

---

# Public Health Law and Policy Implications: Justice Kavanaugh

*James G. Hodge, Jr., Wendy E. Parmet, Georges Benjamin,  
Sarah Somers, and Chelsea Gulinson*

## Introduction

On September 7, 2018, the American Bar Association (ABA) Standing Committee concluded that U.S. Supreme Court nominee Judge Brett Kavanaugh met “the highest standards of integrity, professional competence, and judicial temperament.”<sup>1</sup> Yet, subsequent Senate confirmation hearings, punctuated by sexual assault allegations by Dr. Christine Blasey Ford (and others), revealed a vastly different character. In the midst of the #MeToo era, the politicized hearings prompted immediate reactions. The ABA reopened evaluation of Judge Kavanaugh. The Senate requested the President to allow a limited FBI investigation of sexual assault allegations.<sup>2</sup> Thousands of law professors opined in a published letter that Judge Kavanaugh “displayed a lack of judicial temperament...disqualifying for any court, and certainly [the Supreme Court].”<sup>3</sup>

Justice Kavanaugh’s eventual confirmation via a narrow Senate majority vote on October 6, 2018 may have lasting repercussions on national health laws and policies. His originalist jurisprudence disfavors public health principles and efforts. His antagonistic remarks

during the hearings underscored the divisive nature of American politics<sup>4</sup> and tarnished the independent spirit of the judicial branch. As discussed below, Justice Kavanaugh’s character, holdings, and scholarship raise substantial concerns over core principles impacting the public’s health.

## Kavanaugh and Constitutional Interpretation

Justice Kavanaugh’s ascension to the Supreme Court implicates a complex series of constitutional issues at the heart of modern jurisprudence and principles of health justice. Replacing an occasional swing voter, Justice Kennedy, on an otherwise split Court, Justice Kavanaugh’s originalist and textualist perspectives are expected to lean decidedly conservative. As a judge on the D.C. Court of Appeals, he regularly supported big business by condemning broad interpretations of Constitutional structural and rights-based principles.<sup>5</sup> He cohesively tied separation of powers principles with promotion of liberty as a way to limit governmental powers while enhancing Presidential authorities. Claiming to assess laws akin to how an umpire calls pitches, Judge Kavanaugh reversed dozens of federal agency public health and environmental regulations while on the D.C. Circuit.<sup>6</sup>

From a public health point of view, his jurisprudence and scholarship are alarming. Years ago Justice Kavanaugh argued that the Affordable Care Act (ACA)’s individual mandate exceeded Congress’s powers.<sup>7</sup> His position was later adopted in part by the U.S. Supreme Court in *National Federation of Independent Business v. Sebelius*<sup>8</sup> although the Court ultimately justified the mandate via Congress’ tax power. Subsequently, Congress eliminated the penalty underlying the mandate via the Tax Cuts and Jobs Act of 2017.<sup>9</sup> This legislative

---

**James G. Hodge, Jr., J.D., LL.M.,** is Professor of Public Health Law and Ethics; Director, Center for Public Health Law and Policy, Sandra Day O’Connor College of Law, Arizona State University (ASU); and Director, Western Region Office, Network for Public Health Law. **Wendy E. Parmet, J.D.,** is Matthews Distinguished University Professor of Law; Director, Center for Health Policy and Law; and Professor of Public Policy and Urban Affairs, Northeastern University. **Georges C. Benjamin, M.D.,** is Executive Director, American Public Health Association. **Sarah Somers, J.D., M.P.H.,** is Managing Attorney, North Carolina Office, National Health Law Program. **Chelsea L. Gulinson, J.D.,** is Research Scholar, Center for Public Health Law and Policy, Sandra Day O’Connor College of Law, ASU; and Staff Attorney, Western Region Office, Network for Public Health Law.

development led a federal district court to invalidate the entire ACA in *Texas v. United States* (2018).<sup>10</sup> Following review by the Fifth Circuit Court of Appeals, this case is likely to reach the Supreme Court for a final decision in 2020.

