global warming).

In *Communities for a Better Environment v. EPA* (2014), Judge Kavanaugh approved EPA's decision not to alter standards surrounding air quality and carbon monoxide, but rejected calls for even greater EPA intervention. In the same year in *Natural Resources Defense Council v. EPA*, Judge Kavanaugh sided with EPA against a challenge of its rules under the Clean Air Act that "limit the emissions of [various hazardous air pollutants] from cement plants."

## CIVIL RIGHTS

### *Voting Rights and Affirmative Action*

In *South Carolina v. US* (2012), Judge Kavanaugh denied pre-clearance of South Carolina's proposed voter photo ID law for the November 2012 election pursuant to Section 5 of the **Voting Rights Act**. Absent sufficient time for implementation, Judge Kavanaugh noted, South Carolina's law could have "discriminatory retrogressive effects on African-American voters." He subsequently determined that the photo ID law could be pre-cleared for elections beginning in 2013.

In 1999, Judge Kavanaugh co-wrote an **amicus brief** for an anti-affirmative action group concerning the U.S. Supreme Court decision in *Rice v. Cayetano* (2000). The authors argued that a Hawaii state law allowing only Native Hawaiians to vote in Office of Hawaiian Affairs elections was unconstitutional under the 14<sup>th</sup> and 15<sup>th</sup> Amendments because the law required racial qualification for voting. When questioned whether the brief reflected his personal views on affirmative action during his **2004 judicial confirmation hearing**, Judge Kavanaugh responded he would "faithfully follow" the Supreme Court's precedents on affirmative action programs.

### *Disabilities and Workers' Rights*

In *Hester v. D.C.* (2007), a local government agreed to provide special education services to an incarcerated disabled student, but prison staff blocked educators from entering. Considering contractual requirements via the federal **Individuals with Disabilities Education Act**, Judge Kavanaugh found that local government was not liable for failing to provide the education because it was prevented from fulfilling its obligation.

Judge Kavanaugh has denied relief in cases concerning workplace discrimination and collective bargaining rights. In *Johnson v. Interstate Management Co., LLC* (2017) and *Adeyemi v. D.C.* (2008), Judge Kavanaugh rejected claims under the **Americans with Disabilities Act**, finding each time that employers had provided sufficient evidence of valid reasons to fire employees.

Concerning union rights, Judge Kavanaugh dissented in *Agri Processor Co. v. NLRB* (2008), arguing that undocumented persons are not covered as "employees" under the **National Labor Relations Act** and cannot validly vote in union elections. In *Venetian Casino Resort, LLC v. NLRB* (2015) he ruled in favor of a casino resort that asked the police to issue criminal citations against protesters in a union demonstration in front of the resort. And in *Verizon New England v. NLRB* (2016), Judge Kavanaugh determined that an employer could prohibit employees from posting pro-union signs in their vehicles parked on company property pursuant to employees' waivers of their rights to picket in employer contracts.

Regarding drug testing of employees, Judge Kavanaugh disagreed with his court's 2012 ruling that the Fourth Amendment protects certain federal employees from mandatory drug tests. In *National Federation of Employees v. Vilsack*, he opined that mandatory drug tests were constitutional because government employees were working with at-risk youth housed in residential schools.



## LAW ENFORCEMENT

On July 11, 2018, DOJ **asked** U.S. Attorneys nationally to provide personnel time and expertise to vet Judge Kavanaugh, presumably including his opinions and positions related to federal law enforcement. His holdings on issues including capital punishment or police violence are scant. In ***Roth v. DOJ*** (2011), the D.C. Circuit Court of Appeals granted a **Freedom of Information Act** request to a death row inmate seeking potentially exonerating information from the Federal Bureau of Investigation. Judge Kavanaugh dissented, concluding the FBI should be able to deny the inmate's request due to other suspects' privacy concerns about the requested documents.

In ***Hundley v. D.C.*** (2007), Judge Kavanaugh considered an alleged instance of police brutality regarding an African-American man shot by an officer in self-defense. At trial the jury decided the officer should pay damages for stopping the man initially, but not for the officer's use of excessive force. On appeal Judge Kavanaugh ordered a new trial on the basis that (1) negligently stopping the man was insufficient alone to sustain damages; and (2) there were inconsistencies in the jury's assessment of the officer's claims of self-defense and its finding of non-excessive force.

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