



What “Justice” Kavanaugh May Mean for State and Local Government

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The State and Local Legal Center (SLLC) files Supreme Court amicus curiae briefs on behalf of the Big Seven national organizations representing state and local governments.

The nomination of Judge Brett Kavanaugh to the Supreme Court has touched off a battle between Republicans eager to reshape the Court by moving Justice Kennedy’s “swing seat” to the right and Democrats desperate to ensure that any change is minimal. Much of the national conversation on a “Justice” Kavanaugh centers around his potential views on the social issues for which Justice Kennedy was the swing vote, particularly abortion and overturning *Roe v. Wade*. Kavanaugh is something of an enigma on the issue: he stated at his confirmation hearing for the D.C. Circuit Court of Appeals that he was bound by *Roe v. Wade* as precedent. But he named Chief Justice Rehnquist (who dissented in *Roe*) as a judicial hero, and he voted to uphold restrictions on abortion in certain situations while on the lower court.

Beyond abortion (and his much discussed views on executive power) what might Kavanaugh mean for state and local government? Aside from his reputation as a conservative, his tenure on the D.C. Circuit does not give much indication, since that court rarely hears cases pertaining to state and local issues. However, several cases give potential clues to Kavanaugh’s key differences (and similarities) with Kennedy and other Justices currently on the bench.

Judge Kavanaugh’s few Fourth Amendment cases indicate that he would give law enforcement leeway, similar to Kennedy. For example in *Wesby v. District of Columbia*, he disagreed with the conclusion police violated the Fourth Amendment when arresting partygoers in a vacant house for trespass and argued the officers should be given qualified immunity. As Professor Orin Kerr notes, his approach is similar to that of Kennedy, who “tended to take a law-enforcement-oriented view in Fourth Amendment cases.”

Kavanaugh, like most conservative judges, may be fairly described as pro-employer. For example, in *Johnson v. Interstate Management Co.* he declined to allow employees to sue under the Occupational Health and Safety Act's retaliation provision. Similarly, he voted that an employer did not violate federal labor law by forbidding employees who interacted with customers from wearing incendiary union shirts. However, in his concurrence in *Ayissi-Etoh v. Fannie Mae*, Judge Kavanaugh opined that a single use of the n-word could create a hostile work environment.

Kavanaugh's limited record suggests that he shares the current Justices' enthusiasm for the First Amendment, meaning he may be willing to strike down state laws and local ordinances which restrict speech. In his dissent in *U.S. Telecom Association v. Federal Communications Commission*, for example, Kavanaugh argued that net neutrality violates the First Amendment rights of internet service providers. That said, he authored a concurrence in *Mahoney v. Doe* that upheld an ordinance forbidding protestors from chalking government property.

Kavanaugh's record also does not provide many clues on how he would rule in land use cases, but conservative Justices tend to be skeptical of state and local government regulation of private property. Justices Gorsuch and Kavanaugh may have their first chance to make their views known when the Court decides *Knick v. Township of Scott* next term. In this case the Court is being asked to overturn *Williamson County Regional Planning Commission v. Hamilton Bank*, which requires property owners to first bring takings claims in state (rather than federal) court.

Additionally, Judge Kavanaugh has displayed a significant skepticism about the power of the administrative state. Kavanaugh, like Chief Justice Roberts, and Justices Thomas and Gorsuch, has criticized *Chevron v. NRDC*, which gives deference to regulatory agency decisions. Kavanaugh's desire to apply a stricter standard to agency decisions could have consequences for environmental regulations. Notably, Kavanaugh's only majority opinion that the Supreme Court reversed was in *Environmental Protection Agency v. EME Homer City Generation*, where he voted against an EPA rule that required some states to reduce their emissions.

Since *D.C. v. Heller*, holding that the Second Amendment protects an individual's right to possess a gun for traditionally lawful purposes, the Supreme Court has mostly declined to address whether other gun control provisions violate the Second Amendment. Judge Kavanaugh has dissented from several D.C. Circuit rulings upholding gun restrictions, indicating he may be interested in providing the fourth vote to hear more gun cases.

As with all new Justices that come from a lower court, Kavanaugh will have more freedom to rule how he wants on the Supreme Court and can vote to overturn precedent he deems incorrect. Regardless of the uncertainty as to how he will rule in particular cases, there is no doubt that if confirmed, a Justice Kavanaugh will occupy a pivotal role on the Supreme Court for years to come.