Justice Kavanaugh is an advocate of Second Amendment rights to possess and use firearms, suggesting that access to semiautomatic weapons outweighs community safety.<sup>11</sup> His views are reflected in a 2010 dissenting opinion in *Heller v. District of Columbia*<sup>12</sup> (following the Supreme Court's 2008 decision upholding Second Amendment rights in *Heller D*). Judge Kavanaugh advocated for a higher standard (beyond intermediate scrutiny) to assess the constitutionality of state or local gun violence prevention laws. During his initial confirmation hearings, Justice

Should the Supreme Court be inclined to restrict delegated executive agency authority in a series of forthcoming cases, the ability of agencies to implement legislation dependent on substantial regulatory actions may be significantly weakened. For example, Congress relied on *Chevron* deference in allocating considerable regulatory authority to executive agencies to clarify ACA provisions. Additional federal laws heavily implemented via executive agencies include the Clean Air Act, Clean Water Act, and multiple civil and human rights laws.

### Uncertain Future of Access to Reproductive Health Services

Advocates for reproductive rights and women's health are concerned about Justice Kavanaugh's appointment to the Court. His judicial opinions, writings, and speeches strongly indicate that he will join its conservative wing and diminish women's rights to reproductive health services. Justice Kavanaugh has previously proffered conflicting statements and holdings on whether *Roe v. Wade*, the 1973 Supreme Court decision legalizing abortions, is settled law.

In *Garza v. Hargan* (2017), an undocumented immigrant teenager detained in a federal facility in Texas was denied permission to leave custody and obtain an abortion.<sup>16</sup> A federal district court ordered the government to stop interfering with her right to an abortion.<sup>17</sup> A panel of the D.C. Circuit Court of Appeals (including then-Judge Kavanaugh) vacated this order, requiring actions that could have caused delay past the point when abortion was possible or safe.<sup>18</sup> Garza's attorneys filed an emergency petition for hearing before the full Circuit Court, which reversed and reinstated the original order.<sup>19</sup> In dissent Judge Kavanaugh suggested the court had "badly erred" because the government's interest in "favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion" did not unduly burden her right to choose.<sup>20</sup>

The 2014 case, *Priests for Life v. Department of Health and Human Services*,<sup>21</sup> was one of several challenges to the ACA's mandate that religious employers provide contraceptive coverage. The plaintiffs claimed that a short form "opt out" process to avoid the requirement violated their rights to religious freedom.<sup>22</sup> The district court rejected their claims which the D.C. Circuit affirmed.<sup>23</sup> Regarding the denial of a rehearing, Judge Kavanaugh dissented, stating that the opt out process substantially burdened an employer's religious exercise.<sup>24</sup>

His originalist jurisprudence disfavors public health principles and efforts. His antagonistic remarks during the hearings underscored the divisive nature of American politics and tarnished the independent spirit of the judicial branch...Justice Kavanaugh's character, holdings, and scholarship raise substantial concerns over core principles impacting the public's health.

Kavanaugh followed protocol and refused to comment on reproductive rights issues. However, in prior cases and scholarship, noted below, he expressed significant unease over women's continued access to "unenumerated rights" to abortions.<sup>13</sup>

### Impacts on Public Health Administrative Regulations

Justice Kavanaugh's judicial positions and views on separation of powers reflect waning support for administrative and regulatory legal authorities of executive branch agencies. This is best illustrated by his position on the landmark Supreme Court decision, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984).<sup>14</sup> In this case, the Court held that limited delegations of legislative authority to executive branch agencies are constitutional. As a result, executive agencies can be authorized by Congress to reasonably interpret statutory law when crafting supporting administrative rules. Justice Kavanaugh has criticized *Chevron* deference, labeling it a "textual invention" of the Supreme Court.<sup>15</sup>

In essence, Judge Kavanaugh's opinions that (1) a teenager must essentially extract herself from federal custody to access a legal abortion<sup>25</sup> and (2) a simple process to opt out of ACA contraceptive coverage infringed on religious freedoms reveal a judicial philosophy at odds with women's access to reproductive health services. To the extent it is shared among other Justices on the Court, advocates fear dramatic erosions of rights and diminutions of access to long-standing reproductive health services.

