



BRETT KAVANAUGH:

A threat to church-state separation and religious freedom

A report from

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INTRODUCTION

On July 9, President Trump announced Judge Brett Kavanaugh as his next nominee to the Supreme Court. Kavanaugh would fill the critical seat left open by Justice Kennedy's retirement, threatening the vision of religious freedom for which Americans United has been fighting the last 70 years. Kavanaugh has been sitting on the U.S. Court of Appeals for the D.C. Circuit since 2006, after surviving a contentious, three-year confirmation process.¹

The prospect of Kavanaugh as a Supreme Court justice is concerning, to say the least. He has criticized the very idea of separation of religion and government. He has voted in favor of religious employers' efforts to create obstacles to women's healthcare coverage. He has a record of supporting government-promoted prayer in public schools and sectarian prayer at other governmental events. And he has displayed hostility to precedents that restrict public funding of religious activity and government-sponsored religious displays.

Kavanaugh isn't alone; his addition to the Supreme Court could create a new, conservative judicial majority on all of these issues. Where once we could look to Justice Kennedy, at least in some respects, to uphold religious freedom as a shield to protect human dignity, pluralism, and freedom of conscience,² the appointment of Kavanaugh could turn the balance of the Court against the constitutional guarantee of church-state separation and allow government to impose religion on citizens and distort religious freedom into a weapon that harms others.

KAVANAUGH ON THE ISSUES

Kavanaugh has demonstrated hostility to the very idea of church-state separation.

In a [lecture](#) given less than a year ago to the American Enterprise Institute (a conservative think tank), Kavanaugh praised former Chief Justice William Rehnquist for "persuasively criticiz[ing]" the "metaphor" of "a strict wall of separation between church and state" as "based on bad history" and "useless as a guide to judging."³ Kavanaugh

¹ *An Unqualified Judicial Nominee*, N.Y. TIMES (May 3, 2006), <https://nyti.ms/2IK52Ch>.

² See Rob Boston, *Justice Kennedy: A Mixed Bag on Separation of Church and State*, AMERICANS UNITED (June 28, 2018), <https://bit.ly/2AhtGEE>.

³ Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist* (Sept. 18, 2017), at 12 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting)).

further praised Rehnquist for “changing the jurisprudence and convincing the [Supreme] Court that the wall metaphor was wrong as a matter of law and history.”⁴

Kavanaugh has demonstrated that he would likely allow religious-freedom laws to be used to harm others.

Under Obama Administration regulations, certain employers with religious objections could opt out of a requirement that their health insurance plans cover contraceptives. Once an employer gave notice that it wouldn't provide the coverage, the employer's insurer had to provide the coverage directly to the employees through a separate plan. But some employers objected even to that accommodation of their religious beliefs, arguing that it violates their religious beliefs even to file paperwork stating that they object to the coverage.

In a dissenting opinion in [*Priests for Life v. U.S. Department of Health and Human Services*](#),⁵ Judge Kavanaugh argued that the accommodation substantially burdened religious freedom. His position on this issue is at odds with the opinions of [eight of the nine federal appeals courts](#) that heard challenges to the accommodation and upheld it.

Judge Kavanaugh further argued that the Religious Freedom Restoration Act prohibits the government from requiring objecting religious employers to notify their insurer of their objection or tell the government who their insurer is. Rather, in his view, women employed by the objecting organizations are entitled to contraceptive coverage only if the government can figure out for itself who their insurance-provider is.

In the next few years, the Supreme Court will be asked to decide whether to give religious exemptions to businesses and nonprofit organizations even when the exemption could cause real harm to other people. For example, the Court could hear cases involving businesses that seek religious exemptions that would allow them to fire employees who do not live according to certain religious tenets, or refuse to sell goods to LGBTQ customers. And the Court will be asked to consider Trump Administration religious exemptions that will put people's access to basic healthcare at risk and undermine access to government-funded social services. Kavanaugh seems likely to turn the balance of the Court against the rights of women, LGBTQ people, and religious minorities.

⁴ *Id.* at 13.

⁵ 808 F.3d 1, 14-26 (2015) (Kavanaugh, J., dissenting from denial of rehearing en banc).

Kavanaugh has advocated for relaxation of constitutional restrictions on government-sponsored prayer.

