



Written by [R. Cort Kirkwood](#) on October 8, 2018

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Criticisms of Kavanaugh

When President Trump nominated Judge Brett Kavanaugh to replace liberal Anthony Kennedy on the U.S. Supreme Court, the carefully scheduled Trump Derangement commenced. Such was the fear that Trump would keep his campaign promise and nominate someone who professes to follow the Constitution strictly, and not interpret it to mean something other than what it really says, that Women's March published a preprepared news release riddled with errors.



"In response to Donald Trump's nomination of XX to the Supreme Court of the United States," the lament began. "Trump's announcement today is a death sentence for thousands of women in the United States," it continued, misspelling Kavanaugh's name. The release predicted the rise of "white patriarchal supremacists" and their "oppressive agenda."

Mull that over. "Death sentence?" "White patriarchal supremacists?" "Oppressive agenda?" That's the stuff of kooky fiction by Margaret Atwood. It's not reality.

Yet the anti-Kavanaugh jihadists aren't just exemplars of how extreme the Left has become, particularly if it sniffs a judicial nominee who might fiddle with *Roe v. Wade*, the Left's principal dogmatic legal teaching; they are, as well, the logical end of what happens now with every vacancy on the court. Each nomination occasions bitter, partisan, ideological war because both sides know the high court has become the final, Solomonic arbiter of all local, state, and federal policy. And the court, by the way, arrogated that power unto itself, with no argument from the other two *co-equal* branches of government. Thus, we get press releases about the nomination of XX to the court.

The vicious ideological combat didn't begin with Kavanaugh, or before him, Neil Gorsuch, or before him, President Obama's failed nominee, Merrick Garland. Those of a certain age remember the smearing of a man who could have been one of the greatest justices to sit on the court, Robert Bork.

His name became a verb. Thus did the Left tried to "Bork" Kavanaugh. The Democrats said they would examine every word Kavanaugh ever wrote, which would have included millions of documents given his work in the Bush administration. That tactic failed, so they conceived another: peddling the lie that Kavanaugh believed and testified that all birth control drugs induced abortions. Kavanaugh didn't say it, he doesn't believe it, and his dissent in the case he discussed proved it. The *Washington Post's* fact checker awarded the chief promoter of that lie, Senator Kamala Harris, four of its famed Pinocchios. Democrats distorted other testimony, too. But the most despicable tactic was the last-minute anonymous accusation that Kavanaugh sexually assaulted a woman when he was in high school. Kavanaugh and one of his friends denied it, and 65 women signed a letter that said, essentially, the story was ridiculous.

That mendacious character assassination attempt aside, the question is why either side is jumping to



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conclusions. He is, apparently, not a certain vote to reverse *Roe v. Wade*, a constitutional abomination. But who knows? He might. He's good on guns, we are told, but perhaps less so on takings and the Fourth Amendment, which protects us from unwarranted searches and seizures. On ObamaCare, another fight that won't end, both sides are, again, scared. How would he vote should an ObamaCare case land in the court's lap? Conservatives can only hope that Kavanaugh is what the Left says he is: a constitutionalist who will help roll back the powers of the megastate, including the court itself. But that's uncertain.

Photo: AP Images

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Roe v. Wade

The caterwauling about Kavanaugh centered, as with all nominations, on *Roe v. Wade*, the high court's decision in 1973 that struck down abortion laws in all 50 states and legalized abortion on demand at any time for any reason. It is the Magna Carta of modern leftist judicial activism. Abortion being a sacrament in the High Church of Feminism, any nominee who even entertained a thought that *Roe v. Wade* was decided wrongly must be declared anathema.

Pro-life conservatives are uneasy about Kavanaugh and what he might do given an opportunity to overturn *Roe v. Wade*, should the occasion arise.

"We talked about whether he considered *Roe* to be settled law," said leftist Republican Senator Susan Collins (Maine). Collins and fellow pro-abortion Republican Lisa Murkowski (Alaska) are key votes for Kavanaugh's elevation to the court. So he had to assure the feminist pair he would rule that murdering the unborn is sacrosanct. Reported Collins, "He said that he agreed with what [Chief] Justice [John] Roberts said at his nomination hearing in which he said that it was settled law."

But that means nothing, the Left says. *Rolling Stone* noted that Neil Gorsuch also assured Collins that he would respect precedent, but has been busily overturning precedent in such cases as *Janus v. AFSCME*. That ruling said government workers can't be forced to pay dues to unions that represent workers in collective bargaining because those dues are often used for political activities the workers oppose. The Left went ballistic about *Janus* because it cut off a major supply of campaign funding for Democratic candidates. Gorsuch helped write a book on precedent, the failing magazine noted, and none other than Kavanaugh contributed.