### A Contentious Nomination Process

Although Justice Kavanaugh's greatest impact on health may result from his rulings on the Court, the process through which he was confirmed also has national public health repercussions. Sexual assault is highly prevalent in the U.S. One in three women and one in six men experience sexual violence in their lifetime.<sup>26</sup> Many suffer long-term physical and mental health consequences.<sup>27</sup> Most victims do not report sexual assaults.<sup>28</sup> For many individuals, Justice Kavanaugh's confirmation hearings and his vehement denial of Dr. Ford's sexual assault allegations triggered painful memories.<sup>29</sup> Even more concerning for long-term health is the impact of the hearings and subsequent debates, including President Trump's mocking of Dr. Ford, on future behavior. In a poll taken shortly after Justice Kavanaugh's confirmation, 78% of voters agreed that women are not believed when they report sexual assault; 58% agreed that men might be unfairly accused of assault.<sup>30</sup> Whether these perceptions will deter victims from reporting attacks or embolden would-be attackers remains to be seen.

The highly contentious and deeply partisan confirmation battle may also damage public health by undermining respect for the Supreme Court. Faith in an independent judiciary is a core element of the rule of law, which itself is a "foundational determinant of health."<sup>31</sup> Even before Kavanaugh's hearings, public confidence in the Court had been declining.<sup>32</sup> The starkly partisan nature of the confirmation process, marked by Justice Kavanaugh's overtly biased comments, may hasten that decline. If the public views the Court as overly partisan, its capacity to assure Americans that public health powers are exercised consistent with the rule of law will falter.

### Conclusion

Justice Kavanaugh's confirmation to the Supreme Court looms over core public health legal principles at the heart of ACA protections, executive agency authorities, gun violence prevention, and reproductive rights. Communal health interests may be thwarted via unbalanced or biased views. ACA provisions could

be further abridged or voided outright. Justice Kavanaugh's support for increased presidential power coupled with disparagement of *Chevron* deference for administrative regulatory authority may shift long-standing public health, environmental, and human rights protections. Access to reproductive rights and services are at risk given his murky positions and strong preferences for religious freedoms. His questionable capacity to engage in neutral decision-making has the potential to jeopardize public trust in an independent judiciary at the core of American democracy. While future decisions of the Supreme Court depend on the collective views of all its members, Justice Kavanaugh's ascension may have long-term repercussions on public health law and policy.

### Acknowledgement

The authors thank Drew Hensley and Walter G. Johnson, Senior Legal Researchers, Center for Public Health Law and Policy, Sandra Day O'Connor College of Law, ASU, for their research and editing contributions.

### Note

The authors have nothing to disclose.

### References

1. P. T. Moxley et al., "Statement re: Honorable Brett M. Kavanaugh," American Bar Association, September 7, 2018, available at <<https://www.americanbar.org/content/dam/aba/uncategorized/GAO/KavanaughStatementF92018.pdf>> (last visited April 4, 2019).
2. A. Ramzy and C. Hauser, "American Bar Association and Yale Law School Urge F.B.I. Inquiry Into Kavanaugh," *New York Times*, September 28, 2018, available at <<https://www.nytimes.com/2018/09/28/us/politics/judge-kavanaugh-american-bar-association-fbi.html>> (last visited April 4, 2019).
3. S. Svrluga, "'Unfathomable': More than 2,400 Law Professors Sign Letter Opposing Kavanaugh's Confirmation," *Washington Post*, October 4, 2018, available at <[https://www.washingtonpost.com/education/2018/10/04/unprecedented-unfathomable-more-than-law-professors-sign-letter-after-kavanaugh-hearing/?utm\\_term=.a33869e00472](https://www.washingtonpost.com/education/2018/10/04/unprecedented-unfathomable-more-than-law-professors-sign-letter-after-kavanaugh-hearing/?utm_term=.a33869e00472)> (last visited April 4, 2019).
4. J. S. Gersen, "Brett Kavanaugh's Damaging, Revealing Partisan Bitterness," *New Yorker*, September 28, 2018, available at <<https://www.newyorker.com/news/daily-comment/brett-kavanaughs-damaging-revealing-partisan-bitterness-supreme-court-confirmation>> (last visited April 4, 2019).
5. J. G. Hodge, Jr., et al., "Assessment of Key Constitutional, Public Health & Health Policy Positions, Honorable Brett M. Kavanaugh, Associate Justice Nominee, U.S. Supreme Court," American Public Health Association, July 25, 2018, available at <[https://www.apha.org/-/media/files/pdf/topics/kavanaugh\\_assessment.ashx?la=en&hash=C9451DBE96CB89D9B034EF9E6F56B71C4C6BAAFD](https://www.apha.org/-/media/files/pdf/topics/kavanaugh_assessment.ashx?la=en&hash=C9451DBE96CB89D9B034EF9E6F56B71C4C6BAAFD)> (last visited April 4, 2019).
6. L. O. Gostin and J. G. Hodge, Jr., "Substantial Shifts in Supreme Court Health Law Jurisprudence," *JAMA* 320, no. 14 (2018): 1431-1432.
7. *Seven-Sky v. Holder*, 661 F. 3d 1 (D.C. Cir. 2011).
8. *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).
9. 26 U.S.C. § 1 (2017).

