

# We the People

of the United States, in order to form a more perfect Union, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

## Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years and seven Years a Citizen of the United States, and who, when elected, shall not have been seven Years a Citizen of the State in which he shall be chosen.

Representatives and original Members of the Senate shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

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## From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist



2017 Walter Berns  
Constitution Day Lecture

REMARKS BY

BRETT M. KAVANAUGH

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## The Walter Berns Constitution Day Lecture Series

A scholar of political philosophy and constitutional law, Walter Berns wrote extensively on issues of American government and its founding principles. He authored 10 volumes and published widely in professional and popular journals and America's leading newspapers. He was the John M. Olin University Professor Emeritus at Georgetown University and served as a resident scholar at AEI. He taught at Louisiana State University, Yale University, Cornell University, Colgate University, and the University of Toronto. He earned his master's and doctorate degrees in political science at the University of Chicago. Berns served on the National Council on the Humanities from 1982 to 1988 and on the Council of Scholars in the Library of Congress from 1981 to 1985. He was also a delegate to the United Nations Commission on Human Rights. He was awarded the National Humanities Medal in 2005.

In September 2011, AEI President Arthur Brooks announced that henceforth the Program on American Citizenship's annual Constitution Day celebration would be named in honor of Walter Berns in appreciation of his scholarly legacy in this field and his many years of contributing to AEI's work.



**From the Bench:  
The Constitutional Statesmanship  
of Chief Justice William Rehnquist**

**Brett M. Kavanaugh  
September 18, 2017**

I'm honored to be at the American Enterprise Institute with friends and scholars I've known for many years. This organization has been a place of learning and thinking, and I applaud it for its many continuing contributions to public debate and discourse.

I'm honored to speak at a lecture named for Walter Berns. I was fortunate to become friends with Walter after I was appointed as a judge on the DC Circuit in 2006. As many of you know, Walter was a great storyteller, he possessed a keen sense of poker odds, and he loved the Constitution.

He had the belief, considered naive in some circles, that the meaning of the Constitution is related to the actual words of the Constitution. To use the title of one of his books, he took the Constitution seriously. Walter exuded wisdom and seriousness of purpose. He wrote and taught well. He was a patriot and a great American. I miss him, and we all miss him in these turbulent times. I'm honored to be here at the Berns Lecture.



We're here to celebrate Constitution Day, so I'll start with a few words about the Constitution itself. The Constitution was signed by the delegates at Philadelphia on September 17, 1787—230 years ago yesterday. The Framers believed that in order to protect

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individual liberty, power should not be concentrated in one person or one institution.

To preserve liberty, they created a system of federalism with dual national and state sovereigns. And, furthermore, within the new national government, they separated the legislative, executive, and judicial powers. As William Rehnquist later stated, the framers devised two critical innovations for the new national government: a president who is independent of and not selected by the legislative branch and a judiciary that is independent of both the legislative and executive branches.

It is sometimes said that the Constitution is a document of majestic generalities. I view it differently. As I see it, the Constitution is primarily a document of majestic specificity, and those specific words have meaning. Absent constitutional amendment, those words continue to bind us as judges, legislators, and executive officials.

And if I can be so bold as to suggest an initial homework assignment from my talk today, it is this: In the next few days, block out 30 minutes of time and read the text of the Constitution word for word. I guarantee you'll come away with a renewed appreciation for the Constitution and for its majestic specificity.

We revere the Constitution in this country, and we should. We also, however, must remember its flaws. And its greatest flaw was the tolerance of slavery. That flaw cannot be airbrushed out of the picture when we celebrate the Constitution. It was not until the 1860s, after the Civil War, that this original sin was corrected in part, at least on paper, by ratification of the 13th, 14th, and 15th Amendments to the Constitution.

But that example illustrates a broader point as well. When we think about the Constitution and we focus on the specific words of the Constitution, we ought to not be seduced into thinking that it was perfect and that it remains perfect. The Framers did not think that the Constitution was perfect. And they knew, moreover, that it might need to be changed as times and circumstances and policy views changed.

And so they provided for a very specific amendment process in Article V of the Constitution. The first 10 amendments, as we all

know, came very quickly after the new Congress met in 1789. And those amendments were ratified in 1791. The 11th and 12th Amendments followed soon thereafter, and that process has continued.

Indeed, the amendments have altered fundamental details of our constitutional structure. The 12th Amendment changed how presidents and vice presidents are elected. The 22nd Amendment changed how long presidents can serve. The 17th Amendment altered how the Senate is selected, changing it from a body selected by state legislatures to a body directly elected by the people. The 13th, 14th, and 15th Amendments altered the autonomy of the states and created new constitutional rights and protections for individuals against states.