Rolling Stone and Think Progress, a key leftist website, note that Kavanaugh voted with the Trump administration when it tried to block an illegal alien from aborting her child, and Think Progress published a compelling piece, which ought to hearten conservatives, to show that Kavanaugh will almost certainly vote to overturn *Roe*.

Think Progress reported that 13 abortion cases are percolating through lower courts, with two judges in one of them practically begging for the Supreme Court to overturn a decision *Roe v. Wade* forced them to make, which presumably would undermine *Roe* itself. As well, the website observed, citing his speech to the American Enterprise Institute, Kavanaugh subscribes to the views of late Chief Justice William Rehnquist on the matter of unenumerated rights — meaning rights not mentioned in the Constitution. Rehnquist believed, Kavanaugh said, "that unenumerated rights could be recognized by the courts only if the asserted right was rooted in the nation's history and tradition."



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In 1997's *Washington vs. Glucksberg*, which involved the putative right to assisted suicide, Kavanaugh said, "Rehnquist wrote the opinion for the Court saying that the rights and liberties protected by the due process clause are those rights that are deeply rooted in the nation's history and tradition. And he rejected the claim that assisted suicide qualified as such a fundamental right." Kavanaugh continued:

Of course, even a first-year law student could tell you that the *Glucksberg* approach to unenumerated rights was not consistent with the approach of the abortion cases such as *Roe vs. Wade* in 1973, as well as the 1992 decision reaffirming *Roe*, known as *Planned Parenthood vs. Casey*.

What to make of that? In this context, it's fair to say that Justice Rehnquist was not successful in convincing a majority of the justices in the context of abortion either on *Roe* itself or in the later cases such as *Casey*, in the latter case perhaps because of *stare decisis*.

But he was successful in stemming the general tide of free willing judicial creation of unenumerated rights that were not rooted in the nation's history and tradition. The *Glucksberg* case stands to this day as an important precedent, limiting the Court's role in the realm of social policy and helping to ensure that the Court operates more as a court of law and less as an institution of social policy.

These sentiments, Think Progress averred, mean Kavanaugh is almost a certain vote to overturn *Roe* because the "right to an abortion" is not an unenumerated right "rooted" in the nation's "history and tradition." Then again, perhaps he would be upholding precedent, which is what the Left wants. *Glucksberg*, after all, "stands to this day as important precedent."

For the sake of the unborn, let's hope so, but at any rate, Kavanaugh has terrified the Left even as his comments to Collins left the Right uneasy.

Guns and the Fourth Amendment

In the area of guns, too, the Left says, Kavanaugh isn't just bad news. He's an "extremist," the go-to imprecation when the Left wants to signal that a nominee must be destroyed. "Judge Kavanaugh's Extremist Position on the Second Amendment," ran the headline at the *American Prospect*.

The writer in this case attempts to "Bork" Kavanaugh by claiming that he, like Bork, is "outside the 'mainstream'" on gun rights, largely because of a dissent on Washington, D.C.'s law regulating semi-automatic rifles. Known as *Heller 2* — *Heller 1* dealt with handguns for home protection — Kavanaugh did not view the law as constitutional because he did not see the difference in permitting semi-automatic handguns and semi-automatic rifles. Of course, Think Progress disagrees, and foresees rivers of blood if Kavanaugh gets his way on guns.

Reason magazine noted that Kavanaugh will likely rule for an expansive view of the Second Amendment, so Kavanaugh is probably good on guns.

But citing Senator Rand Paul (R-Ky.) and Representative Justin Amash (R-Mich.), *Reason* scribe Jacob Sullum is quite concerned that Kavanaugh will not fortify the Fourth's protection against "unreasonable searches and seizures."

Kavanaugh thinks the National Security Agency's mining of American telephone records is "entirely consistent with the Fourth Amendment," he wrote in rejecting a rehearing *en banc* on the matter. Citing a decision in 1979 that permitted police to search *sans* warrant the phone numbers a robbery suspect



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dialled, Kavanaugh opined that NSA's turning on its cyber-Hoovers is not a search. The NSA data trawling "readily qualifies as reasonable" because it "serves a critically important special need — preventing terrorist attacks on the United States." Thus, he concluded, the "Fourth Amendment allows governmental searches and seizures without individualized suspicion when the Government demonstrates a sufficient 'special need' — that is, a need beyond the normal need for law enforcement — that outweighs the intrusion on individual liberty. Examples include drug testing of students, roadblocks to detect drunk drivers, border checkpoints, and security screening at airports."

"I disagree completely," Paul said. "And I think if we give up our liberty for security, we may end up with what Franklin said, and that's neither — neither liberty nor security."

Beyond that, *Reason* reported, "Kavanaugh also perceived a 'special need' in a 2012 case involving the U.S. Forest Service's random drug testing of people employed at its Job Corps Civilian Conservation Centers. While two members of a three-judge D.C. Circuit panel deemed that requirement unreasonable because the government had presented no evidence of 'a serious drug problem among staff,' Kavanaugh said the policy was justified as a way of shielding the at-risk youth served by the centers from drugs."

