



**AMERICAN ENTERPRISE INSTITUTE**

**FROM THE BENCH: JUDGE BRETT KAVANAUGH ON  
THE CONSTITUTIONAL STATESMANSHIP OF CHIEF  
JUSTICE WILLIAM REHNQUIST**

**INTRODUCTION:  
RYAN STREETER, AEI**

**REMARKS:  
BRETT KAVANAUGH, US COURT OF APPEALS FOR THE DC  
CIRCUIT**

**MODERATOR:  
GARY J. SCHMITT, AEI**

**5:00–6:10 PM  
MONDAY, SEPTEMBER 18, 2017**

**EVENT PAGE: <http://www.aei.org/events/2017-walter-berns-annual-constitution-day-lecture/>**

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RYAN STREETER: Good afternoon and welcome to AEI. It's my pleasure to welcome you all here today and to introduce our speaker. My name is Ryan Streeter. I'm the director of domestic policy studies here at the American Enterprise Institute. And we're really pleased that you're joining us today for this year's annual Walter Berns Constitution Day Lecture.

Our annual lecture is named in honor of Walter Berns, a true patriot and scholar who did more than anyone in recent memory to revive an interest in the study of the Constitution and show its continued relevance of our never-ending project of cultivating civic virtue and patriotism in the populous and properly instructing our young. So thank you for being here today with us.

In fact, one of the sconces in the front of our new building here when you came in in the entryway has a quote from Berns that says, "Citizenship, like patriotism, has to be cultivated. It cannot be taken for granted." And so this is always a big and important day for us. And we're pleased to be joined by Irene Berns today and other members of the family for today's lecture.

I'm pleased to introduce our speaker for this year's lecture, Brett Kavanaugh, who joins us along with an illustrious list of past speakers, which will include Justice Antonin Scalia, Attorney General Michael Mukasey, and others. After Judge Kavanaugh concludes his remarks today, we'll be joined by AEI resident scholar, director of our project on citizenship, Gary Schmitt for a moderated question and answer time. And then we hope that you will join us outside of these doors afterward for a wine and cheese reception when the event concludes.

So on to today's speaker. 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. Prior to that, he was an assistant to President George W. Bush and staff secretary, meaning he controlled every missive and memo that went into the Oval Office, including some poorly one written by yours truly. He was a partner at Kirkland & Ellis, prior to that in private practice. Also in the 1990s, he was an associate counsel in the Office of Independent Counsel Ken Starr. And he also served as a law clerk to Justice Anthony Kennedy of the Supreme Court. A graduate of Yale College and Yale Law School, Judge Kavanaugh has also taught courses on the separation of powers at Harvard, Yale, and Georgetown.

So, without further ado, I'd like to ask you to join me in welcoming Judge Kavanaugh to AEI. (Applause.)

BRETT KAVANAUGH: Well, thank you, Ryan, for the warm introduction. I thank Gary for helping to arrange this event and for inviting me here today. 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. And how about this great new building? Spectacular.

I'm honored to speak at a lecture named for Walter Berns, and I'm honored that Mrs. Berns is here today. 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, and as Irene of course knows well, 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 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 was 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, which absent constitutional amendment 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, do 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 Five 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: 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 for that matter 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 constitutional 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 constitutional 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 Nixon, he was an extraordinary associate justice from 1972 to 1986. And then in 1986, President 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 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. And 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 to work with the speech writers 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. And 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 and deciding 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, I'm sad to say, 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 case after case had seemed to be simply enshrining its policy views into the Constitution, or so the critics charged. During Rehnquist tenure, the Supreme Court unquestionably changed and became more of an institution of law, where the Court's power is to interpret, apply and to apply the law are 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, quote, “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. 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.

And, 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 Scalia had only been on the Court for a year and not yet written any important opinions at a justice. Justice Thomas was not even a lower court judge yet. My future boss and future mentor, Justice Kennedy, was still a Ninth Circuit judge, and that fall, in the confines of my common law classroom and in other classrooms and other classes later in my law school career, I became exposed to the hallmarks of American constitutional law.