Many think we could use a few more constitutional amendments: term limits for Supreme Court justices, term limits for members of Congress, an equal rights amendment, a balanced budget amendment, abolition of the death penalty. Different people have different views. But here, as elsewhere, the Constitution already focused on the specific question that lies at the foundation of this and so many other constitutional disputes: Who decides?

In this instance, the question is this: Who decides when it is time to change the Constitution? Who decides when it is time to create a new constitutional right or to eliminate an existing constitutional right or to alter the structure of the national government? The Constitution quite specifically tells us that the people decide through their elected representatives. An amendment requires the approval of two-thirds of both houses of Congress as well as three-quarters of the states.

But the amendment process is slowed in part because it is so difficult to garner the congressional and state consensus needed to pass constitutional amendments. Because it is so hard, and because it is not easy even to pass federal legislation, pressure is often put on the courts and the Supreme Court in particular to update the Constitution to reflect the times.

In the views of some, the Constitution is a living document, and the Court must ensure that the Constitution adapts to meet the changing times. For those of us who believe that the judges are

confined to interpreting and applying the Constitution and laws as they are written and not as we might wish they were written, we too believe in a Constitution that lives and endures and in statutes that live and endure. But we believe that changes to the Constitution and laws are to be made by the people through the amendment process and, where appropriate, through the legislative process—not by the courts snatching that constitutional or legislative authority for themselves.



That brings me to my primary topic today: William Hubbs Rehnquist. William Rehnquist served on the Supreme Court for 33 years, from 1972 until his death in September 2005. Appointed by President Richard Nixon, he was an extraordinary associate justice from 1972 to 1986. Then in 1986, President Ronald Reagan appointed William Rehnquist as the 16th chief justice of the United States. He served with distinction in that role for 19 more years. If he were still alive today, the chief would be 92 years old.

William Rehnquist died on Saturday, September 3, 2005. I remember it vividly. At the time, I was working as staff secretary to President George W. Bush. Hurricane Katrina had hit earlier that week. I was distressed about how the week had unfolded for the people of New Orleans and the Gulf Coast, for the country, and for the president himself. I sat late that Saturday night on my couch at home with my then-two-week-old daughter, Margaret, on my shoulder and a college football game on TV. I got a call on my cell from Dan Bartlett, who was communications director for the president. He said simply, “Rehnquist just died; the president wants to meet tomorrow morning.” I was profoundly sad, but I had no time to dwell on it.

As staff secretary, I was responsible for hustling into the White House right away, contacting the president, immediately getting out a presidential written statement, and working with the speechwriters to help prepare the president’s remarks for the following morning, which he delivered from the White House at 10:00 a.m. that Sunday morning.

At that time, John Roberts was the pending nominee for the vacancy created by Sandra Day O'Connor's retirement earlier that summer. Roberts had been a Rehnquist clerk and would be a pallbearer at his funeral. When all of us met with the president in the Oval Office on Sunday morning, it did not take long for the president to settle on nominating John Roberts for the Rehnquist vacancy; he decided that he would worry about the O'Connor vacancy after Roberts was confirmed. The president then publicly announced John Roberts' nomination early on Monday morning before we all took off for another trip to New Orleans and the Gulf Coast.

The enormity of it all—Katrina, Rehnquist, Roberts—still hits me when I think about it in retrospect. But my focus today is Rehnquist. And I've chosen to speak about William Rehnquist for three reasons.

First of all, he and Walter Berns were friends, and they shared a tremendous appreciation for the Constitution and for each other. So it is appropriate, I believe, to remember William Rehnquist at the Berns Lecture.

Second, it pains me that many young lawyers and law students, even Federalist Society types, have little or no sense of the jurisprudence and importance of William Rehnquist to modern constitutional law.

They do not know about his role in turning the Supreme Court away from its 1960s Warren Court approach, where the Court in some cases had seemed to be simply enshrining its policy views into the Constitution, or so the critics charged. During Rehnquist's tenure, the Supreme Court unquestionably changed and became more of an institution of law, where its power is to interpret and to apply the law as written, informed by historical practice, not by its own personal and policy predilections.

When Rehnquist died, Linda Greenhouse of the *New York Times*, who would probably not describe herself as an especially big fan of conservatives, said that Rehnquist had "one of the most consequential" tenures in Supreme Court history. She said that Rehnquist's tenure was marked by "a steady hand, a focus and commitment

that never wavered, and the muscular use of the power of judicial review.”<sup>1</sup> Well said by Linda Greenhouse.

And it is incumbent on us, I believe, to remind ourselves of the importance of Rehnquist and to teach the younger generations to appreciate that legacy as well.

