



# Kavanaugh's Hero Worship Threatens Women's Equal Rights

By Maggie Jo Buchanan and Jocelyn Frye | September 04, 2018

In 2017, Brett Kavanaugh, President Donald Trump's Supreme Court nominee, delivered a speech on former Supreme Court Chief Justice William Rehnquist at the American Enterprise Institute (AEI) during which he called the ultraconservative former justice his hero. Kavanaugh explained that he not only admired Rehnquist's legal opinions but also his strategic approach to the law:

*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.<sup>1</sup>*

That speech has rightfully gained attention for Kavanaugh's remarks in opposition to *Roe v. Wade*.<sup>2</sup> A close examination of the speech and his meticulous defense of different aspects of Rehnquist's record, however, makes clear that Kavanaugh's opposition to women's rights is unlikely to end at reproductive health. Rather, the speech provides a troubling road map for Kavanaugh's legal philosophy, which he aligns in lock-step with a Rehnquist worldview that could undo constitutional protections against sex discrimination that have been in place for more than 40 years.

In his speech, Kavanaugh pointed to Rehnquist's early history on the Supreme Court, including the former justice's interest in pushing a federalism revolution to advance states' rights and his resistance to what he viewed as an inappropriate expansion of unenumerated rights. These were both cited as examples of where Kavanaugh found himself in agreement with Rehnquist. Kavanaugh also praised Rehnquist's stubborn, if not defiant, effort to reshape the court's jurisprudence to align with his own views—regardless of the court's previous stances.

This embrace of Rehnquist makes clear that Kavanaugh is far from content to respect precedent. Furthermore, Kavanaugh says nothing to suggest that he would veer from Rehnquist's staunch resistance to the expansion of women's rights. He lauds Rehnquist's strict interpretation of the Constitution, even though Rehnquist frequently used this analysis to oppose striking down gender-based barriers on equal

protection grounds. Kavanaugh's remarks send a clear message about the type of Supreme Court justice that he most admires; and, if he is confirmed, it is all but certain that he will continue his hero's "long game" of remaking the law in his image.<sup>3</sup> Most importantly, the AEI speech did more than simply reveal Kavanaugh's Rehnquist hero worship; it revealed a skewed vision of the law that will set women back—a vision that requires rigorous scrutiny and ultimately should not be elevated to the Supreme Court.

## Rehnquist's conservatism

Rehnquist served on the Supreme Court from 1971 until he died in 2005, serving as chief justice from 1986 until his death. Even before his time on the court, he was noted for his conservative beliefs. As a clerk in the Supreme Court, he had written a memo urging the court to uphold *Plessy v. Ferguson* and keep schools segregated.<sup>4</sup> Once he became a Supreme Court justice, Rehnquist was respected by colleagues but almost immediately gained the reputation for being the court's most conservative member. Eventually, former President Ronald Reagan elevated him to become chief justice. Rehnquist's career is notable for having reversed progressive gains in education, health care, and criminal law.<sup>5</sup>

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## Marching in lockstep: Rehnquist's early influence on Kavanaugh

Kavanaugh's 2017 AEI speech highlighted his long fidelity to Rehnquist's legal philosophy. Throughout his remarks, Kavanaugh explicitly tied himself to Rehnquist's approach to the law. In particular, Kavanaugh recounted his earliest experiences in law school:

*[I]n 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. ... In class after class, I stood with Rehnquist.*<sup>6</sup>

Kavanaugh did not detail the specific cases where he found himself standing with Rehnquist. However, a review of Rehnquist's opinions and dissents during his first 15 years on the Supreme Court—those that Kavanaugh would have been studying during law school—speaks volumes about Kavanaugh's philosophical roots. Many of these landmark cases formed the foundation for women's rights and are standard

reading for first-year law students, but Rehnquist consistently showcased resistance to a wide range of women's rights. Critically, considering Kavanaugh's admiration for Rehnquist, the former chief justice's opinions in these cases raise serious questions about where Kavanaugh stands today.

### Rehnquist and Kavanaugh's objections to women's constitutional rights

Among the cases that Kavanaugh likely read during his first year of law school was the landmark 1976 *Craig v. Boren* case, in which the Supreme Court recognized for the first time that the 14th Amendment's Equal Protection Clause required heightened constitutional scrutiny when it came to laws that treated men and women differently.<sup>7</sup> This case was the result of a long-fought legal strategy led by future-Justice Ruth Bader Ginsburg and the American Civil Liberties Union to eliminate the legally sanctioned discriminatory practices that resulted in women being treated differently than men.<sup>8</sup> Both before and after *Craig*, Rehnquist strongly opposed the court's approach to applying the Equal Protection Clause to women. And based on Kavanaugh's AEI speech, this view likely became a core part of Kavanaugh's understanding of the law.