And 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 the 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 of 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, which I’ll discuss shortly, 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. (Laughs.)

And my Rehnquist story begins with an extraordinarily important Law Review article Justice Rehnquist wrote in 1976 in the Texas Law Review. It's entitled "The Notion of a Living Constitution." 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 morays of the people.

To begin with, 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.

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 moved on to address what he described as a quite different living Constitution philosophy that then was being espoused in certain circles. Under that version of the living Constitution, as Rehnquist described it, nonelected 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 free-wheeling, 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 then, the federal judiciary may press a buzzer and take its turn at fashioning a solution.

It's important to emphasize that Rehnquist's notion of 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. That was wrong. That was not Rehnquist's philosophy or the point of his article.

His point was that it was not for judges 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 it is straightforward, and if I can be so bold as to give you a second reading assignment from this lecture, it is go read Rehnquist's article entitled "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 under the US reports. And 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. And just a warning that I'm going to be discussing some case law here, but you knew what you were signing up for with this lecture, so here it goes.

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 Neal, 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, Rehnquist said that one of the achievements during his first then 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 vs. Gates*, still cited often today, that made the probable cause standard more flexible and commonsensical. He wrote opinions expanding the category of special



need searches, those that could be done without a warrant or individualized suspicion. For example, the 1990 case of *Michigan vs. 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 vs. 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 separated opinion in *California vs. Munoz*, Rehnquist called for the overruling of *Mapp*. He disagreed with the idea that, in his words, the criminal should go free solely because of a good-faith error in judgment on the part of the arresting officers. 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 had 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 endured to this day. Probably the most notable is the 1984 decision of *United States vs. 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*. Justice Rehnquist was for years the most vehement critic of *Miranda*, and he wrote numerous opinions limiting its application. For example, in *New York vs. 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, limiting the scope of that precedent. Those precedents and cases altered by Rehnquist have ensured that *Miranda*'s applied in what Rehnquist would say is 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 vs. 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 Burger and Justices Blackmun and 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 of 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. He continued, the most expansive reading of the leading constitutional case does not remotely suggest that this Court has been granted a roving commission, either by the founding fathers or by the framers of the 14th Amendment, to strike laws that are based upon notions of policy or morality, suddenly found unacceptable by a majority of this Court. The Court's ruling, Rehnquist stated, was an act of will and not an act of judgment.

But the story did not end there. In the wake of Furman, many states enacted new capital punishment statutes. In 1976, the Court 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 in his words, based on bad history and useless a guide to judging. 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*, that struck down a moment of silence law. He asked reasonably enough, how could a law that allowed students a moment of silence be deemed an establishment of religion? He was in dissent in several other cases involving prayer in public schools such as *Lee vs. Weisman* and *Santa Fe vs. Doe*, involving its 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 Courts throughout his tenure and to this day have sought to cordon off public schools from state-sponsored religious prayer in this place. 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 vs. Allen*, he wrote the opinion for a five-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 an opinion written by Rehnquist in the *Zobrest* case, they reinforced that Mueller holding. And then in 2002, the Court in *Zelman*, again a majority opinion by Rehnquist, upheld an Ohio school voucher program that would allow voucher 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 law metaphor was wrong as a matter of law and history. And that Rehnquist legacy continues as we see, for example, in recent cases such as *Town of Greece vs. Galloway*, which upheld the practice of prayer for local government meetings. And, of course, without the line of Rehnquist cases beginning with Mueller against Allen, we never would have seen last term seven to two decision in *Trinity Lutheran*. 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 — federal commandeering of state officials, 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. While 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 *Lopez vs. United States* in 1995. The case involved the federal Gun Free School Zones Act of 1990. And 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 should 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. Quoting Madison, he said that the powers delegated 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, Rehnquist wrote.