Third, I want to speak about William Rehnquist because he was my first judicial hero. He was not my last judicial hero. But in the fall of 1987, as I started my first year of law school at Yale Law School and as the Bork hearings unfolded that fall, Justice Antonin Scalia had been on the Court for only a year and not yet written any important opinions as a justice. Justice Clarence Thomas was not even a lower court judge yet. My future boss and future mentor, Justice Anthony Kennedy, was still a Ninth Circuit judge. And that fall, in the confines of my constitutional law classroom and in other classrooms and other classes later in my law school career, I became exposed to the landmarks of American constitutional law.

In case after case after case during law school, I noticed something. After I read the assigned reading, I would constantly make notes to myself: Agree with Rehnquist majority opinion. Agree with Rehnquist dissent. Agree with Rehnquist analysis. Rehnquist makes a good point here. Rehnquist destroys the majority’s reasoning here.

At that time, in 1987, Rehnquist had been on the Court for 15 years, almost all of it as an associate justice. And his opinions made a lot of sense to me. In class after class, I stood with Rehnquist. That often meant in the Yale Law School environment of the time that I stood alone. Some things don’t change.

For a total of 33 years, William Rehnquist righted the ship of constitutional jurisprudence. To be sure, I do not agree with all of his opinions. No two people would agree with each other in all cases. *Morrison v. Olson* in 1988 comes quickly to mind as a Rehnquist opinion I still have some trouble with, and there are others as well. I must also confess that I don’t fully understand why he put gold stripes on the sleeves of his judicial robes in his later years as chief justice, but we all have our quirks, I suppose.

Rehnquist moreover would be the first to say that he did not achieve full success on all the issues he cared about. But it is

undeniable, I believe, that he brought about a massive change in constitutional law and how we think about the Constitution.

To begin with, Justice Rehnquist was a judge who contributed to the public debate not only through his judicial opinions but also through his books and articles.

He wrote four very readable books: one about the Supreme Court, one about impeachment (which became helpful a little later in his career), one about civil liberties in wartime (which also became helpful), and one about the election of 1876. When asked why he liked to write books, he said that it was very nice to be able to write something that you don't have to get four other people to agree with.

My Rehnquist story begins with an extraordinarily important law review article Justice Rehnquist wrote in 1976 in the *Texas Law Review*. It's titled "The Notion of a Living Constitution."<sup>2</sup> In that article, Justice Rehnquist sought to alter the debate about the proper role of judges, especially on the Supreme Court, in response to the Warren Court's jurisprudence and to the changing times and the changing mores of the people.

Rehnquist noted with his characteristically understated wit that a living Constitution was surely better than a dead Constitution. He added that only a necrophile would disagree. In response to the straw-man argument often raised by opponents of originalism, Rehnquist first noted, importantly, that the principles of the Constitution apply to new activities.

In his words, "Merely because a particular activity may not have existed when the Constitution was adopted, or because the framers could not have conceived of a particular method of transacting affairs, cannot mean that general language in the Constitution may not be applied to such a course of conduct."<sup>3</sup>

Consistent with Rehnquist's point there, the Fourth Amendment today applies to searches of cars, even though cars did not exist at the time of the Founding, the First Amendment applies to speech on the internet, and so on. Put simply, Rehnquist believed that the constitutional principles do not change absent amendment. But the principles may and indeed must be applied to new developments and activities unforeseen by the framers.

The straw man dispensed with, Rehnquist then addressed what he described as a quite different living Constitution philosophy, which then was being espoused in certain circles. Under that version of the living Constitution, as Rehnquist described it, non-elected members of the federal judiciary may address themselves to a social problem simply because other branches of government have failed or refused to do so. These same judges, responsible to no constituency whatever, are claimed as the voice and conscience of contemporary society, Rehnquist wrote.

Rehnquist set forth what he saw as three serious difficulties with this vision of the living Constitution. First, it misconceives the nature of the Constitution, which was designed to enable the popularly elected branches of government, not the judicial branch, to keep the country abreast of the times. Second, that vision ignores, Rehnquist said, the Supreme Court's disastrous experiences in the past, in cases such as *Dred Scott*, when the Court embraced contemporary, fashionable notions of what a living Constitution should contain. Third, he said, however socially desirable the policy goals sought to be advanced might be, advancing them through a freewheeling, nonelected judiciary is quite unacceptable in a democratic society.

In short, Rehnquist stated, the Constitution does not put the popular branches "in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unsolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution."<sup>4</sup>

It's important to emphasize that Rehnquist's notion of the Constitution was not one where courts simply deferred to legislative choices. One early critic of Rehnquist in 1976 wrote that Rehnquist's vision of the Constitution meant that in cases involving conflicts between the government and individuals, the government would win.<sup>5</sup> That was wrong. That was not Rehnquist's philosophy or the point of his article.

