CONSTITUTIONAL ACCOUNTABILITY CENTER

Supreme Court Nominee Brett Kavanaugh: Will He Respect The Whole Constitution?

BY DAVID H. GANS[†]

AUGUST 2018

Introduction

In announcing Judge Brett Kavanaugh's nomination to the Supreme Court, President Trump billed him as a jurist who will enforce the Constitution as written.[1] Luminaries of the conservative legal movement have lined up to support him, claiming that he "would move the Court in the direction of textualism and originalism."[2] A review of his record—both his opinions and other writings—casts serious doubt on this claim. Judge Kavanaugh's record suggests that he is a selective originalist, who unfortunately has turned a blind eye to the Constitution's text, history, and values when construing the Constitution's many broadly worded guarantees of equality and individual rights. During his tenure on the D.C. Circuit, he has taken a dim view of a number of critical constitutional protections, while stretching the rules of precedent to vastly expand others. Judge Kavanaugh therefore will have a heavy burden to meet when he testifies before the Senate Judiciary Committee, which will soon consider his nomination to the United States Supreme Court. He will have to demonstrate that he is willing to enforce the *whole* Constitution—both the Founding document and the Amendments that made our Constitution more protective of freedom, equality, and democracy—not just the parts that match his conservative political beliefs.

[†] David H. Gans is Director of the Human Rights, Civil Rights & Citizenship Program at the Constitutional Accountability Center.

[1] *See Trump Announces Brett Kavanaugh as Supreme Court Nominee: Full Video and Transcript*, N.Y. Times (July 9, 2018), https://www.nytimes.com/2018/07/09/us/politics/trump-supreme-court-announcement-transcript.html.

[2] Randy Barnett, @RandyEBarnett, Twitter (July 9, 2018, 9:11 PM), https://twitter.com/randyebarnett/status/1016505091241709568

1200 18th Street NW, Suite 501, Washington, D.C. 20036
Phone: 202-296-6889 | Fax: 202-296-6895

Our Constitution is, in its most vital respects, a progressive document. At a time when monarchies reigned in much of the world, our Constitution's Framers created a democratic system based on the sovereignty of "We the People" and a system of checks and balances to better secure liberty and prevent any one branch from aggrandizing its power. The Framers created the Article III judiciary to vindicate individual rights and prevent abuse of power by the government, recognizing that "[t]here is no other body that can afford such a protection."[3] In the Bill of Rights, our Constitution requires that the federal government respect fundamental rights and ensure fair legal treatment for all persons, citizens and noncitizens alike.

However, our original Constitution was far from perfect; it sanctioned slavery and permitted massive violations of fundamental rights by state governments. But the Amendments ratified in the wake of the Civil War, often termed America's Second Founding,[4] eliminated these blights on our Constitution.[5] The Thirteenth Amendment abolished slavery; the Fourteenth Amendment guaranteed birthright citizenship to all persons born or naturalized in the United States and wrote into the Constitution sweeping new guarantees that required state and local governments to respect the liberty, dignity, and equality of all persons; and the Fifteenth Amendment guaranteed the right to vote free from racial discrimination. All three of these Second Founding Amendments gave Congress broad enforcement power to make these new constitutional guarantees real. In the 20th century, a host of other Amendments broadened the right to vote and made our system of government more democratic. Each of these voting rights Amendments—like the Second Founding Amendments—explicitly gave enforcement power to Congress.

Both in his writings and his opinions, Judge Kavanaugh has exalted the Constitution's structure over the Amendments that have been added to the Constitution over the course of more than two centuries. Kavanaugh has discounted the Constitution's "majestic generalities" and celebrated the "nitty-gritty details of specific government structure" in the original Constitution over the broadly worded guarantees of individual rights added by the Bill of Rights, the Second Founding Amendments, and other amendments.[6] For Kavanaugh, the Constitution's structure is "where our liberty is really protected,"[7] a

---

[3] 3 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 554 (Jonathan Elliott ed., 1836) (statement of John Marshall); *see generally* David H. Gans, *The Keystone of the Arch: The Text and History of Article III and the Constitution's Promise of Access to Courts,* (2016), https://www.theusconstitution.org/think_tank/the-keystone-of-the-arch-the-text-and-history-of-article-iii-and-the-constitutions-promise-of-access-to-courts.

[4] *The Second Founding*, The Atlantic, https://www.theatlantic.com/projects/the-second-founding/ (last visited August 30, 2018).

[5] *See* David H. Gans and Douglas T. Kendall, *The Gem of the Constitution: The Text and History of the Privileges or Immunities Clause* (2008), https://www.theusconstitution.org/think_tank/the-gem-of-the-constitution; David H. Gans & Douglas T. Kendall, *The Shield of National Protection: The Text and History of Section 5 of the Fourteenth Amendment* (2009), https://www.theusconstitution.org/think_tank/the-shield-of-national-protection-the-text-history-of-section-5-of-the-fourteenth-amendment; David H. Gans, *Perfecting the Declaration: The Text and History of the Equal Protection Clause of the Fourteenth Amendment* (2011), https://www.theusconstitution.org/think_tank/perfecting-the-declaration-the-text-and-history-of-the-equal-protection-clause-of-the-fourteenth-amendment.

[6] Panel, *A Dialogue with Federal Judges on the Role of History in Interpretation*, 80 Geo. Wash. L. Rev. 1889, 1900 (2012) [hereinafter *Dialogue*]; Lecture, Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist,* 2 (September 18, 2017) [hereinafter Kavanaugh, *From the Bench*] ("It is sometimes said that the Constitution is a document of majestic generalities. I view it differently."), *available at* http://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf.

[7] *Dialogue*, *supra*, at 1900-01; Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1915 (2014) [hereinafter Kavanaugh, *Our Anchor*] ("The

view that ignores that many parts of our Constitution are designed to protect liberty by preventing the abuse of power by state governments in addition to federal structured protections. Not surprisingly, virtually all of Judge Kavanaugh's opinions that discuss the Constitution's text and history concern the Constitution's structure,[8] and even in those opinions, Judge Kavanaugh often gets the text and history wrong, taking a view of the Constitution's structure that turns our foundational charter on its head. Kavanaugh's jurisprudence would tip the scales of our systems of checks and balances decisively in favor of an all-powerful executive.

Where Judge Kavanaugh does not purport to rely on constitutional text and history, he looks to precedent, but he often interprets prior Supreme Court decisions to move the law sharply to the right. He has sought to vastly expand protections for some rights, while permitting the government to run roughshod over others. These results may please conservatives, but they are badly out of step with the Constitution's text, history, and values. Indeed, even his conservative colleagues have chided him about his approach to precedent. As Judge Janice Rogers Brown pointedly reminded Judge Kavanaugh, "[*s*]*tare decisis* means nothing if we are only bound by those cases with which we already agree. Like it or not, we cannot ignore Supreme Court precedent."[9] Given this record, Judge Kavanaugh has a heavy burden to convince the Senate that he is a judge who will be faithful to the entire Constitution if he is confirmed to a seat on the Supreme Court.

This Issue Brief unfolds as follows. Part I examines Judge Kavanaugh's jurisprudence on constitutional structure, examining his views on both presidential and congressional power. Judge Kavanaugh has written that text matters, but in many of his rulings, he has dramatically expanded the powers of the President, while narrowing the broad scope of the powers granted to Congress to solve national problems. Part II examines Judge Kavanaugh's record in cases interpreting the protections contained in the Bill of Rights; here, he has applied precedent to whittle down certain rights, while expanding others. In First and Second Amendment cases, Judge Kavanaugh has applied precedent to give corporations and the wealthy new sweeping free speech protections and gun owners broad protections against reasonable gun regulation. By contrast, he has proven a consistent pro-government vote in Fourth Amendment cases and has offered an extremely cramped view of the right to choose abortion, emptying the established undue burden standard of any real content.

---

primary protection of individual liberty in our constitutional system comes from the separation of powers in the Constitution . . . .").