Rehnquist then described the arc of the Court's commerce clause jurisprudence, which had expanded the clause significantly over the years, but he said they 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'd be hard-pressed to posit any activity by an individual that Congress is without power to regulate. Congress, Rehnquist emphasized, does not have a general police power. 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 vs. 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, the Congress' commerce clause authority extends to regulation of economic activity, not to noneconomic conducts 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. And after Rehnquist had left the Court, in the health care case in 2012, although it is not often the first things 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, 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 vs. 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 in 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 vs. 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 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's approach to unenumerated rights was not consistent with the approach of the abortion cases such as *Roe vs. Wade* in 1973, as well as the 1992 decision reaffirming *Roe*, known as *Planned Parenthood vs. Casey*.

What to make of that? In this context, it's fair to say that Justice Rehnquist was not successful in convincing a majority of the justices in the context of abortion either on *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 willing 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, administrative law. Here, too, I can't possibly cover all of his many significant contributions. For example, in *Vermont Yankee* 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 vs. API*, 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 only for himself, would have held that the act was an unconstitutional delegation of legislative power to the executive branch. He operated within the confined of precedent. And the precedence did allow some delegation of rulemaking authority to agencies.

So 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 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, Rehnquist wrote.

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 *Brown and Williamson vs. FDA*, 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 and Williamson* applied a presumption of nondelegation in the face of statutory ambiguity over major policy questions or questions of major political or economic significance.

In recent years, the Supreme Court has applied that major rules doctrine in an important EPA 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 on 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 Woodward and 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 in that book with the following description 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, which were 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 image their reaction.

Rehnquist was at the helm of major national events. He presided over the impeachment trial of President 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 vs. Gore*. In that case, he wrote a concurring opinion joined by Justices Scalia and Thomas that was based on a precise text in 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 in the federal judiciary with a firm hand on the wheel, but without seizing the spotlight. One senses that his former clerks, 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 out in the Camden yards with the Rehnquist, Scalia, and Kennedy clerks. The Nats 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 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 finally 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 Stevens unhelpfully chimed in, "We usually rely on Whitmore."

Later in the argument, Justice 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 then I paused and turned my head to look at the chief justice. And 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 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 imaging things — the transcript says, “Laughter.” (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. (Laughter.)

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.

Thank you for listening. (Applause.)

GARY SCHMITT: Well, I’m Gary Schmitt and I’m director of the AEI’s program on American citizenship. And we have a few minutes to take some questions from our guest, for Judge Kavanaugh, and I’ll be a moderator and not ask the 10 questions I have here. So please, if you would raise your hand, and then, when you have a microphone in front of you, please identify yourself and ask a question.

Q: Thank you. It was an excellent presentation. It really was. I was very moved by the personal touch you gave. But my question is what would Rehnquist’s position have been on the Obamacare tax ruling? (Laughter.)

JUDGE KAVANAUGH: Let’s start right off.

DR. SCHMITT: Yes.

JUDGE KAVANAUGH: Well, I have no way to predict, but obviously that ruling, as I’ve said many times publicly, was ultimately based on the principle of constitutional avoidance and how you — the power of courts to interpret seeming ambiguities in statutes to avoid constitutional questions. And I’ve written about this.

That principle really rests on how quickly you find ambiguity in statutes. So the Court said it was — Chief Justice Roberts said it was ambiguous whether it was really a penalty and could not reasonably be construed as a tax. The four dissenters obviously disagreed



that the statute could be reasonably read that way. It all boiled down — the whole thing boiled down to what's your trigger for finding ambiguity in interpreting statutes.

And this is one of the things that bothers me as a judge. There's no good guideposts to that. There's no good way to have neutral principles. And I've recommended that we do something about the trigger of the ambiguity in constitutional avoidance legislative history, chevron doctrine. But that's what it turned on.

