

Jewish Interests Seen In Peril As Kavanaugh Ascends To Court

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Many in the Jewish community held their collective breath this week as Justice Brett Kavanaugh took his seat on the U.S. Supreme Court, fearful that many of the liberal causes they have fought for over the years may be swept away by the court, which now has a majority of conservative jurists.

Everything from immigration rights to abortion, and from sanctuary cities to affirmative action, may be challenged in the coming months and years. Many conservatives are reportedly eager to move ahead with cases — some of them touching on issues of religious liberty that are dear to the Orthodox community — that will allow the court to impose a conservative imprint on the country.

But just how much the court tilts to the right will not be known immediately. This year's court docket is devoid of any hot-button cases and Marc Stern, general counsel at the AJC, said it may take years before Kavanaugh's impact is felt. "You would not expect him to be a liberal stalwart, but whether he will be an entirely predictable vote or not, only time will tell," he said.

Noting that Kavanaugh "was burned by the [confirmation] process," during which three women came forward to accuse him of sexual misconduct while he was in high school and college, Stern said that experience might "further strengthen his ideological position."

The likelihood of an ideologically altered high court has liberal groups seemingly more anxious than they have been in years.

Nancy Kaufman, CEO of the National Council of Jewish Women, said her organization is "deeply concerned with what will happen with this court."

She said Kavanaugh's partisan comments during his confirmation hearing are "something we have never seen. I don't know what will be. The way he behaved [during the confirmation process] does not bode well for the way he will be on the court. Maybe he will surprise everyone,

but I am not hopeful. I'm concerned for the issues we have worked on," she said, such as freedom of religion and women's health.

Kaufman said that "the Jewish community has always understood the importance of what it means to be a minority in a majority culture. We have always looked to the courts to protect our rights — on separation of church and state, a woman's right to abortion, affordable health care, access to clinics and voting rights. We are very concerned that there could be a very serious setback [in those areas] for decades to come. ... A fair and independent judiciary I think is now in question, and I don't think this is what our Founding Fathers envisioned for America."

Stosh Cotler, CEO of Bend the Arc, a Jewish group that fights for immigration reform, workers' rights and other domestic liberal causes, was less cautious in her appraisal of Kavanaugh.

"The Supreme Court will now certainly be hostile to most issues that the Jewish community is quite aligned on," she said. "Whether it is supporting the rights of immigrants, women's health issues including reproductive choices, or supporting the rights of LGBTQ individuals and communities, if these justices vote along partisan lines and along the lines of their track record, this court will not reflect the values and the views of the American Jewish community."

Kavanaugh's confirmation last Saturday by a 50-48 vote in the Senate — the closest for a Supreme Court nominee in modern times — is a "reminder that we must do our work to elect people who really do reflect our communities," said Cotler. "We can then make more progress in the legislative realm instead of being at loggerheads where virtually nothing is possible now. We have to continue to organize and ensure that we have progressive champions holding elective office at all levels of government."

Rabbi David Teutsch, former president of the Reconstructionist Rabbinical College in Philadelphia, said one of the issues he is most worried about is abortion rights "because one of the things [Kavanaugh] stands for is a strong emphasis on states' rights. The principle of *Roe v. Wade* [which legalized abortion] rests on the notion that the federal government has the regulatory power to some extent over the right of women to choose abortion. If Kavanaugh decides this is a states' rights issue — and we already know there are a significant number of states that would ban abortion — that would be an enormous moment in terms of the erosion of women's rights."

However, there are those in the Jewish community who have applauded Kavanaugh's selection. One of them, Rabbi Yaakov Menken, managing director of the Coalition for Jewish Values, which represents the public policy views of more than 1,000 traditional rabbis, attended Kavanaugh's White House ceremonial swearing-in ceremony Monday evening on behalf of the organization.

Despite media reports that the ceremony was a "victory lap" for President Donald Trump, Rabbi Menken told *The Jewish Week* in an email that "it didn't feel that way." Instead, he said, those in attendance were there to support Kavanaugh and his family and "those who fought for him." He added that Kavanaugh "helped heal the partisan divide [by saying] ... he's going to look forward, not backwards. He said the nomination process did not change his approach to judging

[and that] ... judges don't sit on opposite sides of an aisle, they are a team of nine, and that he looks forward to being part of that team.”