[8] *See, e,g., Free Enter. Fund v. Pub. Co. Account. Oversight Bd.*, 537 F.3d 667, 685-715 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff'd in part and rev'd in part*, 561 U.S. 477 (2010); *In re Aiken County*, 645 F.3d 428, 438-48 (D.C Cir. 2011) (Kavanaugh, J., concurring); *Sissel v. U.S. Dep't of Health and Hum. Servs.*, 799 F.3d 1035, 1049-65 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from the denial of rehearing en banc); *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 164-200 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

[9] *Emily's List v. FEC*, 581 F.3d 1, 33 (D.C. Cir. 2009) (Brown, J., concurring in part).

I. Judge Kavanaugh and Constitutional Structure

A. The Powers of the President

1. Independent Agencies

Judge Kavanaugh has written a number of opinions condemning independent agencies as an extra-constitutional fourth branch of government. He has repeatedly expressed his disagreement with decades of Supreme Court precedent upholding the power of Congress to create independent agencies and to impose limits on the President's removal power.

In 2008, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, Judge Kavanaugh wrote a sweeping dissenting opinion attacking the constitutionality of the Public Company Accounting Oversight Board (PCAOB), an independent agency whose members were removable for cause by the Securities and Exchange Commission (SEC).[10] In his dissent, Kavanaugh insisted that the Board's structure could not be squared with the "text and original understanding" of Article II because, in his view, "the President possesses the power . . . to remove officers of the Executive Branch *at will*."[11] Kavanaugh conceded that "the subject of removing officers in the Executive Branch 'was not discussed in the Constitutional Convention,'"[12] but he found that beside the point. The vesting of executive power in the President, he claimed, meant that "a single President possesses the entirety of the 'executive power' . . . and the entire authority to take care that the laws be faithfully executed," including an unfettered power to remove officers at will.[13]

Kavanaugh's interpretation of Article II's Vesting Clause flew in the face of the Supreme Court's decisions in *Humphrey's Executor v. United States*[14] and *Morrison v. Olson*,[15] both of which upheld for-cause removal limitations. According to Kavanaugh, those cases should be read as narrowly as possible because they "represent[ed] what up to now have been the outermost constitutional limits on permissible congressional restrictions on the President's removal power."[16] Any "questions about the scope of those precedents" had to be resolved "in light of and in the direction of the constitutional text and constitutional history."[17] He voted to strike down PCAOB's structure on the grounds that "double for-cause removal provisions . . . completely strip the President's ability to remove PCAOB members . . . and combine to eliminate any meaningful Presidential control over the PCAOB."[18]

---

[10] 537 F.3d at 685 (Kavanaugh, J., dissenting).

[11] *Id.* at 692 (emphasis added).

[12] *Id.* at 691 (quoting *Myers v. United States*, 272 U.S. 52, 109-110 (1926)).

[13] *Id.* at 689.

[14] 295 U.S. 602 (1935).

[15] 487 U.S. 654 (1988).

[16] *Free Enter. Fund*, 537 F.3d at 698 (Kavanaugh, J., dissenting).

[17] *Id.*

[18] *Id.* at 697.

In his dissent, Judge Kavanaugh also would have held that the Board's structure violated the Appointments Clause. He argued that the members of the PCAOB were principal officers, who had to be appointed by the President and confirmed by the Senate, because the SEC lacked the power to "remove[] *at will*" Board members or "to manage the ongoing conduct of, Board inspections, investigations, and enforcement actions."[19]

In a 5-4 ruling, the Supreme Court reversed the D.C. Circuit's decision. Although the Court agreed with Kavanaugh's attack on double for-cause removal, it did so without calling into question longstanding Supreme Court precedent permitting Congress to ensure that independent agencies, in fact, enjoy some independence from presidential control. As Chief Justice Roberts put it, "While we have sustained in certain cases limits on the President's removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President's authority in this way."[20] The majority remedied this defect by excising the removal provisions, making "the Board removable by the Commission at will" and leaving "the President separated from Board members by only a single level of good-cause tenure."[21] By a 9-0 vote, the Court rejected Kavanaugh's Appointments Clause analysis, concluding that "the Board members are inferior officers whose appointment Congress may permissibly vest in a 'Hea[d] of Departmen[t].'"[22]

This is not the only case in which Judge Kavanaugh has attacked independent agencies. To the contrary, during his tenure, Judge Kavanaugh has done so repeatedly. In a 2009 case, *Securities Exchange Commission v. Federal Labor Relations Authority*, Kavanaugh wrote "separately to point out the constitutional oddity of a case pitting two agencies in the Executive Branch against one another."[23] Under Article II, he wrote, "a single President controls the Executive Branch" and thus "legal or policy disputes between two Executive Branch agencies are typically resolved by the President . . . without judicial intervention."[24] A suit between two agencies, he wrote, was "in tension with the constitutional structure designed by the Framers," and resulted from the fact that, in *Humphrey's Executor*, the "Supreme Court approved of independent agencies, at least in some circumstances," allowing them to function as "a kind of extra-constitutional Fourth Branch."[25]

In a 2011 ruling, *In re Aiken County*, Judge Kavanaugh wrote separately to question *Humphrey's Executor* once again, writing that "[o]ne would think . . . that the President would be able to direct the interpretation of law and exercise of discretion by all agencies in the Executive Branch," given that Article II vests in the President "not some of the executive power, but all of it."[26] He bemoaned that "[b]ecause of *Humphrey's Executor*, the President to this day lacks day-to-day control over large swaths of

---

[19] *Id.* at 709.

[20] *Free Enter. Fund v. Pub. Co. Account. Oversight Bd.*, 561 U.S. 477, 514 (2010).

[21] *Id.* at 509.

[22] *Id.* at 510 (quoting U.S. Const., art II, § 2, cl. 2).

[23] *Sec. Exch. Comm'n v. Fed. Lab. Rel. Board*, 568 F.3d 990, 996 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

[24] *Id.* at 997.

[25] *Id.*

[26] 645 F.3d at 439 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

regulatory policy and enforcement in the Executive Branch."[27] He viewed the decision as a politically motivated departure from the Constitution, "best explained by the fact that it was decided in 1935 on what became known as Roosevelt's 'Black Monday,'" which was "one in a line of decisions . . . by a Supreme Court seemingly bent on resisting President Roosevelt and his New Deal policies."[28] He lamented that "*Humphrey's Executor* survived" and "lives on," while other cases of that era "have long since been discarded as relics of an overly activist anti-New Deal Supreme Court."[29]

In 2018, in *PHH v. Consumer Financial Protection Bureau*, Judge Kavanaugh dissented from a 7-3 *en banc* D.C. Circuit ruling upholding the constitutionality of the leadership structure of the Consumer Financial Protection Bureau (CFPB).[30] He would have held that an independent agency headed by a single director—even though removable by the President for cause—could not be squared with Article II, which, he insisted, "speak[s] with unmistakable clarity about who controls the executive power."[31] Despite the fact that for-cause removal provisions had been upheld in *Humphrey's Executor* and *Morrison*, and had been the remedy imposed in *Free Enterprise Fund*, Judge Kavanaugh insisted that the President had the right to remove the CFPB's director at will. He claimed that "[t]he CFPB's concentration of enormous power in a single unaccountable, unchecked Director poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty."[32] Further, he asserted, the CFPB's structure "represents a gross departure from settled historical practice. Never before has an independent agency exercising substantial executive authority been headed by just one person."[33] The Supreme Court's past precedents were all distinguishable in Judge Kavanaugh's view. "Neither *Humphrey's Executor* nor any later case gives Congress blanket permission to create independent agencies that depart from history and threaten individual liberty."[34]

The centerpiece of Judge Kavanaugh's attacks on independent agencies is his view that Article II's text speaks with "unmistakable clarity" about the President's right to remove subordinate executive branch officers.[35] That claim is overstated. As Judge Kavanaugh's dissent in *Free Enterprise Fund* conceded, "the subject of removing officers in the Executive Branch 'was not discussed in the Constitutional Convention,'"[36] and as Chief Justice Rehnquist made the point in *Morrison*, such a "rigid" view "depends upon an extrapolation from general constitutional language" which "is more than the text will bear."[37] In his many opinions on the subject, Judge Kavanaugh has yet to grapple with Founding-era history, which, as the *PHH* majority recognized, demonstrates that "[c]ongressional alertness to the distinctive danger

---

[27] *Id*. at 442.