And I really have no way of predicting. I mean, I think it's pretty clear where he would have been on the commerce clause, pretty clear, if it's considered a penalty, then it can be justified by the taxing power. The question is really how quickly can you find constitutional avoidance to construe it not as a penalty and as a tax. And there are no good guideposts to that, which probably explains, you know, what happened in that case.

I will say Chief Justice Roberts has been fairly consistent throughout his jurisprudence over the years in applying the constitutional avoidance doctrine, and that case was no different from others where he's done that and also incurred the wrath of some of his colleagues when he's done so. I hope that avoided the question appropriately. (Laughter.)

DR. SCHMITT: It's very good.

Q: Good afternoon, and thank you for coming.

DR. SCHMITT: Could you identify yourself please?

Q: Yeah. David Jimenez from the American Enterprise Institute. One thing that I think often makes following the Supreme Court so interesting is that the "right," quote, unquote, on the Court has much more diversity and tensions within it than the other side. So I'm curious if you could speak of what tensions Rehnquist might have had with — in terms of different legal vision compared to Clarence Thomas and Antonin Scalia. And if those differences were caused by Rehnquist being chief justice and having kind of a different role given that position or whether there was actually a tension in their philosophies.

JUDGE KAVANAUGH: Right. So I think they agreed by and large on most major questions of constitutional law. One thing that clearly Rehnquist — and I didn't talk about this because you can't talk about everything in the remarks. On the First Amendment, free speech clause, Rehnquist was much more deferential to state and local governments on speech issues. He did not believe — he was following Justice Harlan and before that Justice Frankfurter. He did not believe in dot-for-dot incorporation necessarily of the First Amendment's free speech clause.

So he applied it more vigorously against the federal government than he did against the states. And you see this come up times and again in the free speech context. Justices Scalia and Thomas disagreed with that. They are much more on the free speech side of things. They do not draw a line between federal and state government.

A good example, the flag-burning case. Justice Scalia was on the Court at the time. He's in the majority in the flag-burning case. Rehnquist dissents vigorously and says that the states should be allowed to prohibit expression like that. There are a number of other cases like that, where Rehnquist was more deferential to state and local governments on the First Amendment free speech clause.

There are other areas, too, where it looked like they differed, although it's a little hard to know whether Rehnquist was making a strategic tactical judgment or really disagreed with Scalia and Thomas on certain cases and certain positions. One of the adjectives I used there was clever tactician, and I think that's one — when he passed away and throughout this tenure one of the things people recognized about Rehnquist was he played the long game. He saw where he wanted the law to go, and he was willing to make incremental steps to try to convince his colleagues so that he could get five justices to that position.

And so he ended up in some cases disagreeing with Justice Scalia and Thomas on a variety of things. But, in general, they shared the same basic approach to the Constitution, I believe, at least in my view. Justice Scalia and Thomas a little more textualist on statutory interpretation, although, like the Vermont Yankee case I mentioned, in 1978, that was as textual as it comes. And it was a very important Rehnquist opinion on administrative law.

DR. SCHMITT: It is interesting. I mean, you know, when he was not the chief justice for those 15 years —

JUDGE KAVANAUGH: Yes.

DR. SCHMITT: He was known as the lone ranger.

JUDGE KAVANAUGH: Right.

DR. SCHMITT: And so the dissents were pretty strong. And, as chief justice, obviously, he thought he had different kinds of responsibilities.

JUDGE KAVANAUGH: It appears that way, so it's a little hard to know exactly what was motivating him, but it's true. He wrote many fewer solo dissents as he got — but not none. You know, Bush v. Gore is very interesting. Why did he write separately in Bush v. Gore? He rarely wrote separately. He must have felt very strongly that his opinion was right. And he was going to join the per curiam majority, but he wanted to have this position out there on that, which is — I still think in retrospect people don't even teach that case. I teach it every year because I think it's an extraordinary case. And his position and leading the Court to the results that it reached I think is a great story and an interesting set of opinions to read. They were about law actually.

DR. SCHMITT: In the back here.