His point was that it was not for a judge to add to or subtract from the individual rights or structural protections of the Constitution based on the judge's own views.

I read Rehnquist's *Texas Law Review* article when I was a first-year law student, and it's impossible to overstate its significance to me and how I first came to understand the role of a judge in our constitutional system. The article stood then as a lonely voice against the vision of the Supreme Court that was being promoted by most Supreme Court justices and by virtually all law professors at the time.

In my view, Rehnquist's article is one of the most important legal articles of all time. It is short and straightforward, and if I can be so bold as to give you a second reading assignment from this lecture, it is to read Rehnquist's article titled "The Notion of a Living Constitution."

Of course, he was not only a scholar. He was a jurist. He put his views not only into law reviews and books but also into the *United States Reports*. I can't possibly touch on all or even most of his enormous body of judicial work, but I'm going to briefly summarize five areas of Rehnquist's jurisprudence where he applied his principles and where he had a massive and enduring impact on American law: criminal procedure, religion, federalism, unenumerated rights, and administrative law.

The first topic is criminal procedure, including the death penalty. When I clerked for Justice Kennedy in 1993–94, the Kennedy clerks as a group had lunches with each of the other justices at some point during the year. When we had our lunch with Chief Justice Rehnquist, one of my Kennedy co-clerks (and it wasn't Neil Gorsuch) somewhat boldly asked the chief justice what kinds of cases he liked the most. And without missing a beat, the chief said cases involving the rights of criminal defendants.

In a 1985 *New York Times* interview,<sup>6</sup> Rehnquist said that one of the achievements during his first 13 years on the Court had been to call a halt to the number of sweeping rulings of the Warren Court. In the field of criminal procedure, Rehnquist fervently believed that the Supreme Court had taken a wrong turn in the 1960s and 1970s, and nowhere was he more forceful on this point than in the Fourth Amendment context, especially in cases involving violent crime and drugs. He led the charge in rebalancing Fourth

Amendment law to respect the rights of the people and victims of violent crime as well as of criminal defendants. He wrote the 1983 opinion in *Illinois v. Gates*, still cited often today, that made the probable cause standard more flexible and commonsensical. He wrote opinions expanding the category of special needs searches, those that could be done without a warrant or individualized suspicion—for example, the 1990 case of *Michigan v. Sitz* upholding drunk-driving roadblocks.

Perhaps his most vehement objection to Warren Court Fourth Amendment law concerned the exclusionary rule by which courts would exclude probative evidence from criminal trials because the police had erred in how they obtained the evidence. At the time Rehnquist took his seat on the Court in 1972, *Mapp v. Ohio*, which had extended the exclusionary rule to states, was only 10 years old. But Rehnquist was obviously not sold on it. In his 1979 separate opinion in *California v. Minjares*, Rehnquist called for the overruling of *Mapp*. He disagreed with the idea that, in his words, “‘the criminal is to go free’ solely because of a good-faith error in judgment on the part of the arresting officers.”<sup>7</sup> This judge-created rule in Rehnquist’s view was beyond the four corners of the Fourth Amendment’s text and imposed tremendous costs on society.

He advocated for other remedies for police mistakes or misconduct, but he believed that freeing obviously guilty violent criminals was not a proper remedy and, in any event, was surely not a remedy required by the Constitution. Rehnquist of course did not succeed in calling for the overruling of the exclusionary rule, and not many people today call for doing so, given its firmly entrenched position in American law.

But it would be a mistake to call his exclusionary rule project a failure. On the contrary, Rehnquist dramatically changed the law of the exclusionary rule. Led by Rehnquist, the Supreme Court created many needed exceptions to the exclusionary rule that endure to this day. Probably the most notable is the 1984 decision of *United States v. Leon*, where the Court held that exclusion would rarely be appropriate if an officer conducted a search with a warrant in good faith. And there were many others.

The same basic story occurred with *Miranda v. Arizona*. Justice Rehnquist was for years the most vehement critic of *Miranda*, and he wrote numerous opinions limiting its application. For example, in *New York v. Quarles* in 1984, Rehnquist wrote for the Court that there was a public-safety exception to *Miranda* so that *Miranda* warnings need not be given in situations where the officers sought information to protect the public from harm.

To this day, as with the exclusionary rule, courts apply *Miranda* based on many precedents that Rehnquist authored. Those precedents and cases authored by Rehnquist have ensured that *Miranda* is applied in (Rehnquist would say) a more commonsensical way that is closer to the proper constitutional meaning and that avoids the extremes of the Warren Court holdings.