[28] *Id*. at 441-42.

[29] *Id*. at 442.

[30] *PHH*, 881 F.3d at 164. (Kavanaugh, J., dissenting).

[31] *Id*.

[32] *Id*. at 166.

[33] *Id*.

[34] *Id*. at 195.

[35] *Id*. at 164.

[36] 537 F.3d at 691 (Kavanaugh, J., dissenting) (quoting *Myers*, 272 U.S. at 109-10).

[37] *Morrison*, 487 U.S. at 690 n.29.

of political interference with financial affairs, dating to the founding era, began the longstanding tradition of affording some independence to the government's financial functions."[38] Indeed, since the early days of the Republic—when the First Congress created the Treasury Department and made it independent from the President in a number of respects[39]—Kavanaugh's extreme view of presidential power has never been the law. Kavanaugh's opinions on executive power ignore critical aspects of the Constitution's text, history, and values.

Judge Kavanaugh plainly disagrees with many of the Supreme Court's precedents in this area. Off the bench, he has argued that the Supreme Court's decision in *Morrison* has "been effectively overruled," but he "would put the final nail in."[40] There is little doubt that, if he is confirmed, he would urge overruling *Morrison* as well as many other important precedents in this area.

2. Presidential Non-Enforcement and Immunity

Judge Kavanaugh would likely vote to expand presidential power in other ways as well. In dicta Judge Kavanaugh has argued that, notwithstanding the duty the Take Care Clause imposes on the President to "faithfully execute[]" the "Laws,"[41] there are some circumstances in which the President may refuse to enforce laws passed by Congress. In his dissent from *Seven-Sky v. Holder*, in which the D.C. Circuit upheld the Affordable Care Act (ACA), Judge Kavanaugh argued that the courts might never have to decide the ACA's constitutionality because "the President might not enforce the individual mandate provision if the President concludes that enforcing it would be unconstitutional."[42] Kavanaugh wrote, "[u]nder the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional."[43] In dicta, Judge Kavanaugh has also claimed that the President can limit the enforcement of statutes he disagrees with. He has claimed that "[t]he President may decline to prosecute or may pardon because of the President's own constitutional concerns about a law *or* because of policy objections to the law, among other reasons."[44] In fact, he claims, "[o]ne of the greatest *unilateral* powers a President possesses under the Constitution . . . is the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior."[45] He has called "the President's prosecutorial discretion and pardon powers" an "independent protection for individual citizens against

---

[38] 881 F.3d at 91.

[39] Brief Amici Curiae of Current and Former Members of Cong. In Support of Respondent at 8-9, *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (No. 15-1177) (en banc), https://www.theusconstitution.org/wp-content/uploads/2017/12/PHH_v_CFPB_DC_Cir_En_Banc_Amicus_Final-1.pdf.

[40] American Enterprise Institute, *Judge Brett Kavanaugh – The Court: Power, policy, and self government I* LIVE STREAM, YouTube (Mar. 31, 2016), https://youtu.be/GCtR0OyHiK8?t=50m40s.

[41] U.S. Const., art. II, § 3.

[42] *Seven-Sky v. Holder*, 661 F.3d 1, 50 (D.C. Cir. 2011) (Kavanaugh, J., dissenting as to jurisdiction and not deciding on the merits).

[43] *Id. at* 50 n.43.

[44] *In re Aiken County*, 725 F.3d 255, 263 (D.C. Cir. 2013). Judge Randolph, who concurred in Judge Kavanaugh's majority opinion, pointedly declined to join this discussion, which was "unnecessary to decide the case." *Id.* at 267 (Randolph, J., concurring).

[45] *Id.* at 264 (opinion of Kavanaugh J.).

the enforcement of oppressive laws that Congress may have passed."[46] Although he has recognized that "the President must abide by statutory *prohibitions* unless the President has a constitutional objection to the prohibition,"[47] he would give the President substantial leeway not to enforce statutes regulating private individuals, such as the ACA.

Judge Kavanaugh also would likely vote to recognize presidential immunity from criminal prosecution while in office, hampering efforts to hold the President accountable for wrongdoing. In his non-judicial writings, Judge Kavanaugh has argued that "even in the absence of a congressionally conferred immunity, a serious constitutional question exists regarding whether a President can be criminally indicted and tried while in office."[48] Kavanaugh has argued that the "indictment and trial of a sitting President . . . would cripple the federal government, rendering it unable to function with credibility in either the international or domestic arenas."[49] In Kavanaugh's view, "[i]f the President does something dastardly, the impeachment process is available."[50] In sum, he thinks that "[n]o single prosecutor, judge, or jury should be able to accomplish what the Constitution assigns to Congress."[51]

Judge Kavanaugh has even raised questions about the correctness of the landmark, unanimous ruling in *United States v. Nixon*,[52] observing that the Supreme Court's decision in "*Nixon* took away the power of the president to control information in the executive branch by holding that the courts had power and jurisdiction to order the president to disclose information in response to a subpoena sought by a subordinate executive branch official."[53] Kavanaugh called this "a huge step" and asked whether "the tension of the time led to an erroneous decision."[54]

B. The Enumerated Powers of Congress

While Judge Kavanaugh's views of presidential power are expansive, his views of the powers of Congress are much more cramped.

Judge Kavanaugh has correctly recognized that "[t]he Constitution's Framers sought a national government that would be more effective than under the Articles of Confederation,"[55] but he has also incorrectly suggested that "[t]he Framers wanted it to be hard to pass legislation"[56] and celebrated Chief

---

[46] *Id.*

[47] *Id.* at 259.

[48] Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L. Rev. 1454, 1461 n.31 (2009).

[49] *Id.* at 1461.

[50] *Id.* at 1462.

[51] *Id.*

[52] 418 U.S. 683 (1974).

[53] *See* Mark Sherman, *Kavanaugh: Watergate Tapes Decision May Have Been Wrong*, AP (July 22, 2018), https://apnews.com/3ea406469d344dd8b2527aed92da6365/High-court-nominee-gets-started-answering-questions.

[54] *Id.*

[55] *Aiken County*, 645 F.3d at 439.

[56] Kavanaugh, *Our Anchor*, *supra*, at 1910.

Justice Rehnquist's efforts to "put[] the brakes on the Commerce Clause" and "prevent[] Congress from assuming a general police power."[57]

In *Seven-Sky v. Holder*, Judge Kavanaugh dissented from a 2-1 ruling upholding the constitutionality of the ACA's individual mandate. He thought the court lacked the power to hear the case under the Anti-Injunction Act, but also raised doubts about the constitutional validity of the ACA.

Judge Kavanaugh recognized that "[s]triking down a federal law as beyond Congress's Commerce Clause authority is a rare, extraordinary and momentous act," but suggested that the ACA may have crossed the line.[58] He expressed concern that "the majority opinion has green-lighted a significant expansion of congressional authority—and thus also a potentially significant infringement of individual liberty," observing that "there is no real limiting principle to [the court's] Commerce Clause holding."[59] He viewed the ACA as a novel enactment, commenting that "[t]o uphold the Affordable Care Act's mandatory-purchase requirement, under the Commerce Clause, we would have to uphold a law that is unprecedented on the federal level in American history."[60] He also raised doubts over whether the individual mandate could be upheld under the Taxing Clause, explaining that "the current statute *may not* suffice under the Taxing Clause" because it "arguably does not just incentivize certain kinds of lawful behavior but also mandates such behavior."[61] "The Taxing Clause," he wrote, "has not traditionally authorized a legal prohibition or mandate, as opposed to just a financial disincentive or incentive."[62]

Ultimately, of course, in *National Federation of Independent Business v. Sebelius* (*NFIB*), the Supreme Court, in a 5-4 ruling written by Chief Justice Roberts, upheld the individual mandate under the Taxing Clause, but not under the Commerce Clause.[63] As Chief Justice Roberts wrote, "[t]he Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness."[64]

Notably, since *NFIB*, Kavanaugh has had a hard time accepting that the Supreme Court, in fact, upheld the Affordable Care Act. Judge Kavanaugh has described *NFIB* as holding that neither "the Commerce, Necessary and Proper, or Tax Clauses support a mandate to purchase a product or service,"[65] claiming that "[t]he Chief Justice *agreed* with the four dissenters (Justices Scalia, Kennedy, Thomas, and Alito) on all the key constitutional and statutory issues raised about the individual mandate."[66] This odd

---

[57] Kavanaugh, *From the Bench*, *supra*, at 15.