Also supporting Kavanaugh's selection was Ilya Shapiro, a senior fellow in constitutional studies at The Cato Institute, a libertarian think tank. In an article on Kavanaugh posted on the Jewish Policy Center's website, he wrote that Kavanaugh is a “great pick” whose decisions on the D.C. Circuit “are grounded in text and history and are often cited by the Supreme Court itself. He's much like Justice [Anthony] Kennedy [whose retirement in July opened the seat for Kavanaugh], for whom he clerked, in his dedication to the Constitution's structural protections for liberty. ...

“Perhaps most notably, Kavanaugh's willingness to push back on the excesses of the regulatory state make him a man for the moment. ... Kavanaugh sees the judicial role as reading and applying the law, not being an agent for social change.”

Rabbi Menken said he is not sure it is accurate to describe Kavanaugh as a “staunch conservative,” because he reportedly agreed with Merrick Garland more than nine times out of 10. Garland and Kavanaugh both sat as Circuit Court judges on the U.S. Court of Appeals for the District of Columbia. Garland had been nominated to the Supreme Court by President Barack Obama in 2016, but the Republican-controlled Senate refused to consider him, arguing that since it was the last year of Obama's presidency, the next president should fill the vacancy.

Among the cases expected to come before the court that are of particular interest to the Jewish community is one in which Morris County, N.J., is using public money to repair churches that are on the National Register of Historic Places, according to Stern of the AJC.

Another is whether the 1964 Civil Rights Act's ban on discrimination on the basis of sex encompasses sexual orientation and gender identity, thus covering people who identify as gay, lesbian or transgender. And a third involves a constitutional challenge to Deferred Action for Childhood Arrivals (DACA), an American immigration policy that allows some individuals illegally brought to the U.S. as children to receive a renewable two-year period during which they are eligible for a work permit and the government will defer action on deporting them.

Rabbi Jill Jacobs, executive director of T'ruah: The Rabbinic Call for Human Rights, noted that “there has been a consensus in the Jewish community in support of immigrants, DACA and LGBTQ rights. The Jewish community is standing with them and [Kavanaugh's] place on the Supreme Court is disconcerting because he has the power to overturn protections for DACA recipients and LGBTQ people, to rule narrowly on what constitutes discrimination.”

Steve Freeman, vice president of civil rights at the Anti-Defamation League, expressed similar concerns. In an email to The Jewish Week he pointed out that Kavanaugh “sees no problem with sectarian prayers at public school events, and he seems open to claims of religious liberty that can be used to justify discrimination against members of the LGBTQ community. There also is reason to believe he would be supportive of executive branch efforts to curtail the rights of immigrants. ...

“We simply do not agree with Justice Kavanaugh on a set of core principles, such as how we as a society fight discrimination, safeguard religious freedom, maintain the separation of church and

state and protect immigrant rights. There are likewise legitimate reasons to be concerned about the impact of his presence on the court on long-standing civil rights issues.”

Rabbi Jacobs noted that the “Jewish community has also been active on voting rights and [opposing] gerrymandering as a way to reduce the voice of certain citizens, particularly trying to minimize the voice of people of color.”

When it comes to religious liberty cases, Kavanaugh has been fairly consistent. In a 2015 case, Kavanaugh argued against a federal mandate that required religious employers to cover employees’ contraception. Five years earlier, he ruled against an atheist who challenged the tradition of having prayers recited at presidential inaugurations. He wrote that the “desire of others in America to publicly ask for God’s blessing on certain government activities and to publicly seek God’s guidance for certain government officials” cannot be dismissed. In addition, he has suggested that he might be amenable to increasing public funding to religious schools.

Regarding affirmative action, Kavanaugh in 1999 wrote an amicus brief on behalf of the Center for Equal Opportunity, which opposed race-based affirmative action in college admissions.

However, a 2011 decision he wrote is said to have paved the way for Chief Justice John Roberts to later uphold the constitutionality of the Obama administration’s Affordable Care Act.

Stern of the AJC stressed that he “would caution against jumping to immediate conclusions” regarding the way Kavanaugh will vote.

“The man ought to be given an opportunity to weigh the cases [he hears],” he said. “Let’s see how he performs.”