In [*Newdow v. Roberts*](#),⁶ a group of nontheists challenged sectarian prayers at presidential inaugurations. While the majority in the case refused to address the substantive issues there due to mootness and standing problems, Kavanaugh wrote a concurring opinion arguing that the prayers were constitutional.

Although the Supreme Court has upheld government-sponsored prayers only at the opening of legislative sessions, Kavanaugh's opinion argued that opening prayers are equally permissible at "executive sessions," suggesting that they should be allowed at a wide variety of governmental ceremonies.⁷ He further took the position that where government-sponsored prayers are permitted, they may be sectarian (i.e., reference Jesus or other deities or doctrines specific to one faith). At that time, there was a substantial split among federal appellate courts about whether sectarian prayers are permissible; the Supreme Court subsequently [ruled](#) that they are, by a 5-4 vote.⁸ Kavanaugh praised that decision in his speech to the American Enterprise Institute last year.

Kavanaugh has argued in favor of allowing student-delivered prayers at public-school events.

Kavanaugh disagrees with constitutional restrictions on government-promoted prayer even in the public schools, where children are particularly susceptible to coercion. When he was in private practice, Kavanaugh [authored a brief](#) submitted to the U.S. Supreme Court defending a public school district's policy that promoted student-voted, student-delivered pre-game prayers at school football games.⁹

Not only did Kavanaugh argue that allowing the prayers were constitutional, but he contended that the Constitution requires public schools to permit students to deliver prayers or religious speeches to a captive audience of other students at public-school events (so long as the speaking students are selected pursuant to a neutral policy). And Kavanaugh implicitly criticized prior Supreme Court decisions that struck down school-sponsored prayers at [graduations](#) and at the [beginning of the school day](#), suggesting that those practices could have been upheld on the grounds that they "are deeply rooted

⁶ 603 F.3d 1002 (2010).

⁷ *Newdow v. Roberts*, 603 F.3d at 1019–21 (Kavanaugh, J., concurring in the judgment).

⁸ *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

⁹ Brief of Amici Curiae Congressman Steve Largent & Congressman J.C. Watts in Supp. Pet'r, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (No. 99-62), 1999 WL 1272963.

in our history and tradition.”¹⁰ Kavanaugh’s brief completely ignored the effect of prayer at school functions on members of minority religions and people who are nonreligious.

The Supreme Court rejected Kavanaugh’s arguments and struck down the football-game prayers by a 6-3 vote, with Justice Kennedy in the majority, in [Santa Fe Independent School District v. Doe](#).¹¹ The Court explained that public schools must not use students to circumvent constitutional restrictions on school-sponsored prayer. But Kavanaugh could turn the balance of the Court and roll back the restrictions on government-promoted prayer and religious activity in the public schools.

Other statements by Kavanaugh, including ones in a Supreme Court brief that Kavanaugh wrote and filed less than a year later, add weight to this concern. In [Good News Club v. Milford Central School](#),¹² Kavanaugh argued that a school district violated the U.S.

“If Santa Fe High School took steps to prevent the student speaker from invoking God’s name or uttering religious words or saying a prayer in his or her pre-game statement, then the school would violate the Constitution—the Free Speech and Free Exercise Clauses of the First Amendment.”

Amicus Brief Filed in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

Constitution by prohibiting a proselytizing religious club for six- to twelve-year-old children from meeting in elementary-school facilities immediately after conclusion of classes.¹³ Americans United filed a friend-of-the-court brief arguing that the Constitution prohibited the school from allowing the club to meet in those circumstances.¹⁴ We explained that forcing the school to facilitate the

meetings would convey to young students a message of governmental support for the club’s proselytizing. (The Supreme Court unfortunately ended up [agreeing](#) with Kavanaugh’s position by a 6-3 vote, with Justices Stevens, Souter, and Ginsburg dissenting.) More recently, in his speech to the American Enterprise Institute last year, Kavanaugh criticized a Supreme Court [decision](#) that invalidated a “moment of silence” law whose actual purpose was to promote school prayer.¹⁵

¹⁰ *Id.* at 27 (citing *Lee v. Weisman*, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting); *Engel v. Vitale*, 370 U.S. 421, 446 (1962) (Stewart, J., dissenting)).

¹¹ 530 U.S. 290 (2000).

¹² 533 U.S. 98 (2001).