10. *Texas v. United States*, No. 4:18-cv-00167-O, 2018 WL 6589412 (N.D. Tex. Dec. 14, 2018) (appealed to the 5th Circuit on Jan. 3, 2019).
11. Gostin and Hodge, *supra* note 6, at 1432.
12. *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2010) (Kavanaugh, J., dissenting).
13. B. M. Kavanaugh, "From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist," Walter Berns Constitution Day Lecture, September 18, 2017, *available at* <<http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf>> (last visited April 4, 2019).
14. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
15. B. M. Kavanaugh, "Fixing Statutory Interpretation," *Harvard Law Review* 129, no. 8 (2016): 2118-2163.
16. *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (*en banc*).
17. *Garza v. Hargan*, No. 17-cv-02122 (D.D.C. Oct. 18, 2017) (temporary restraining order).
18. *Garza v. Hargan*, 874 F.3d 735, 741, n.6 (D.C. Cir. 2017) (*en banc*).
19. *Id.*, at 736.
20. *Id.*, at 752 (Kavanaugh, J., dissenting).
21. *Priests for Life v. Department of Health and Human Services*, 772 F.3d 229 (D.C. Cir. 2014).
22. *Id.*, at 235.
23. *Id.*, affirming 7 F. Supp. 3d 88 (D.D.C. 2013).
24. *Priests for Life v. Department of Health and Human Services*, 808 F.3d 1, 14 (D.C. Cir. 2015) (Kavanaugh, J., dissenting).
25. *Garza v. Hargan*, 874 F.3d 735, 736 (Millet, J., concurring).
26. National Sexual Violence Resource Center, "Statistics," March 17, 2018, *available at* <<https://www.nsvrc.org/statistics>> (last visited April 4, 2019).
27. CDC, *National Intimate Partner and Sexual Violence Survey: 2010 Summary Report*, November 2011.
28. National Sexual Violence Resource Center, "Statistics," March 17, 2018, *available at* <<https://www.nsvrc.org/statistics>> (last visited April 4, 2019).
29. M. Fox, "Kavanaugh Hearings Triggered Painful Memories, One Doctor Finds," National Broadcasting Company News, October 11, 2018, *available at* <<https://www.nbcnews.com/health/health-news/kavanaugh-hearings-triggered-painful-memories-one-doctor-finds-n919261>> (last visited April 4, 2019).
30. D. Balz and S. Clement, "Battleground House Districts Remain Close in New Poll," *Washington Post*, October 23, 2018, *available at* <[https://www.washingtonpost.com/politics/battleground-house-districts-remain-close-in-new-poll/2018/10/22/e6c77a32-d63e-11e8-aeb7-ddcad4a0a54e\\_story.html?utm\\_term=.0974b903e153](https://www.washingtonpost.com/politics/battleground-house-districts-remain-close-in-new-poll/2018/10/22/e6c77a32-d63e-11e8-aeb7-ddcad4a0a54e_story.html?utm_term=.0974b903e153)> (last visited April 4, 2019).
31. A. M. Pinzon-Rondon et al., "Association of Rule of Law and Health Outcomes: An Ecological Study," *British Medical Journal Open* 5, no. 10 (2014), *available at* <<https://bmjopen.bmj.com/content/5/10/e007004>> (last visited April 4, 2019).
32. S. Shayanian, "Gallup: Only 37 % of Americans Highly Confident in Supreme Court," *United Press International*, July 2, 2018, *available at* <<https://www.upi.com/Gallup-Only-37-of-Americans-highly-confident-in-Supreme-Court/3471530530061/>> (last visited April 4, 2019).