Q: My name is Tom Korologos. I'm a Washington swamp (lawyer ?).

JUDGE KAVANAUGH: Yes.

Q: I want to add a couple of tidbits to your story. I was in the Nixon White House when he was nominated for associate. And we got through that. I think there were 30 or something — 33 votes against him. And then he became chief, he called me and said, “Here we go again.” So I went up, and he said, “Why do we need a hearing?” I said, “What do you mean why do we need a hearing? We’ve got to have a hearing before the committee.” He said, “All my cases are there. They can read them if they’d like. I’m not going to telegraph what I’m going to do on pending cases, so why do I have to go to a hearing?” And he was serious. And I kind of had to beat him up a little bit to go to the hearing.

And my other story is — first of all, I’m not a lawyer, but I’ve read the Constitution for several reasons. And when Secretary Hillary Clinton was running for president, I read the Constitution again. And nowhere in the Constitution does it say “she.” It’s the case will be presented to him and he and he and he, and nowhere does it say “she.” So I mentioned this to a sitting justice once at lunch. And he said, “My God, don’t tell Scalia.” (Laughter.) Thank you.

JUDGE KAVANAUGH: I don’t think I can improve on that. (Laughter.)

DR. SCHMITT: Well, as somebody who used to work in the US Senate, I can tell you the answer is because we can. But, actually, I think the vote was very similar to —

JUDGE KAVANAUGH: Yeah. He had a tough confirmation process both times. It did not increase his affection for Congress.

DR. SCHMITT: Yeah.

JUDGE KAVANAUGH: Either preceding. You would know better than I, but that’s what my understanding is.

Q: Thank you. Thank you very much. Abe Shulsky from the Hudson Institute. With respect to the — what you said about the Miranda decision, I was just wondering what your view and what you think Justice Rehnquist might have thought about the way in which some of the terrorism suspects are handled now. Because it seems that in the last administration, because they wanted to bring them all to an ordinary civilian criminal court, they stretched it quite a bit by questioning these suspects for some period of time before giving them the Miranda warning. And I was just wondering if that — if you think that’s inconsistent with the way he would have looked at it or —

JUDGE KAVANAUGH: Well, I mentioned the Quarles case, and I choose that deliberately because I was trying to choose cases that had relevance to this day. And the Quarles public safety exception to Miranda is an extremely important case and has been the case that has been relied on in other contexts other than the precise context it arose in there, including the national security context.

So I think actually he created that and many other exceptions to Miranda that in his — you know, he obviously would prefer to overrule it, but if it was going to stay, he thought it had to be cabined and narrowed in ways that made it more commonsensical and more consistent with the text of the Constitution. Quarles was one such example, and I think that is the case that's often bandied about today when they're discussing issues like the one you raise.

DR. SCHMITT: Can I dive a little bit deeper on Miranda? Because, I mean, clearly, he thought the original decision was wrong. But then when he had a chance to sort of — you know, sort of wipe it off the books, if I remember correctly, he argued that — and so, now it's so engrained in our sort of —

JUDGE KAVANAUGH: So there are different theories on this. It was a seven-two decision reaffirming Miranda. Did he suddenly wake up and think, oh, Miranda actually was correct and my 20 years of jurisprudence is wrong? I think that's highly unlikely.

I think what probably happened is he realized there was no chance the Court at that time or anytime in the foreseeable future was going to overrule Miranda. And rather than someone else writing an opinion that would do things that he was not amenable to, that he would write the opinion and create this one-off exception for reaffirming a case that had been around for a long time.

That's one theory, and I think it's a fairly persuasive theory, but, obviously, Justices Scalia and Thomas, that's an example where they dissented in the case. But I think he wanted to narrow or at least not expand stare decisis in ways that he wouldn't like, and he didn't want things being said about Miranda that he would not agree with so he kept control of the opinion. I could be wrong on that. That's one theory though.