[58] *Id*. at 52.

[59] *Id*.

[60] *Id*. at 51.

[61] *Id*. at 48.

[62] *Id*. at 48-49.

[63] 567 U.S. 519 (2012).

[64] *Id*. at 574.

[65] Kavanaugh, *Our Anchor*, *supra*, at 1923.

[66] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2147 (2016) (reviewing Robert A. Katzmann, *Judging Statutes* (2014)).

formulation misses or obscures the key fact—Roberts provided the fifth vote to uphold the ACA's constitutionality under the Taxing Clause.

II. Judge Kavanaugh and the Bill of Rights

In his decisions construing the Bill of Rights, Judge Kavanaugh has interpreted Supreme Court precedent to reach conservative results. At times, Judge Kavanaugh has insisted on a broad reading of Supreme Court precedent, insisting that "it is essential that we follow both the words and the music of Supreme Court opinions."[67] In other cases, he has urged a very narrow reading of applicable Supreme Court precedent, observing that "[t]he nature of our system of legal precedent is that later cases often distinguish prior cases based on sometimes slight differences."[68] Whether Kavanaugh interprets a precedent narrowly or broadly, he almost always moves the law sharply to the right.

This section looks at four different areas of law, two where Kavanaugh has consistently sought to drastically expand the scope of constitutional protections, particularly in favor of corporations,[69] and two where he has sought to scale them back to the detriment of individual liberty.

A. The First Amendment's Guarantee of Freedom of Speech

Judge Kavanaugh has issued a host of sweeping decisions interpreting the First Amendment, and his record suggests that he will be a reliable vote to "weaponiz[e] the First Amendment,"[70] inventing new ways for businesses to object to economic and regulatory policies they dislike. He has written important opinions on the reach of the First Amendment in three different areas: (1) campaign finance; (2) net neutrality and cable regulation; and (3) commercial disclosure. In each of these areas, Judge Kavanaugh has sought to push the law to the right, rewriting First Amendment principles to allow the wealthy to spend unlimited sums of money and to strike down economic regulation.

1. Campaign Finance

Even before the Supreme Court's decision in *Citizens United* gutted campaign finance law, Judge Kavanaugh made similar sweeping First Amendment arguments in favor of unlimited spending that sought to move the law in that direction. Early in his tenure, he made clear that the "most important sentence in the Court's entire campaign finance jurisprudence"[71] was the part of the 1976 ruling in *Buckley v. Valeo*[72] that said that the government "cannot restrict the speech of some so that others have

---

[67] *United States v. Martinez-Cruz*, 736 F.3d 999, 1006 (D.C. Cir. 2013) (Kavanaugh, J., dissenting).

[68] *Indep. Inst. v. FEC*, 816 F.3d 113, 117 (D.C. Cir. 2016).

[69] This is in line with the pro-corporate bent reflected in his jurisprudence as a whole. *See* Ashwin Phatak, *Supreme Court Nominee Brett Kavanaugh: Will He Be Another Reliable Vote for Big Business?* (August 2018), https://www.theusconstitution.org/wp-content/uploads/2018/08/CAC-Kavanaugh-Business.pdf.

[70] *Janus v. Am. Fed'n of St., Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

[71] *Emily's List*, 581 F.3d at 5.

[72] 424 U.S. 1 (1976).

equal voice or influence in the electoral process."[73] *Buckley*'s pronouncement that the government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others" is at the core of Kavanaugh's First Amendment jurisprudence.[74]

In *EMILY's List v. FEC*, a major 2009 ruling authored by Judge Kavanaugh, the D.C. Circuit struck down an FEC regulation limiting campaign spending by non-profit groups.[75] At the time, *McConnell v. FEC*,[76] the governing Supreme Court precedent, took a broad view of the government's role in limiting corruption, but Kavanaugh insisted that "the anti-corruption rationale is not boundless" and limited the government to redressing *quid pro quo* corruption, [77] a limitation *McConnell* had explicitly rejected.[78] In a sweeping opinion, Kavanaugh held that "non-profit groups may accept unlimited donations to their soft-money accounts" and "may spend unlimited amounts out of their soft-money accounts for election-related activities such as advertisements, get-out-the-vote efforts, and voter registration drives."[79] These results, Judge Janice Rogers Brown argued in a concurring opinion, "are in tension—perhaps irreconcilable tension—with *McConnell*."[80] While she was sympathetic to Judge Kavanaugh's view, she recognized that "[o]ur duty as an intermediate court is not to tell the Court what it ought to have said, but to abide by what it did say."[81]

EMILY's List did not go as far as *Citizens Unite*d did—only the Supreme Court had the power to overrule past precedent limiting corporate spending—but it opened the door to huge soft money contributions to political committees. Judge Kavanaugh recognized that "it might seem incongruous to permit non-profits to receive and spend large soft-money donations when political parties and candidates cannot."[82] But the answer to this disparity, he argued, was further deregulation. "If eliminating this perceived asymmetry is deemed necessary, the constitutionally permitted legislative solution is 'to raise or eliminate limits' on contributions to parties or candidates."[83]

Judge Kavanaugh's opinion in *EMILY's List* was particularly aggressive in its use of judicial review. It refused to decide the case on statutory grounds, as Judge Brown urged in her concurring opinion, and issued a ruling even more sweeping than the plaintiff had requested. As Judge Brown put it, "[t]he court, however, is not content just answering a gratuitous constitutional question. Its holding is broader than even the plaintiff requests. . . . Because EMILY's List's actual claims are not bold enough, the court *sua*

---

[73] *EMILY's List*, 581 F.3d at 5.

[74] 424 U.S. at 48-49.

[75] 581 F.3d at 1.

[76] 540 U.S. 93 (2003).

[77] *EMILY's List*, 581 F.3d at 6.

[78] *McConnell*, 540 U.S. at 152.

[79] *EMILY's List*, 581 F.3d at 14.

[80] *Id.* at 39 (Brown, J., concurring in part).

[81] *Id.* at 38; *id.* at 39 ("Someday the Supreme Court may be persuaded to reconsider [its] approach. But that cannot be our task.").

[82] *Id.* at 19 (majority opinion)

[83] *Id.* (quoting *Davis v. FEC*, 554 U.S. 724, 743 (2008)).

sponte spins a more aggressive argument . . . ."[84] Rather than proceed incrementally, Kavanaugh sought to fashion a broad constitutional ruling.

Even Judge Kavanaugh's opinions rejecting challenges to campaign finance regulation have worked to move the law to the right. In 2010, in *RNC v. FEC*,[85] sitting on a three-judge district court, Judge Kavanaugh dismissed a challenge to the ban on soft money contributions to political parties, and the Supreme Court summarily affirmed. In the wake of *Citizens United*, the RNC had sought to overrule the part of *McConnell* that had upheld the ban on soft money contributions to political parties. Judge Kavanaugh agreed with the RNC that "*Citizens United* undermines any theory of limiting contributions to political parties that might have rested on the idea that large contributions to parties create gratitude from, facilitate access to, or generate influence over federal officers and candidates."[86] But he concluded that only the Supreme Court could overrule *McConnell*. "As a lower court," he wrote, "we do not believe we possess the authority to clarify or refine *McConnell* . . . or to otherwise get ahead of the Supreme Court."[87] Of course, if confirmed to the Supreme Court, Judge Kavanaugh could—and likely would—overrule decisions, such as *McConnell*, that have upheld certain campaign finance limitations.