The story is similar with respect to the death penalty. Just a few days after Rehnquist took his seat on the Supreme Court in January 1972, the Court heard argument in a series of cases, known by the lead case *Furman v. Georgia*, about the constitutionality of the death penalty. The Court that June ultimately struck down by a five-to-four decision all of the death penalty laws in the United States. Rehnquist dissented, joined by Chief Justice Warren Burger and Justices Harry Blackmun and Lewis Powell. Burger wrote the main dissent, but Rehnquist's dissent also packed a punch.

A mere five and a half pages in the US Reports deftly summarize the fundamental problems he saw in the core of the Court's holding. As he explained, the decision "brings into sharp relief the fundamental question of the role of judicial review in a democratic society."<sup>8</sup> He continued, "The most expansive reading of the leading constitutional cases does not remotely suggest that this Court has been granted a roving commission, either by the Founding Fathers or by the framers of the Fourteenth Amendment, to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court."<sup>9</sup> The Court's ruling, Rehnquist stated, was "not an act of judgment, but rather an act of will."<sup>10</sup>

But the story did not end there. In the wake of *Furman*, many states enacted new capital punishment statutes. In 1976, the Court

turned around and upheld many of them. To this day, the death penalty remains constitutional. Many judges and justices no doubt have policy or moral concerns about the death penalty. But Rehnquist's call for the Court to remember its proper and limited role in the constitutional scheme has so far proved enduring in the death penalty context.

In short, today's constitutional jurisprudence in the field of criminal procedure and the death penalty has Rehnquist's fingerprints all over it. Those are the cases that Rehnquist cared about most. That was his mission primarily, and it is fair to say that he had a dramatic and enduring effect on the course of constitutional law in those areas.

The second topic is religion. When Justice Rehnquist joined the Supreme Court in January 1972, the Court was in the midst of erecting a strict wall of separation between church and state. Religious institutions could not receive funds from government, even pursuant to neutral government benefits programs. William Rehnquist was instrumental in reversing that trend. He persuasively criticized the wall metaphor as "based on bad history" and "useless as a guide to judging."<sup>11</sup> Rehnquist said that the true meaning of the Establishment Clause can be seen only in its history.

To be sure, his views of the Establishment Clause did not always prevail. He dissented in a 1985 case, *Wallace v. Jaffree*, which struck down a moment of silence law. He asked, reasonably enough, how a law that allowed students a moment of silence could be deemed an establishment of religion. He was in dissent in several other cases involving prayer in public schools, such as *Lee v. Weisman* and *Santa Fe Independent School District v. Doe*, involving prayer at graduation ceremonies and before football games.

Of course, all of those cases involved prayer in the public school setting. And it is fair to say that a majority of the Court throughout his tenure and to this day has sought to cordon off public schools from state-sponsored religious prayer. But Rehnquist had much more success in ensuring that religious schools and religious institutions could participate as equals in society and in state benefits programs, receiving funding or benefits from the state so long as

the funding was pursuant to a neutral program that, among other things, included religious and nonreligious institutions alike.

In the critical 1983 case of *Mueller v. Allen*, he wrote the opinion for a five-to-four Court upholding a Minnesota program that allowed taxpayers to deduct expenses for the education of their children at private schools, including parochial schools. In 1993, again in an opinion written by Rehnquist in the *Zobrest v. Catalina Foothills School District* case, the Court reinforced that *Mueller* holding. And then in 2002, the Court in *Zelman v. Simmons-Harris* (again, a majority opinion by Rehnquist) upheld an Ohio school voucher program that allowed vouchers for students who attended private schools, including religious schools.

In the Establishment Clause context, Rehnquist was central in changing the jurisprudence and convincing the Court that the wall metaphor was wrong as a matter of law and history. And that Rehnquist legacy continues, as we see in recent cases such as *Town of Greece v. Galloway*, which upheld the practice of prayer for local government meetings. And without the line of Rehnquist cases beginning with *Mueller v. Allen*, we never would have seen last term's seven-to-two decision in *Trinity Lutheran Church of Columbia v. Comer*. In that case, only two justices found an Establishment Clause problem in a state program that provided funds to schools, including religious schools, for playgrounds. There again, the Rehnquist legacy was at work.

Third is federalism. Justice Rehnquist led a federalism revolution in a variety of areas—including federal commandeering of state officials and state sovereign immunity. I'm not going to speak more about those two issues today, but I will focus on federalism in terms of Congress' power to regulate interstate commerce.

As of the early 1990s, it was widely assumed that there was no real limit to the scope of the authority Congress could exercise under the Commerce and Necessary and Proper Clauses. Although other clauses may impose limits on the scope of congressional power, few expected that the Court would ever rely on a lack of Commerce Clause authority as the basis for invalidating a federal law. That was certainly what I was taught at Yale Law School. But

it was not just in New Haven. It was widely believed that no such limits existed.