#### *The importance of constitutional protections against sex discrimination*

Until 1971, women were not recognized to have any rights under the 14th Amendment. This changed following the Supreme Court's landmark *Reed v. Reed* decision, in which, for the first time, the majority applied the Equal Protection Clause to invalidate a law on the basis of sex discrimination.<sup>9</sup> Even then, however, governments defending laws based on gender only had to meet a bare-minimum standard—known as rational basis review—for explaining why such laws should be upheld. Five years later, thanks to the Supreme Court's ruling in *Craig v. Boren*, women's constitutional rights were significantly strengthened.

While the government does not have to meet as high of a bar when defending laws that discriminate on the basis of gender versus that of race, it would be hard to overstate the importance of the court's rightful recognition that sex discrimination is prohibited by the constitution in this manner. *Craig* paved the way for the elimination of laws that mandated different treatment between men and women in areas such as unemployment and social security survivor benefits, as well as laws that gave husbands the right to control marital property without their wife's consent.<sup>10</sup> The case also strongly influenced the court's understanding of sex discrimination cases brought under Title VII of the Civil Rights Act of 1964, significantly strengthening women's ability to fight sex discrimination and to pursue pay and promotion opportunities in the workplace.

After these rights were established, women's economic power increased dramatically. Women's participation in the workforce has accounted for the majority of increases in family income observed since the year 1970—meaning that women are not only

better able to support their families but also to support themselves both outside and inside a marriage.<sup>11</sup> These increases have also benefitted the U.S. economy as a whole; the economy is approximately 13.5 percent larger than it would have been if the number of women in the workforce—and their wages—had remained at 1970 rates.<sup>12</sup>

### *Justice Rehnquist's opposition*

Despite these gains, Rehnquist was staunchly opposed to the idea that discrimination on the basis of sex deserved any sort of heightened protection under the Constitution.

Even before *Craig*, Rehnquist had been a reliable vote against any decision to strike down a law on the basis of sex discrimination. This often meant taking the idea of states' rights to the extreme and maintaining that the state had the right to discriminate even when the majority of the court had been unable to find a rational reason for the law at issue to be upheld.

In one notable example, Rehnquist was the only dissenting justice in the 1975 case *Taylor v. Louisiana*, which struck down a state law that systematically excluded women from jury service.<sup>13</sup> Rehnquist seemed baffled by the majority's ruling and questioned why the changing, modernizing views about women's proper roles should affect the decision. Rehnquist's opposition to striking down laws based on sex discrimination applied to the federal government as well. He dissented in the 1973 case *Frontiero v. Richardson*, another groundbreaking case, which was argued by Ruth Bader Ginsburg a few years prior to *Craig v. Boren*. The case struck down the government's policy of automatically providing housing for the wives of servicemen but not for the husbands of servicewomen.<sup>14</sup>

Unsurprisingly, Rehnquist dissented strongly in *Craig v. Boren* once the Supreme Court recognized heightened protections in the constitution against sex discrimination. In his dissent, he complained bitterly that the only “redeeming feature of the Court's opinion ... is that it signals a retreat by those who joined the plurality opinion in *Frontiero v. Richardson*”—an opinion that suggested that the court may eventually adopt an even stricter view when evaluating sex discrimination.<sup>15</sup> Rehnquist even suggested that the majority opinion would create widespread confusion in the lower courts when dealing with sex discrimination:

*And even if we manage to avoid both confusion and the mirroring of our own preferences in the development of this new doctrine, the thousands of judges in other courts who must interpret the Equal Protection Clause may not be so fortunate.*<sup>16</sup>

Rehnquist's opposition to the use of heightened review under the 14th Amendment in order to prohibit sex discrimination did not end after he dissented in *Craig*. At nearly every turn, the justice objected—either through dissents or carefully worded concurrences—to the court's reasoning when it invoked the Constitution to strike down laws on the basis of sex discrimination.<sup>17</sup>

These views persisted throughout his career as he frequently used his beliefs in federalism and state rights as a *carte blanche* to discriminate. Nearly two decades after *Craig* was decided, then-Chief Justice Rehnquist penned a strong dissent in the 1994 case *J.E.B. v. Alabama ex rel. T.B.*, in which the majority found it unconstitutional to eliminate potential jurors during voir dire on the basis of their sex.<sup>18</sup> Rehnquist, however, strongly disagreed. First, he suggested that gender inequality was no longer an issue, before stating that all-male or all-female juries could be a positive: “The two sexes differ, both biologically and, to a diminishing extent, in experience. It is not merely ‘stereotyping’ to say that these differences may produce a difference in outlook which is brought to the jury room.”<sup>19</sup> The chief justice believed that single-sex juries could “substantially further” the ability to “achieve a fair and impartial trial.”<sup>20</sup>

### *Hiding behind legal theory*

Rehnquist’s opposition to equal rights for women went past individual cases. On the contrary, it was a deep-seated part of his approach to the law—and of his personal beliefs.