In 2011, in *Bluman v. FEC*,[88] another ruling summarily affirmed by the Supreme Court, Judge Kavanaugh wrote the opinion for a three-judge district court upholding the federal ban on campaign giving and spending by foreign nationals, concluding that "it serves the compelling interest in limiting the participation of *non-Americans* in the activities of democratic self-government."[89] But, in dicta, Kavanaugh went out of his way to write a huge loophole into the ban, concluding that it "does not bar foreign nationals from issue advocacy—that is, speech that does not expressly advocate the election or defeat of a specific candidate."[90] This means that foreign nationals can spend millions of dollars to influence our elections so long as they do not explicitly advocate on behalf of, or against, specific candidates. This part of *Bluman* looms large, as a Russian company indicted as part of the Mueller investigation is currently invoking Judge Kavanaugh's opinion to dismiss the charges against them.[91]

Judge Kavanaugh has also written opinions taking a narrow view of Supreme Court precedent upholding campaign finance disclosure laws. In 2016, in *Independence Institute v. FEC*, Judge Kavanaugh wrote a 2-1 opinion overturning the dismissal of a plaintiff's as-applied challenge to federal disclosure requirements.[92] In Kavanaugh's view, a three-judge court should have been convened to hear the plaintiff's claim that 501(c)(3) organizations have a right to air issue advertisements without disclosing their donors. Kavanaugh stressed that the Supreme Court's cases, which twice had rejected challenges to the identical disclosure requirement attacked by the plaintiff, do not "address whether a speaker's tax

---

[84] *Id.* at 31 (Brown, J., concurring in part).

[85] 698 F. Supp.2d 150 (D.D.C.) (three-judge court), *aff'd*, 561 U.S. 1040 (2010).

[86] *Id.* at 158.

[87] *Id.* at 160.

[88] 800 F.Supp.2d 281 (D.D.C. 2011) (three-judge court), *aff'd*, 565 U.S. 1104 (2012).

[89] *Id.* at 290.

[90] *Id.* at 284.

[91] *See* Adam Smith, *Indicted Russian Company Uses Trump's Supreme Court Pick as Get Out of Jail Free Card*, Every Voice (July 18, 2018), *available at* https://everyvoice.org/featured/russia-kavanaugh.

[92] *Indep. Inst.*, 816 F.3d 113 (D.D.C. 2016).

status or the nature of the nonprofit organizations affects the constitutional analysis of [the Bipartisan Campaign Reform Act's] disclosure requirement."[93] These minor differences, in Kavanaugh's view, made the issue an open one because "[t]he nature of our system of legal precedent is that later cases often distinguish prior cases based on sometimes slight differences."[94] In dissent, Judge Wilkins argued that the Institute's claim "is squarely foreclosed by . . . Supreme Court precedent," insisting that "the several immaterial factual distinctions" the Institute points to do not "transform its case into one presenting a substantial constitutional question."[95] Ultimately, a three-judge court held that the plaintiff's claims "founder on Supreme Court precedent,"[96] and the Supreme Court summarily affirmed.

2. Net Neutrality and Cable Regulation

Judge Kavanaugh has also employed an expansive reading of *Buckley* to strike down net neutrality and efforts to regulate the cable television industry.[97] In his view, *Buckley* means that "the First Amendment does not allow the Government to regulate the content choices of private editors just so that the Government may enhance certain voices and alter the content available to the citizenry."[98] As Judge Kavanaugh's record reflects, he would invoke *Buckley* broadly to strike down economic regulation aimed at internet and cable providers. He has argued that "the First Amendment contemplates a more 'laissez-faire regime'" and "greatly limits the Government's ability to interfere with speech in communication markets."[99]

In *U.S. Telecom Ass'n*, Judge Kavanaugh dissented from the D.C. Circuit's refusal to rehear *en banc* a ruling upholding the FCC's net neutrality rule, which required broadband internet service providers (ISPs) to allow its customers to access all or substantially all content on the internet without alteration or blocking.[100] Although the rule only applied to ISPs who held themselves out as providing access to all content, Judge Kavanaugh would have struck down the rule, insisting that "Internet service providers enjoy First Amendment protection of their rights to speak and exercise editorial discretion."[101] Judge Kavanaugh claimed that, rather than respect the First Amendment rights of ISPs, the net neutrality rule "compels" them "to supply an open platform for all would-be Internet speakers, and thereby diversify and increase the number of voices available on the Internet."[102] In Kavanaugh's view, this ran headlong

---

[93] *Id.* at 116-17.

[94] *Id.* at 117.

[95] *Id.* at 118, 117 (Wilkins, J., dissenting).

[96] *Indep. Inst. v. FEC*, 216 F. Supp.3d 176, 185 (D.D.C. 2016) (three-judge court), *aff'd*, 137 S. Ct. 1204 (2017).

[97] *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1315-29 (D.C. Cir. 2010) (Kavanaugh, J., dissenting); *Comcast Cable Commc'ns., LLC v. FCC*, 717 F.3d 982, 987-94 (D.C. Cir. 2013) (Kavanaugh, J., concurring); *U.S. Telecom. Ass'n v. FCC*, 855 F.3d 381, 417-35 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

[98] *Id.* at 432.

[99] *Cablevision*, 597 F.3d at 1327-28 (Kavanaugh, J., dissenting) (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 161 (1973) (Douglas, J., concurring)).

[100] *U.S. Telecom.*, 855 F.3d at 417-35 (Kavanaugh, J., dissenting from denial of rehearing en banc).

[101] *Id.* at 428.

[102] *Id.* at 432.

into *Buckley* and could not be justified "absent some market dysfunction."[103] Thus, he concluded "the Government must keep its hands off the editorial decisions of Internet service providers."[104]

This is a stunningly broad view, which would pervert the First Amendment and limit economic regulation of the communications industry. As Judge Sri Srinivasan wrote, "broadband ISPs would have a First Amendment entitlement to block and throttle content based on their own commercial preferences even if they had led customers to anticipate neutral and indiscriminate access to all internet content."[105] The First Amendment, he insisted, did not stand in the way of such regulation of economic conduct. "[B]roadband ISPs have no First Amendment entitlement to hold themselves out as indiscriminate conduits but then to act as something different."[106]

Judge Kavanaugh has pressed this same broad view of the First Amendment in cases involving governmental regulation of the cable industry.

In 2010, in *Cablevision Systems Corp. v. FCC*, the D.C. Circuit, in an opinion by Judge David Sentelle, upheld the FCC's decision to extend for five more years a statutory prohibition against exclusive contracts between cable operators and cable affiliated programming networks, finding that the plaintiff had waived any constitutional claim.[107] "It is hardly necessary for us to decide an issue of constitutionality which petitioner does not even set forth as an issue in the case . . . ."[108] Judge Kavanaugh disagreed, and would have struck down the rule as a violation of the First Amendment, asserting that it forces cable operators "to sell to video programming distributors when they might otherwise choose not to do so" and "dampens their incentives to invest in new or existing programming networks."[109] Because of the emergence of a "radically changed and highly competitive marketplace," he insisted that "[t]he Government can no longer show that the ban on exclusive contracts furthers the interest in fair competition."[110] In his view, "when a market is competitive, direct interference with First Amendment free speech rights in the name of competition is typically unnecessary and constitutionally inappropriate."[111]

In a 2013 case, *Comcast Cable Communications v. FCC*, Judge Kavanaugh wrote separately to reiterate his broad reading of *Buckley*, insisting that applying a federal prohibition on discrimination against an unaffiliated video programming network "to a video programming distributor that lacks market power would violate the First Amendment as it has been interpreted by the Supreme Court."[112] Kavanaugh observed that "the FCC may think it preferable simply as a communications policy matter to equalize or enhance the voices of various entertainment and sports networks," but he insisted that could not be

---

[103] *Id.* at 433.

[104] *Id.* at 435.

[105] *Id.* at 393 (Srinivasan, J., concurring in the denial of rehearing en banc).

[106] *Id.*

[107] *Cablevision*, 597 F.3d at 1306.