Enter the case of *United States v. Lopez* in 1995. The case involved the federal Gun Free School Zones Act of 1990. That law made it a crime to possess a firearm within 1,000 feet of a school. The defendant who was convicted of violating that law raised a seemingly Hail Mary argument that the law exceeded Congress' authority under the Commerce Clause. And in an unexpected five-to-four decision written by Chief Justice Rehnquist, the Supreme Court agreed with the defendant's position.

Laws like this, the Court said, should be and were being passed by the states. They could not be passed by the federal government. In the chief's opinion, he stated:

We start with first principles. The Constitution creates a Federal Government of enumerated powers. As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties."<sup>12</sup>

Rehnquist then described the arc of the Court's Commerce Clause jurisprudence, which had expanded the clause significantly over the years. But he said there still had to be outer limits. And he noted that all the precedents involved regulation of economic activity where the activity substantially affected interstate commerce.

The government's theory was that possession of a firearm may result in violent crime, which may in turn affect the economy. Rehnquist was having none of it. Under that theory, he explained, federal regulation of family law and local educational curriculum could be justified on the ground that such activities affected the national economy. And he stated, "if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."<sup>13</sup> Congress,

Rehnquist emphasized, does not have “a general police power.”<sup>14</sup> He concluded that the activity being regulated had to be commercial in nature, and he stated that possession of a gun in a local school zone is in no sense an economic activity.

Five years later, Rehnquist again wrote the majority opinion of the Court in *United States v. Morrison*, holding that a 1994 statute creating a federal civil cause of action against gender-motivated violence likewise exceeded Congress’ Commerce Clause power. He repeated, Congress’ Commerce Clause authority extends to regulation of economic activity, not to noneconomic conduct such as traditional violent crimes. Regulation of that kind was limited to the states.

Those two decisions were critically important in putting the brakes on the Commerce Clause and in preventing Congress from assuming a general police power. After Rehnquist had left the Court, in the health care case in 2012, although it is not often the first thing discussed about that case, we do remember that a five-justice majority said that the Commerce Clause did not give Congress authority to require citizens to purchase a good or service.

Congress’ Commerce Clause power undoubtedly remains very broad, but there are limits. Congress does not have a general police power, and William Rehnquist is largely responsible for that important feature of modern constitutional law.

Fourth is the Court’s power to recognize unenumerated rights. A few months after he joined the Court in 1972, Justice Rehnquist faced an oral argument about the constitutionality of a state law prohibiting abortion in the case of *Roe v. Wade*. Rehnquist, along with Justice Byron White, ultimately dissented from the Court’s seven-two holding recognizing a constitutional right to abortion.

Rehnquist’s dissenting opinion did not suggest that the Constitution protected no rights other than those enumerated in the text of the Bill of Rights. But he stated that under the Court’s precedents, any such unenumerated right had to be rooted in the traditions and conscience of our people. Given the prevalence of abortion regulations both historically and at the time, Rehnquist said he could not reach such a conclusion about abortion. He explained that a law prohibiting an abortion even where the mother’s life was in

jeopardy would violate the Constitution. But otherwise he stated the states had the power to legislate with regard to this matter.

In later cases, Rehnquist reiterated his view that unenumerated rights could be recognized by the courts only if the asserted right was rooted in the nation's history and tradition. The 1997 case of *Washington v. Glucksberg* involved an asserted right to assisted suicide. For a five-to-four majority this time, Rehnquist wrote the opinion for the Court saying that the unenumerated rights and liberties protected by the due process clause are those rights that are deeply rooted in the nation's history and tradition. And he rejected the claim that assisted suicide qualified as such a fundamental right.

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

What to make of that? In this context, it is fair to say that Justice Rehnquist was not successful in convincing a majority of the justices in the context of abortion either in *Roe* itself or in the later cases such as *Casey*, in the latter case perhaps because of *stare decisis*. But he was successful in stemming the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition. The *Glucksberg* case stands to this day as an important precedent, limiting the Court's role in the realm of social policy and helping to ensure that the Court operates more as a court of law and less as an institution of social policy.

Fifth and last is administrative law. Here, too, I can't possibly cover all of his many significant contributions. For example, in *Vermont Yankee Nuclear Power Corporation v. NRDC* in 1978, he wrote a textualist and important opinion for the Court. The Court should not be making up new procedural requirements for agencies to meet, beyond those requirements specified in the Administrative Procedure Act.

But the case I want to focus on in this context is Justice Rehnquist's separate opinion in the 1980 case of *Industrial Union*

*Department v. American Petroleum Institute*, popularly known as the “Benzene Case.” In that case, the statute gave the secretary of labor expansive authority to promulgate standards to regulate harmful substances such as benzene. In a separate opinion, Justice Rehnquist, speaking for only himself, would have held that the act was an unconstitutional delegation of legislative power to the executive branch.