Conservatives are no doubt split on whether the NSA ought to vacuum cyberspace and the atmosphere, sucking up even the private conversations of perfectly innocent Americans in the hope of bagging a terrorist. But regardless of what one thinks about any given example, a larger concern ought to give pause. The government's power to code and trace our activities, as depicted in such popular television fare as *24*, has reached frightening levels. As I wrote in *Chronicles* in 2008, quoting the late Sam Francis, the tyrants of old, such as Mao or Stalin, would drool at the prospect of having the techno-gadgetry available to the Deep State today.

Given his support for Rehnquist's view that obviously guilty criminals should not be freed on technicalities, such as a warrantless search that turned up evidence of guilt, a columnist for the *Chicago Tribune* summed up Kavanaugh this way: He has a "soft spot for police abuses."

So where will Kavanaugh come down on the Fourth Amendment? Kavanaugh might not like the exclusionary rule, which forbids prosecutors from using illegally obtained evidence, wrote Rory Little for the *Scotusblog*, but "many of Kavanaugh's rulings can be labeled 'pro-defense': Although some court-observers fear that Kavanaugh's confirmation could drive the Supreme Court further to 'the right,' I found at least eight D.C. Circuit decisions ... in which Kavanaugh wrote to join a 'pro-defendant' ruling."

On criminal cases, Little called him a "'Kennedy-esque' moderate."

Taking Private Property

As bad — or good — as Kavanaugh might be on the Fourth Amendment, those who have examined how he might rule on takings and the burdensome federal regulations favor his confirmation. "While commentators have been scrutinizing Kavanaugh's record on hot-button topics like abortion and immigration," *Realtor.com* observed, "there's been little discussion of what a more conservative court could mean for home buyers, sellers, and owners. And it could mean a great deal."

That report anticipates more property cases heading to the court. If Kavanaugh is confirmed, plaintiffs will find a court more amenable to their interests and more opposed to eminent domain seizures.



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“Eminent domain could be checked,” the website averred. The site explained:

For years, when most Americans thought of eminent domain, they thought of it as the government seizure of privately owned land to use for new schools, roads, or utilities.

But *Kelo v. City of New London* changed those perceptions. In a slim 5-4 ruling, the Supreme Court decided in 2005 that local governments could use eminent domain to take private land when redevelopment would result in economic benefits to a community.

That means that homes could hypothetically be seized and turned over to a developer, and a mall or hotel could go up where they once stood. Property owners would be compensated for their losses. (In response, a number of states passed laws restricting this practice.)

But now, the website noted, with Kennedy gone and his replacement much less inclined to grant government such broad powers of seizure, the outcome could be different. One such case, the website reported, involves a challenge to an ordinance in Scott, Pennsylvania, that requires residents who own property where graves are found to permit public access during the day. Kavanaugh, many believe, is a vote to strike down such an ordinance as an unjust taking.

As environmental restrictions go, *Politico* reported, Kavanaugh “is not a fan of what he believes is the overreach of many government agencies — including the U.S. Environmental Protection Agency. Loosening or rescinding various federal and environmental regulations could make more land available to builders and could give property owners more control over their land.” A memo from the White House to business groups, *Politico* reported, reminded the recipients that “Kavanaugh helped kill President Obama’s most destructive new environmental rules” and has “led the effort to rein in unaccountable independent agencies.”

Stephen Wermiel, a professor of constitutional law at American University’s Washington College of Law, told *Politico* that “Kavanaugh joins a court that already thinks government agencies have too much regulatory power. He’ll be a strong fifth vote to spread that view.”

Kavanaugh on ObamaCare

What Kavanaugh might do were an ObamaCare case to land on the court’s docket depends on whom you talk to. The headlines about it are, literally, all over the place:

The Los Angeles Times: “Kavanaugh signals skepticism about the latest GOP lawsuit to overturn Obamacare”

The Washington Post: “Brett Kavanaugh could take an ax to Obamacare”

USA Today: “Brett Kavanaugh on Supreme Court could kill Affordable Care Act”

The Federalist: “How Potential SCOTUS Pick Brett Kavanaugh Wrote A Roadmap For Saving Obamacare”

According to the *LA Times*, when he traversed the halls of Calhoun and Clay for the ritual meet-and-greet, Kavanaugh told Democrats that he might not vote to overturn the unconstitutional law.

“Kavanaugh has signaled in private meetings with Senate Democrats that he is skeptical of some of the legal claims being asserted in the latest GOP-led effort to overturn the Affordable Care Act,” the newspaper reported.