[108] *Id.* at 1312.

[109] *Id.* at 1322 (Kavanaugh, J., dissenting).

[110] *Id.* at 1324, 1325.

[111] *Id.* at 1328.

[112] *Comcast*, 717 F.3d at 993 (Kavanaugh, J., concurring).

squared with what *Buckley* said "in one of the most important sentences in First Amendment history."[113] In his view, "the FCC's interference with Comcast's editorial discretion cannot stand."[114]

3. Commercial Disclosure

Judge Kavanaugh has also insisted that "the First Amendment imposes stringent limits on the Government's authority to . . . compel speech by private citizens and organizations," including in the context of commercial disclosure laws.[115]

In 2014, in *American Meat Institute v. U.S. Department of Agriculture*, the en banc D.C. Circuit, by a vote of 9-2, rejected a free speech challenge to Department of Agriculture regulations requiring country-of-origin labels on meat products.[116] Judge Kavanaugh agreed with the majority that "the First Amendment does not bar . . . longstanding and commonplace country-of-origin labeling requirements," but wrote separately to make clear that a demanding First Amendment test applies.[117]

First, Judge Kavanaugh emphasized that the "historical pedigree" of a disclosure regulation "is critical for First Amendment purposes."[118] He wrote that the "[g]overnment has long required commercial disclosures to prevent consumer deception and to ensure consumer health or safety" and that "[t]hose interests explain and justify the compelled commercial disclosures that are common and familiar to American consumers, such as nutrition labels and health warnings."[119] But he made clear that "it is plainly not enough for the Government to say simply that it has a substantial interest in giving consumers information," calling that "a circular formulation" that "would be true of any and all disclosure requirements."[120] He voted to uphold the regulation in the case because of "the Government's historically rooted interest in supporting American manufacturers, farmers, and ranchers as they compete with foreign manufacturers, farmers, and ranchers."[121] But he never explained why a disclosure regulation has to be deeply rooted in history to pass constitutional muster.

Second, Judge Kavanaugh described the applicable standard of review in much tougher terms than the applicable Supreme Court precedents. As Kavanaugh conceded, under the Supreme Court's binding precedent in *Zauderer v. Office of Disciplinary Counsel*,[122] "[t]he disclosure must be purely factual, uncontroversial, not unduly burdensome, and reasonably related to the Government's interest."[123] The Supreme Court had insisted on a more forgiving standard of scrutiny because a commercial speaker's

---

[113] *Id.* at 994.

[114] *Id.*

[115] *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 30 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring).

[116] *Id.* at 18.

[117] *Id.* at 30.

[118] *Id.* at 32.

[119] *Id.* at 31.

[120] *Id.*

[121] *Id.* at 32.

[122] 471 U.S. 626 (1985).

[123] *Am. Meat Inst.*, 760 F.3d at 33 (Kavanaugh, J., concurring).

"constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal,"[124] but Kavanaugh sought to ratchet up the level of scrutiny. He emphasized that "*Zauderer* tightly limits mandatory disclosures to a very narrow class" and called the "*Zauderer* fit requirements" "stringent."[125] Some have insisted that commercial speech is deserving of more protection in this context,[126] but it is hard to read *Zauderer*, as Kavanaugh did, to impose a stringent test.

B. The Second Amendment's Right to Bear Arms

Judge Kavanaugh has interpreted the Supreme Court's decisions in *District of Columbia v. Heller*[127] and *McDonald v. City of Chicago*[128] to strip governments of the power to enact innovative gun regulations, insisting that the Supreme Court has said that "regulations on the sale, possession, or use of guns are permissible [only] if they are within the class of traditional, 'longstanding' gun regulations in the United States."[129] Newer approaches to reconciling the individual right protected by the Second Amendment with the interest in protecting community safety are, in Kavanaugh' view, unconstitutional, irrespective of the burden they place on gun owners. This is a radical reading of Supreme Court precedent, and it has no basis in the Constitution's text, history, and values. Indeed, no federal court of appeals has adopted this position.[130] As one judge recently commented, "[e]ach circuit to have considered this proposal has rejected it for . . . a sound reason: it is not what the Supreme Court said."[131]

In 2011, in *Heller v. District of Columbia*—a sequel involving a challenge to a 2008 D.C. law passed in the wake of the Supreme Court's 5-4 decision striking down D.C.'s handgun ban—the D.C. Circuit, in an opinion by Judge Douglas Ginsburg, upheld gun regulations banning certain assault weapons, including semi-automatic rifles, and requiring gun owners to register their firearms.[132] Judge Kavanaugh dissented, voting to strike down both regulations, claiming that the Supreme Court in *Heller* had said that "gun bans and regulations" must be "assess[ed] . . . based on text, history, and tradition, not by a

---

[124] *Zauderer*, 471 U.S. at 651; *see also Nat'l Inst. of Fam. Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) ("[O]ur precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'").

[125] *Am. Meat Inst.*, 760 F.3d at 34 (Kavanaugh, J., concurring).

[126] *Milavetz, Gallop, & Milavetz, P.A. v. United States*, 559 U.S. 229, 256 (2010) (Thomas, J., concurring in part) (expressing "willing[ness] to reexamine *Zauderer* and its progeny in an appropriate case to determine whether these precedents provide sufficient First Amendment protection against government-mandated disclosures").

[127] 554 U.S. 570 (2008).

[128] 561 U.S. 742 (2010).

[129] *Heller v. D.C.*, 670 F.3d 1244, 1270 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

[130] *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 685-86 (6th Cir. 2016) (en banc); *Kolbe v. Hogan*, 849 F.3d 114, 131-34 (4th Cir. 2017) (en banc); *Binderup v. Atty Gen.l*, 836 F.3d 336, 344 (3d Cir. 2016) (en banc); *United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th Cir. 2013); *Kachalsky v. County of Westchester*, 701 F.3d 81, 88-97 (2d Cir. 2012); *Nat'l Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 193-98 (5th Cir. 2012); *GeorgiaCarry.org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); *United States v. Booker*, 644 F.3d 12, 22-25 (1st Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 700-04 (7th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800-02 (10th Cir. 2010).

[131] *Mance v. Sessions*, 2018 WL 3544988 (5th Cir. July 20, 2018) (Higginson, J., concurring in the denial of rehearing en banc).

[132] 670 F.3d at 1244,

balancing test such as strict or intermediate scrutiny."[133] As he "read *Heller*," the "Court set forth fairly precise guidance," establishing "a test based wholly on text, history, and tradition."[134] In Kavanaugh's view, under *Heller*, "traditional and common gun laws in the United States remain constitutionally permissible."[135] But he argued that, under *Heller*, "outliers that are not traditional or common in the United States" were *per se* unconstitutional.[136] He claimed that the gun laws passed by D.C. fell into this class.

Kavanaugh's opinion is hard to square with what Justice Scalia actually wrote in *Heller*. Far from establishing any *per se* ban on gun laws—which would have been a virtually unprecedented constitutional rule—the Supreme Court in *Heller* went out of its way to make clear that D.C.'s handgun ban was invalid "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights."[137] Justice Scalia rejected rational basis review, but otherwise did not specify how courts should adjudicate challenges to gun laws.[138] As Judge Douglas Ginsburg put it in his majority opinion, "[u]nlike our dissenting colleague, we read *Heller* straightforwardly. The Supreme Court there left open and untouched even by implication the issue presented in this case."[139] He explained, "[i]f the Supreme Court truly intended to rule out any form of heightened scrutiny for all Second Amendment cases, then surely it would have said at least something to that effect. The Court did not say anything of the sort; the plaintiffs in this case do not suggest it did; and the idea that *Heller* precludes heightened scrutiny has eluded every circuit to address the question since *Heller* was issued."[140]

Under Kavanaugh's tortured reading of *Heller*, the government would be deprived of its broad power to craft reasonable gun regulations. Judge Kavanaugh insisted that "just because gun regulations are assessed by reference to history and tradition does not mean that governments lack flexibility or power to enact gun regulations."[141] But Kavanaugh voted to strike down D.C.'s ban on assault-weapons, insisting that the "government may not generally ban semi-automatic guns, whether semi-automatic rifles, shotguns, or handguns."[142] He also would have struck down D.C.'s registration requirement, claiming that "[r]egistration of all guns lawfully possessed by citizens in the relevant jurisdiction has not been traditionally required in the United States and, indeed, remains highly unusual today."[143] In Kavanaugh's expansive view, even the requirement that a gun owner register his or her gun or guns—with no restriction of any kind on the bearing of arms—runs afoul of the Second Amendment.