¹³ Brief of Amicus Curiae Sally Campbell in Supp. Pet’rs, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), No. 99-2036, 2000 WL 1784193.

¹⁴ Brief of Ams. United for Separation of Church & State et al. in Supp. Resp’t, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), No. 99-2036, 2000 WL 43353.

¹⁵ From the Bench, *supra* note 3, at 12.

Kavanaugh has argued against long-standing precedent prohibiting the use of public funds for religious activities.

In his brief in the football-prayer case, Kavanaugh wrote that long-standing constitutional law prohibiting the use of taxpayer dollars to pay for religious activities in circumstances where the funds are available to religious and nonreligious applicants “is of questionable validity and is inconsistent with the thrust of the Court’s modern jurisprudence.”¹⁶

In his brief in the religious-club case, Kavanaugh went further, incorrectly suggesting that the law had changed so that neutrally allocated funding of religious institutions was now permissible. Kavanaugh also wrote in the religious-club brief that the government may not “deny a benefit because of the religious nature of a group, person, writing, speech, or idea.”¹⁷ And in his speech to the American Enterprise Institute last year, Kavanaugh continued to advocate the proposition that “religious schools and religious institutions” should be able to “receiv[e] funding or benefits from the state so long as the funding [i]s pursuant to a neutral program that, among other things, include[s] religious and nonreligious institutions alike.”¹⁸

In the wake of the 2017 decision, [*Trinity Lutheran Church of Columbia v. Comer*](#),¹⁹ the Supreme Court likely could be asked to decide a number of cases addressing this very issue. In *Trinity Lutheran*, the Supreme Court ruled that the state of Missouri could not exclude a church from a taxpayer-funded grant program that pays to resurface playgrounds. The decision was explicitly limited to the facts of the case and applies only to playground resurfacing, but some concurring justices would have broadly extended the decision.

Since the ruling, the case has been used to argue that the government should provide funding to rebuild houses of worship; that state constitutional

provisions prohibiting private-school vouchers should be nullified; and that the government must be required to give grants to foster-care providers that discriminate against Jewish, Catholic, and LGBTQ families.

If the Court were to adopt Kavanaugh’s views on public funding of religion, that would upend the bedrock constitutional principle that we each get to decide for ourselves

The constitutional prohibition against “government monies...go[ing] directly to religious institutions...is of questionable validity and is inconsistent with the thrust of the Court’s modern jurisprudence.”

Amicus Brief Filed in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

¹⁶ Brief of Amici Curiae Congressman Steve Largent & Congressman J.C. Watts, *supra* note 9, at 28 n.7.

¹⁷ Brief of Amicus Curiae Sally Campbell, *supra* note 13, at 20.

¹⁸ From the Bench, *supra* note 3, at 12.

¹⁹ 137 S. Ct. 2012 (2017).

whether and how our money goes to support religion. And if Kavanaugh joins the court, it might go even further by ruling that the Constitution requires government bodies to fund religious activity if they fund private secular activity. Such a radical ruling would turn the Establishment Clause on its head, nullifying numerous provisions in state constitutions across the country that limit state funding of religious activity.

With Kavanaugh, the Supreme Court may also make it more difficult for taxpayers to challenge public funding of religious activities. As a D.C. Circuit judge, Kavanaugh wrote an [opinion](#) that narrowly construed taxpayers' rights to sue over public funding of religion.²⁰

Kavanaugh would likely be permissive of government-sponsored religious displays on public property.

In his football-prayer brief, Kavanaugh also implied that practices “deeply rooted in our history and tradition” should be permitted even if they “favor or promote religion over non-religion,” so long as the practices are applied neutrally.²¹ In his discussion on this point, he cited some cases (in addition to prayer cases discussed above) relating to religious displays on public property, citing with apparent approval an opinion dissenting in part from a Supreme Court [decision](#) that struck down the display of a nativity scene in a government building.²² It appears, then, that if Kavanaugh is confirmed, the Supreme Court could erode precedent restricting government-sponsored religious displays.

Judge Kavanaugh is a dangerous Supreme Court pick. He has a track record of coming down on the wrong side of church-state issues.

²⁰ *In re Navy Chaplaincy*, 534 F.3d 756 (2008).

²¹ Brief of Amici Curiae Congressman Steve Largent & Congressman J.C. Watts, *supra* note 9, at 28 n.27-28.

²² *See County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).