He operated within the confines of precedent. And the precedent did allow some delegation of rule-making authority to agencies. Rehnquist did not suggest that agencies lacked any power to issue binding rules. But applying the precedents, Rehnquist argued that Congress may not delegate *important* choices of social policy to agencies. He summarized the point this way: “It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people. When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President” in the legislative process.<sup>15</sup>

Rehnquist’s opinion on the nondelegation issue has not become the law, but it nonetheless has had a major impact in laying the foundation for the Court’s modern major rules doctrine, sometimes referred to as the major questions doctrine. In the 2000 decision in *FDA v. Brown & Williamson*, the Supreme Court, with Rehnquist in the majority, adopted a principle of statutory interpretation under which Congress may not delegate authority to agencies to issue major rules unless Congress clearly says as much. In Professor Abbe Gluck’s words, *Brown & Williamson* applied “a presumption of *nondelegation* in the face of statutory ambiguity over major policy questions or questions of major political or economic significance.”<sup>16</sup>

In recent years, the Supreme Court has applied that major rules doctrine in an important Environmental Protection Agency case written by Justice Scalia. And lower courts, including this judge, continue to apply that doctrine in significant ways. The major rules or major questions doctrine is critical to limiting the ability of agencies to make major policy decisions that belong to Congress,

at least unless Congress clearly delegates that authority. Rehnquist is ultimately responsible for that rule.



In sum, few justices in history have had as much impact as William Rehnquist. He did so by dint of his personality and the force of his intellect. He was a humble man. He was not flashy. The 1970s book *The Brethren* by Bob Woodward and Scott Armstrong was highly critical of many justices for being too arrogant or too aloof or too lazy or not up to the job. The book was unsparing and caused a sensation in the country. More than any time since then, the individual justices themselves were the talk of the country.

But that negativity did not extend to Rehnquist. Although the book was arguably critical of his jurisprudence as being too conservative, at least in the eyes of the book's sources or authors, Rehnquist was referred to with the following descriptions sprinkled throughout the book: easygoing, good-natured, thoughtful, diligent, a crisp intellect, a solid conservative, well-reasoned, sophisticated analysis, a clever tactician, very casual, friendly toward clerks, a team player, remarkably unstuffy, and affable. Pretty good for a book critical of virtually everyone on the Supreme Court. But that reflected the man.

He loved to play tennis with his clerks. He played once a week with his clerks. He only hired three clerks because he wanted to have a set doubles game every week. Asked if he hired clerks based on their athletic ability, he said, "Of course not. It's only one of several factors."

He wrote clever lines. Here's one lengthy passage from a 1977 case:

Those who valiantly but vainly defended the heights of Bunker Hill in 1775 made it possible that men such as James Madison might later sit in the first Congress and draft the Bill of Rights to the Constitution. The post-Civil War Congresses which drafted the Civil War

Amendments to the Constitution could not have accomplished their task without the blood of brave men on both sides which was shed at Shiloh, Gettysburg, and Cold Harbor. If those responsible for these Amendments, by feats of valor or efforts of draftsmanship, could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men's room of truck stops, notwithstanding the considered judgment of the New York Legislature to the contrary, it is not difficult to imagine their reaction.<sup>17</sup>

Rehnquist was at the helm of major national events. He presided over the impeachment trial of President Bill Clinton. Of his experience presiding over that trial, he later said he did nothing of note and did it very well. He presided over and kept the Court intact after perhaps the single most controversial episode in modern Supreme Court history, *Bush v. Gore*. In that case, he wrote a concurring opinion joined by Justices Scalia and Thomas that was based on the precise text and history of Article Two, and that was more persuasive to many than the *per curiam* majority opinion.

Despite suffering badly from cancer, he valiantly made his way to the inauguration stand in 2005 to administer the oath to President George W. Bush. He led the Court and the federal judiciary with a firm hand on the wheel, but without seizing the spotlight. One senses that his former clerk John Roberts is following the Rehnquist model and seeking to lead the Court and the judiciary with that same firm but humble touch.

Despite his affability, Rehnquist was efficient. He hated wasted time. He bristled at logistical messes. The year I clerked at the Court, I was put in charge of organizing a baseball game outing to Camden Yards with the Rehnquist, Scalia, and Kennedy clerks. The Washington Nationals did not exist yet, so we were off to Baltimore. But not just the clerks. The chief justice decided he wanted to go as well, along with Justice Kennedy. I bought all the game tickets; I arranged the train transportation to Baltimore from Union Station. At the time, there was a direct train to the stadium.