---

[133] *Id*. at 1271 (Kavanaugh, J., dissenting).

[134] *Id*. at 1271, 1276.

[135] *Id*. at 1270.

[136] *Id*. at 1271.

[137] *Heller*, 554 U.S. at 628; *Silvester v. Becerra*, 138 S. Ct. 945, 947 (2018) (Thomas, J., dissenting from the denial of certiorari) ("This Court has not definitively resolved the standard for evaluating Second Amendment claims.").

[138] *Heller*, 554 U.S. at 628 n.27.

[139] *Heller*, 670 F.3d at 1266.

[140] *Id*. at 1265.

[141] *Id*. at 1274 (Kavanaugh, J., dissenting).

[142] *Id*. at 1288.

[143] *Id*. at 1291.

C. The Fourth Amendment's Guarantee Against Unreasonable Searches and Seizures

In contrast with his First and Second Amendment jurisprudence, in Fourth Amendment cases, Judge Kavanaugh has repeatedly voted to scale back constitutional protections. Taking a page from Chief Justice Rehnquist's jurisprudence, Kavanaugh has ignored the critical role the Fourth Amendment plays in curbing governmental abuse of power. Rather than vindicate the Framers' goal of protecting privacy and security from abuse of power, Judge Kavanaugh has repeatedly voted to uphold governmental surveillance programs[144] and drug testing programs,[145] and to expand the authority of police officers to search suspects without probable cause.[146] In all of these ways, Kavanaugh's record turns a blind eye to the "obstacles" the Fourth Amendment places "in the way of a too permeating police surveillance," thwarting what Chief Justice Roberts has called a "central aim of the Framers."[147]

In 2008, in *United States v. Askew*, Judge Kavanaugh dissented from an *en banc* ruling holding that police officers violated the Fourth Amendment when they unzipped Paul Askew's jacket during a *Terry* stop.[148] A plurality of five members of the court held that "the police officer's unzipping of appellant's jacket went beyond what is necessary to protect the investigating officers or others nearby" and under binding Supreme Court precedent "amounted to precisely the sort of evidentiary search that is impermissible in the context of a *Terry* stop."[149] Judge Kavanaugh dissented, calling the officers' actions an example of "textbook compliance with the requirements of *Terry*."[150] He would have read dicta in a 1985 Supreme Court case to expand the scope of permissible *Terry* searches, urging that "[i]dentification procedures constituting searches are permitted during *Terry* stops so long as the procedures are reasonable under the circumstances."[151] But the D.C. Circuit declined to take this step, insisting that "this court is not free to reweigh the interests at issue to create the new and wholly unprecedented identification exception to the warrant and probable cause requirements."[152]

In 2010, in *United States v. Jones*, Judge Kavanaugh dissented from the D.C. Circuit's refusal to rehear *en banc* a panel decision holding that the government's use of warrantless GPS tracking violated the

---

[144] *Klayman v. Obama*, 805 F.3d 1148, 1148-49 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc).

[145] *Nat'l Fed'n of Fed. Emps.—IAM v. Vilsack*, 681 F.3d 483, 499-502 (D.C. Cir. 2012) (Kavanaugh, J., dissenting).

[146] *United States v. Askew*, 529 F.3d 1119, 1149-65 (D.C. Cir. 2008) (en banc) (Kavanaugh, J., dissenting).

[147] *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

[148] *Askew*, 529 F.3d at 1149 (Kavanaugh, J., dissenting). Under the Supreme Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968), when a police officer has a reasonable suspicion that "the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a protective search "to determine whether the person is in fact carrying a weapon." *Id.* at 24. But *Terry* did not permit a search for evidence, merely for weapons.

[149] *Askew*, 529 F.3d at 1123 (plurality opinion).

[150] *Id.* at 1154 (Kavanaugh, J., dissenting).

[151] *Id.* at 1161.

[152] *Id.* at 1127 (plurality opinion); *id.* at 1149 (Griffiths, J., concurring) ("As a court of appeals, we are in no position to create a new exception that would have far-reaching effects on how the police may properly investigate crime. Rather, we are bound by Supreme Court precedent, which in this case requires probable cause to support the unzipping of Askew's jacket.").

Fourth Amendment.[153] Judge Kavanaugh joined Judge Sentelle's dissenting opinion, which argued that the GPS tracking device attached to Jones's car did not violates any reasonable expectation of privacy. "The reasonable expectation of privacy as to a person's movements on the highway is . . . zero."[154] Judge Kavanaugh wrote separately, insisting that the *en banc* court should consider an "alternative and narrower, property-based Fourth Amendment argument," based on the fact that the police "intruded . . . on the defendant's personal property . . . to install the GPS device on the vehicle."[155] Kavanaugh did not decide whether Jones would have prevailed on that theory, instead calling it "an important and close question."[156] Ultimately, the Supreme Court voted to hear the case, and Justice Scalia's majority opinion accepted the property-based Fourth Amendment argument flagged by Judge Kavanaugh.[157]

In 2012, in *National Federation of Federal Employees v. Vilsack*, Judge Kavanaugh dissented from a 2-1 ruling striking down a random drug testing policy applicable to all employees working at Job Corps Civilian Conservation Centers operated by the U.S. Forest Service.[158] The majority held the program violated the Fourth Amendment, finding that mandatory drug testing of all employees, given a total "lack of evidence of a serious drug problem among Forest Service Job Corps staff," was a "solution in search of a problem."[159] Judge Kavanaugh would have struck the balance in favor of the government, concluding that "the government's strong interest in ensuring a drug-free workforce . . . outweighs the infringement of individual privacy associated with this drug testing program."[160]

In 2015, in *Klayman v. Obama*, which involved a constitutional challenge to the National Security Agency's mass collection of telephone records, the D.C. Circuit vacated a preliminary injunction against the program without reaching the merits.[161] Judge Kavanaugh concurred in the denial of rehearing *en banc*, writing separately to explain his conclusion that "the Government's metadata collection program is entirely consistent with the Fourth Amendment."[162] First, he argued that "[t]he Government's collection of telephony metadata from a third party . . . is not considered a search under the Fourth Amendment" under Supreme Court precedent.[163] Second, he argued, "the Government's metadata collection program readily qualifies as reasonable" because it "serves a critically important special need—preventing terrorist attacks on the United States."[164] In Kavanaugh's view, when the government is fighting terrorism, it can search and seize persons "without individualized suspicion."[165] This is a

---

[153] *United States v. Jones*, 625 F.3d 766 (D.C. Cir. 2010) (Sentelle, J., dissenting from the denial of rehearing en banc).

[154] *Id.* at 769.

[155] *Id.* at 770 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

[156] *Id.* at 771.

[157] *United States v. Jones*, 565 U.S. 400, 404-13 (2012).

[158] *Nat'l Fed'n of Fed. Emps.*, 681 F.3d 483 (D.C. Cir. 2012).

[159] *Id.* at 498, 497.

[160] *Id.* at 502 (Kavanaugh, J., dissenting).

[161] *Klayman*, 805 F.3d at 1148.

[162] *Id.* (Kavanaugh, J., concurring in the denial of rehearing en banc).

[163] *Id.* at 1149.

[164] *Id.*

[165] *Id.*

sweeping view that could open the door to widespread government surveillance in the name of fighting terrorism.