Q: Judge Kavanaugh, thank you for coming today. My name is Chris Johnswick (ph). I just had a question for you. You spoke about the chief justice's role in both Roe and Casey. I wonder if you could elaborate as what would you say his biggest legacy is for us. You agreed with his dissent in those opinions.

JUDGE KAVANAUGH: As I said, he was not successful in convincing the other members of the Court to his position there. But, more broadly, in subsequent due process, or unenumerated rights cases more generally, he did write the Glucksberg opinion that prevents a general role for the Court in creating new social rights.

So I don't know if I can improve upon just that bare description of what he did. He clearly wanted to overrule Roe and Casey and did not have the votes. That's where it was left. So it did not deter him or prevent the Court from reaching the result it reached in the later Glucksberg cases, as I mentioned, and that adopts a general framework for creation of new social rights that still applies today.

DR. SCHMITT: Please, up front.

Q: I have a question —

DR. SCHMITT: Wait for the mic, please. Thank you. And identify yourself. Please, thanks.

Q: Thank you. Dan Berinsky (ph), retired lawyer. I just read and I don't know how to evaluate it from Michael McConnell, former circuit judge who was on the losing side in the City of Boerne case. He says that the 14th Amendment specifically it was debated and changed to leave Congress with the muscular authority to enforce the 14th Amendment. And that was because Congress did not trust the Supreme Court, who had recently issued a Dred Scott decision. If that really was the intentions of the framer, then could you comment — you obviously haven't read or I would be surprised if you read ex-Judge McConnell's or former Judge McConnell's comments.

JUDGE KAVANAUGH: I am familiar with it. And he — the City of Boerne is a tough case in figuring out the scope of Congress' Section Five authority. The congruence and proportionality test is not exactly one that lends itself to crisp lines that the Court has drawn in that area. So I think anything Professor McConnell writes is worth paying attention to in any context. And, you know, that article makes a very strong case for that position in the case. He has still not reconciled to Smith or City of Boerne. Yeah.

DR. SCHMITT: Actually, Walter Berns had a student who wrote a dissertation under my dissertation adviser about the 14th Amendment. And one of the sort of notes he took away from it was that Congress had learned by that time that the congressional record could be used in interpreting how judges were going to read. And so his argument was is that they said everything possible so that the coherence of the thing is actually very much up in the air. So modern game-playing when it came to the Court was already underway. Please.

Q: Hi. I'm Susan Verdin (ph). My question is how much of Justice Rehnquist do you replicate every day? Obviously, you've chosen to join the judiciary and have foregone a lot of the benefits of the private sector.

JUDGE KAVANAUGH: I don't have gold stripes.

Q: Yeah. Share what of him lives in you.

MR. KAVANAUGH: Share — I didn't hear.

Q: What of him lives in you.

JUDGE KAVANAUGH: Oh, well, I didn't clerk for him, but I obviously admired him. I mean, I think one year in law school, you're reading all these cases, and like I said, he was the guy who I agreed with in all sorts of different cases. And then to actually — I can't say I knew him well but to get to know him as a law clerk in the building and, you know, arguing in front of him and some interactions. I just always thought he was a good person.

So, yeah. He's a role model, if that's the question, in terms of his behavior in the Court and his general jurisprudence. Like I said, I disagree with some aspects of it, but so would any two people. But, yeah. In terms of how he conducted himself, I think he's a role model for all of us and certainly one for me.

All those adjectives that I read coming from an otherwise hostile book about the judiciary are ones that we would all hope would be said about us, and I certainly strive for those, too. So both in his — he wrote books, he wrote articles, he was interested in the law, he was consistent in his positions, and he was a nice person. Those are things all of us I think would aspire to, and I certainly aspire to. And that's one of the reasons I chose him as the topic for the lecture.

DR. SCHMITT: I think we're going to leave it on that high note and also because there's wine to be had. So I want to thank you all for joining us, but I also want to again thank the judge for a wonderful presentation. (Applause.)

(END)