It seemed simple, but I was scared that some screwup would occur. “What was I doing in charge of the chief justice?” I thought to myself. Happily, the whole day went off without a hitch, although I can’t say I enjoyed any of it until we were all safely back in DC and went our own ways.

But I do remember when the chief said to me as we left Union Station at the end of the day that the trip had been enjoyable and very well organized. Maybe it was just a throwaway line, but I was excited. From the chief, that was the highest praise. It was as if Walter Berns had told you that you were an excellent constitutional scholar. It doesn’t get any better than that.

For those who saw him only in oral argument, Rehnquist could seem tough and gruff at times. When I argued an attorney-client privilege case in the Supreme Court in 1998, Rehnquist quickly asked me if anyone supported the position I was advocating. I quickly cited two academic commentators, Mueller and Kirkpatrick. Without missing a beat, Rehnquist with evident disdain said, “Who are they?” When I explained that they had written a treatise on evidence, Justice John Paul Stevens unhelpfully chimed in, “We usually rely on Wigmore.”

Later in the argument, Justice Stephen Breyer returned to the theme and asked whether anyone supported another position I was advocating in the case. And I said: “With hesitation at raising their names again,” and I then paused and turned my head to look at the chief justice. He smiled and laughed. And then I proceeded to repeat that Professors Mueller and Kirkpatrick supported that position, too.

The bar for humor at the Supreme Court is admittedly pretty low, but I was nonetheless pleased that I somehow cleared it that day and did so without irritating the chief justice. Indeed, in the official transcript of the oral argument, which I double-checked this morning just to make sure I was not imagining things, the transcript says, “Laughter.” Thank God.

That moment made it a little easier for me when Chief Justice Rehnquist wrote the majority opinion rejecting my position in the case. But, by the way, he cited Mueller and Kirkpatrick.

As we celebrate Constitution Day, I am honored to have been able to say a few words about my first judicial hero, William Rehnquist. Working on these remarks has been a labor of love and a sign of my deep appreciation and respect for Walter Berns and for William Rehnquist, two constitutional statesmen.

## Notes

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7. *California v. Minjares*, 443 U.S. 916, 918–19 (1979) (Rehnquist, J. dissenting from denial of stay).
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9. *Ibid.*, 467.
10. *Ibid.*, 468.
11. *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J. dissenting).
12. *United States v. Lopez*, 514 U.S. 549, 552 (1995) (parenthetical references omitted).
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## About Brett Kavanaugh

Brett Kavanaugh is a judge on the US Court of Appeals for the DC Circuit. He was nominated to the Court by President George W. Bush and confirmed by the Senate in 2006. Before his judicial appointment, Judge Kavanaugh served in the White House for President Bush for more than five years. From 2003 to 2006, he was assistant to the president and staff secretary, and from 2001 to 2003, he was associate counsel and then senior associate counsel to the president. Judge Kavanaugh was a partner at Kirkland & Ellis in Washington, DC, from 1997 to 1998 and again from 1999 to 2001. From 1994 to 1997 and for a period in 1998, Judge Kavanaugh was associate counsel in the Office of Independent Counsel Kenneth W. Starr. In 1993–94, Judge Kavanaugh served as a law clerk to Justice Anthony M. Kennedy of the US Supreme Court. He previously clerked for Judge Walter Stapleton of the US Court of Appeals for the Third Circuit and for Judge Alex Kozinski of the US Court of Appeals for the Ninth Circuit. Since becoming a judge, Judge Kavanaugh has taught full-term courses on separation of powers at Harvard Law School, as well as courses at Georgetown University Law Center and Yale Law School.

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# From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist

*2017 Walter Berns Constitution Day Lecture*

“[William Rehnquist] had a massive and enduring impact on American law,” including in areas of “criminal procedure, religion, federalism, unenumerated rights, and administrative law.”

“[He] would be the first to say that he did not achieve full success on all the issues he cared about. But it is undeniable, I believe, that he brought about a massive change in constitutional law and how we think about the Constitution.”

—Brett M. Kavanaugh

Over more than three decades in service to the Supreme Court, Chief Justice William Rehnquist stressed the importance of constitutional structure to preserving individual liberty. Always emphasizing the role of the courts in maintaining that structure, Chief Justice Rehnquist redirected American law in key areas—most notably, federalism, congressional power, criminal procedure, and religion. Through his opinions, articles, and books, he demonstrated how to be a modern constitutional statesman, deserving commemoration and celebration.

In honor of the anniversary of the signing of the US Constitution on September 17, 1787, AEI’s Program on American Citizenship marked Constitution Day with a lecture by Judge Brett Kavanaugh. Kavanaugh’s lecture was the sixth in a series named for distinguished AEI scholar Walter Berns.