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The lawsuit in question — filed by Texas plus 19 states — argues that ObamaCare is unconstitutional because Congress essentially repealed the mandate that forces Americans to buy some sort of insurance. As two lawyers involved in the case wrote for *The Hill*, “The new ACA challenge is quite simple. The Supreme Court held that individual mandate was only constitutional because it was a tax, and in doing so, salvaged the remainder of the ACA. It was only a tax because it produced ‘some revenue.’ Now, the individual mandate produces no revenue. On December 22, 2017, Congress eliminated the tax penalty. Because it produces no revenue, it can’t be described as a tax. Thus, Congress has no constitutional authority to support the individual mandate.”

Question is, would Kavanaugh buy that argument. Writing in *Reason* magazine, Damon Root suggested that Kavanaugh’s dissent in *Seven Sky v. Holder* might tell us. That lawsuit challenged ObamaCare’s constitutionality by asking whether Congress has the authority to impose the individual mandate.

The federal court upheld ObamaCare, but Kavanaugh dissented, “not because he necessarily disagreed with the majority’s Commerce Clause analysis. Rather, Kavanaugh dissented because he thought the federal courts had no business hearing the case.” Root continued:

“For judges, there is a natural and understandable inclination to decide these weighty and historic constitutional questions,” Kavanaugh wrote. “By waiting, we would respect the bedrock principle of judicial restraint that courts avoid prematurely or unnecessarily deciding constitutional questions.”

But let’s get back to what Kavanaugh told senators: “As Kavanaugh made the rounds on Capitol Hill in recent weeks he suggested that even if one piece of the healthcare law is ruled invalid, the entire law doesn’t necessarily have to come down with it, three Democrats who were in the meetings told the *Los Angeles Times*.”

When Democrats asked about the lawsuit, Kavanaugh would not address the case “directly, but repeatedly pointed to the legal idea that one unconstitutional provision shouldn’t eliminate an entire statute.” Of course, those same Democrats suspect Kavanaugh’s comments might be an “attempt to use legal semantics to alleviate fears that he would support the renewed legal attack on the Affordable Care Act.”

So, again, the question is how Kavanaugh would vote. Answer: unpredictably. He’s not a hidebound legal ideologue.

No Way to Tell

So what can anyone say about Kavanaugh’s upcoming decisions should the Senate approve him, which it likely will? Not much. No one can predict how Kavanaugh, or any other judge who has taken positions at odds with what a given constituency expects, will vote.

Some judges are entirely predictable. Justice Ruth Bader Ginsburg is one of them. So was, from the conservative side, the late Antonin Scalia. Others are less so. Kavanaugh might be good on guns, but bad on ObamaCare. Knowing the future is impossible. No one thought Chief Justice John Roberts, a Bush appointee, would save ObamaCare. But he did. Just as another Republican, Anthony Kennedy, a Reagan appointee, enshrined the fiction of homosexual “marriage” into federal law. And not just with his vote: His deciding text contains the most legally, theologically, and philosophically preposterous paragraph ever penned by a man with a law degree.

No matter what Kavanaugh does, whichever side he enrages will say, “I told you so.”



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In late August, former House speaker and abortion fanatic Nancy Pelosi (Calif.), a Catholic who has repeatedly misstated the teaching of her church on the matter, divulged one way she's working to thwart Kavanaugh's appointment: "I pray a lot."

Well, conservatives better pray a lot, too. Not necessarily that Kavanaugh gets the seat — he will, barring some unforeseen event — but that when he does, he votes to uphold the Constitution and begin rolling back the court's century-long attack on the American political order.

Kavanaugh in Brief

Democrats are furious about President Trump's nomination of Brett Kavanaugh to replace Anthony Kennedy on the U.S. Supreme Court, and not just because they fear he might undo the modern Left's most sacred legal text, *Roe v. Wade*.

They don't like him for another reason: Kavanaugh was on the team assembled by Independent Counsel Ken Starr, the man whose probe of President Clinton led to the first impeachment of a president since Andrew Johnson. Like Johnson, Clinton escaped conviction.

Indeed, Kavanaugh wasn't just a member of the team. The Yale Law School grad was its captain in some ways. He authored a sizzling memorandum that said Clinton had "disgraced his office, the legal system and the American people by having sex with a 22-year-old intern and turning her life into a shambles."

He also wrote a number of shockingly frank questions to probe Clinton's relationship with the intern, Monica Lewinsky, and he was the lead author of the Starr report.

Kavanaugh went to Yale undergrad and law school, graduating in 1990. He clerked for two federal judges, then landed a spot with Neil Gorsuch (Trump's first pick for the Supreme Court) clerking for Justice Anthony Kennedy.

He became a judge on the U.S. Court of Appeals for the District of Columbia Circuit in 2006 after serving the Bush White House.

The usual suspects, such as People for the American Way, opposed Kavanaugh's nomination to the appeals court.

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