Judge Kavanaugh also has taken a broad view of the qualified immunity doctrine. In 2016, in *Wesby v. District of Columbia*,[166] Judge Kavanaugh dissented from the D.C. Circuit's refusal to rehear *en banc* a ruling holding that D.C. officers were not entitled to qualified immunity in a false arrest case. In *Wesby*, Judge Kavanaugh stressed just how hard it is for a plaintiff to sue a police officer for damages in a false arrest case. "[I]n suits alleging a lack of probable cause to arrest, officers are not liable if they *arguably* had probable cause—that is, if the officer *reasonably could have believed* that there was probably cause to arrest."[167] This rule, Kavanaugh has stressed, "affords police officers room to make reasonable judgments about whether they have probable cause to make arrests. . . . [T]he doctrine protects all but the plainly incompetent or those who knowingly violate clearly established law."[168] Kavanaugh has described the "extra dose of judicial deference" qualified immunity gives to the police as a "manifestation of the law's general concern about retroactive punishment or liability."[169]

Ultimately, the Supreme Court reversed, vindicating Judge Kavanaugh's dissent,[170] but even some conservatives have argued that qualified immunity doctrine prevents courts from holding police officers accountable for abuse of power, and should be reconsidered.[171] Judge Kavanaugh's record suggests that, if confirmed, he is unlikely to be receptive to those arguments.

In sum, Judge Kavanaugh's record suggests he would be a reliable pro-government vote in a wide range of Fourth Amendment cases.

D. The Fifth Amendment's Protection of the Right To Choose Abortion and Other Fundamental Rights

Judge Kavanaugh has written that "when the constitutional text expressly protects an individual liberty . . . then the courts cannot subtract from that."[172] But in a number of areas, that is what he has done, following in the footsteps of Chief Justice William Rehnquist, whom he has called one of his judicial heroes.[173] Like Rehnquist—who dissented in *Roe v. Wade*[174] and spent the rest of his career trying to overrule that decision—Judge Kavanaugh has taken a cramped view of the Fifth Amendment's protection of substantive fundamental rights, expressing hostility to the protection of fundamental rights not specifically enumerated elsewhere in the Constitution. Indeed, Kavanaugh has celebrated Rehnquist's

---

[166] 816 F.3d 96 (D.C. Cir. 2016).

[167] *Id.* at 106 (Kavanaugh, J., dissenting from denial of rehearing en banc).

[168] *Id.* at 112; *see also Moore v. Hartman*, 704 F.3d 1003, 1004 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) (arguing that qualified immunity barred suit because "the First Amendment law on this point is not clear").

[169] *Wesby*, 816 F.3d at 105, 110 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

[170] *D.C. v. Wesby*, 138 S. Ct. 577 (2018).

[171] *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018).

[172] Kavanaugh, *Our Anchor*, *supra*, at 1927.

[173] Kavanaugh, *From the Bench*, *supra*, at 6.

[174] 410 U.S. 113 (1973).

dissent in *Roe* for its refusal to "recognize unenumerated rights,"[175] as well as later decisions, such as his majority opinion in *Washington v. Glucksberg*,[176] that put the brakes on what Kavanaugh termed "the free-wheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition."[177] Kavanaugh praised Rehnquist's approach in *Glucksberg* as an end-run around *Roe*. As he observed in a 2017 speech, "even a first-year law student could tell that *Glucksberg*'s approach to unenumerated rights was not consistent with the approach of the abortion cases, such as *Roe v. Wade* in 1973—as well as the 1992 decision reaffirming *Roe*, known as *Planned Parenthood v. Casey*."[178]

His own opinions reflect the same hostility to the Supreme Court's many precedents protecting a woman's right to choose abortion. Most recently, in *Garza v. Hargan*,[179] Judge Kavanaugh voted to give the Trump Administration the power to keep an unaccompanied 17-year old immigrant in custody to keep her from exercising her constitutional right to choose abortion. In that case, the *en banc* court held, 7-3, that the government cannot "categorically blockade exercise" of a 17-year old immigrant woman's "exercise of her constitutional right" simply because she was in federal custody.[180] As Judge Millet observed, "the mere act of entry into the United States without documentation does not mean that an immigrant's body is no longer her or his own. Nor can the sanction for unlawful entry be forcing a child to have a baby. The bedrock protections of the Fifth Amendment's Due Process Clause cannot be that shallow."[181] Kavanaugh bitterly disagreed, insisting that the *en banc* ruling "is ultimately based on a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand."[182]

In Kavanaugh's view, this was "a radical extension of the Supreme Court's abortion jurisprudence," which failed to give due regard to the government's "permissible interests in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion."[183] Taking an extremely narrow view of the Supreme Court's repeated holdings that a woman's right to choose abortion is part of the fundamental liberty that the Due Process Clause guarantees and of the protections afforded by the undue burden test announced in *Planned Parenthood v, Casey*, Kavanaugh would have held that "it is not an undue burden for the U.S. Government to transfer an unlawful immigrant minor to an immigration

---

[175] Kavanaugh, *From the Bench*, *supra*, at 15.

[176] 521 U.S. 702 (1997). In *Glucksberg*, Chief Justice Rehnquist's opinion upheld the constitutionality of Washington's ban on assisted suicide, insisting that a right to assisted suicide was not deeply rooted in our nation's history and tradition because of the longstanding nature of these prohibitions. *Id*. at 723-28.

[177] Kavanaugh, *From the Bench*, supra, at 16.

[178] *Id*.

[179] *Garza v. Hargan*, 874 F.3d 735, 752-56 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting), *vacated on other grounds sub nom. Azar v. Garza*, 139 S. Ct. 1790 (2018).

[180] *Id.* at 737 (Millet, J., concurring).

[181] *Id*. at 737-38.

[182] *Id*. at 752 (Kavanaugh, J., dissenting). Kavanaugh's view ignored that the young woman had fully complied with Texas's stringent abortion laws, which hardly authorize "immediate abortion on demand." As Judge Millet observed, "J.D., like other minors in the United States who satisfy state-approved procedures, is entitled under binding Supreme Court precedent to choose to terminate her pregnancy. The court's opinion gives effect to that concession; it does not create a 'radical' 'new right' by doing so." *Id*. at 737 (Millet, J., concurring).

[183] *Id*. at 752 (Kavanaugh, J., dissenting).

sponsor before she has an abortion, so long as the transfer is expeditious."[184] As Judge Millet observed, Kavanaugh's crabbed reading of the undue burden standard would allow the government to "impose[] a flat prohibition on her reproductive freedom that [she] has no independent ability to overcome."[185] As this case reflects, Kavanaugh passed President Trump's anti-abortion litmus test with flying colors.

In other fundamental rights cases, Judge Kavanaugh has relied on Chief Justice Rehnquist's opinion in *Glucksberg* to reject fundamental rights claims. For example, in 2007, in *Doe v. District of Columbia*,[186] Judge Kavanaugh wrote the court's opinion rejecting a constitutional challenge to D.C.'s policy, which, in certain circumstances, allowed the government to perform surgery on intellectually disabled persons who had never been competent without their consent. Citing *Glucksberg*, Judge Kavanaugh wrote that "plaintiffs have not shown that consideration of the wishes of a never-competent patient is 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [the asserted right] were sacrificed.'"[187]

If confirmed, there is little doubt that Judge Kavanaugh would be hostile to the protection of fundamental rights and would vote to roll back *Roe* and other Supreme Court precedent protecting the full scope of liberty.

Conclusion

A Justice of the Supreme Court must be faithful to the entire Constitution; he or she cannot pick and choose based on their own predilections. But a review of Judge Kavanaugh's record demonstrates that he often does just that, interpreting precedent to reach conservative results in case after case. As his record shows, Judge Kavanaugh has sought to dramatically expand presidential power, while failing to respect Congress' broad powers to solve national problems. He has sought to vastly expand protections for some rights, while permitting the government to run roughshod over others. Judge Kavanaugh thus has a heavy burden to carry when he appears before the Senate Judiciary Committee: he must demonstrate his fidelity to the entire Constitution if he wants to be confirmed to the Supreme Court.

[184] *Id.* at 753.

[185] *Id.* at 739 (Millet, J., concurring).

[186] 489 F.3d 376 (D.C. Cir. 2007).

[187] *Id.* at 383 (quoting *Glucksberg*, 521 U.S. at 720-21).