During the same year that the Supreme Court decided *Craig v. Boren*, Justice Rehnquist published “The Notion of a Living Constitution.”<sup>21</sup> The article, printed in the *Texas Law Review*, was originally a speech to law students at the University of Texas and is still considered a guiding document in conservative legal theory—adherents of which often refer to themselves as “originalists” or “strict constitutionalists.” While not explicitly referencing the ongoing legal debate over sex discrimination, Rehnquist makes sweeping statements in opposition to the judicial branch’s power to interpret the Constitution in a way that would recognize such unenumerated rights—essentially, rights that underlie or are invoked in the Constitution but are not explicitly named. Instead, Rehnquist argues that any responsibility to correct such injustices rests on elected officials, with one caveat: “Even in the face of a conceded social evil, a reasonably competent and reasonably representative legislature may decide to do nothing.”<sup>22</sup>

Ostensibly, Rehnquist argues that this approach is necessary to protect against judges inserting their own opinions into the law. Yet this talking point is a red herring. Conservative justices often oppose the recognition of rights because they have their own personal convictions against those rights and believe the law should align with those beliefs. Rehnquist’s own career in politics and then on the bench demonstrates this clearly enough.

When serving as a top official in former President Richard Nixon’s Department of Justice, the future Chief Justice—not long after proposing an amendment to end school desegregation—wrote a memo in opposition to the proposed Equal Rights Amendment.<sup>23</sup> Rehnquist did so with passion, decrying that equal protection for women under the law would lead to the dissolution of the family and “turn ‘holy wedlock’ into ‘holy deadlock.’”<sup>24</sup> Echoing the words he would write decades later in support of same-sex juries, he critiqued the amendment, saying that it would “virtually abolish all legal distinctions between men and women.”<sup>25</sup>

Rehnquist opposed constitutional protections against sex discrimination, whatever the vehicle. He opposed legislative measures such as the Equal Rights Amendment and judicial decisions such as *Craig v. Boren*. The legal theory that he—and conservatives like him—invokes in “The Notion of a Living Constitution” is simply window dressing to hide his personal distaste for equal rights.

## **Roe v. Wade and unenumerated rights**

While reproductive rights are vital to women’s ability to direct their futures on the same basis as men, the court decided *Roe v. Wade* under a different legal theory than the Equal Protection Clause—which is the focus of this brief.<sup>26</sup> While many leading feminist lawyers believe that the right to access comprehensive reproductive health care is also embodied in the 14th Amendment, the court instead decided *Roe* under the constitutional right to privacy.<sup>27</sup> Referred to as an unenumerated right, the right to privacy underpins several amendments in the Bill of Rights and was first explicitly named in the 1965 case *Griswold v. Connecticut* in order to explain the unconstitutionality of a law prohibiting the use of contraceptives among married couples.<sup>28</sup>

While *Griswold* was decided before Rehnquist’s time on the court, he objected strongly when the right was invoked in *Roe v. Wade*. In his AEI speech, Kavanaugh explicitly praised this dissent and supported the former chief justice’s restrictive views on the judiciary’s ability to apply the Constitution in upholding the right of women to end their pregnancies.<sup>29</sup> Kavanaugh agreed with Rehnquist’s reasoning in *Roe*, claiming that unenumerated rights should only be recognized when “rooted in the nation’s history and tradition.”<sup>30</sup> Given the nation’s history, this subjective standard can easily be used to reinforce conservative notions regarding the rights of women and people of color—as Rehnquist does throughout his jurisprudence on the Equal Protection Clause and women.

Furthermore, even when presented with legal questions on equal protection for women outside of the Equal Protection Clause, Rehnquist would largely oppose any argument designed to strengthen women’s rights. As one notable example, Rehnquist authored the opinion in *General Electric Company v. Gilbert*.<sup>31</sup> That case, which was

brought under Title VII, upheld the ability of employers to deny disability benefits to pregnant women. In writing the court’s opinion, Rehnquist relied on an earlier Equal Protection case, *Geduldig v. Aiello*, in which he had voted with the majority in ruling that discriminating against pregnancy was not sex discrimination.<sup>32</sup> Rehnquist’s ruling ultimately led Congress to pass the Pregnancy Discrimination Act of 1978 in order to overrule the decision.

Given these deep-seated views, it is perhaps understandable that Rehnquist concludes “The Notion of a Living Constitution” with language that is as dramatic as it is disturbing. He explains that recognizing constitutional rights such as those that protect against sex discrimination is “genuinely corrosive of the fundamental values of our democratic society.”<sup>33</sup> More than 40 years after those words were published, during his AEI speech, Kavanaugh recalled the article and stated, “it’s impossible to overstate its significance to me.”<sup>34</sup>

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### Judge Kavanaugh as Rehnquist’s successor

Brett Kavanaugh—a former senior aide in the George W. Bush White House who has been involved in multiple controversial political events spearheaded by conservative activists—is now presented with the opportunity to continue Rehnquist’s legal legacy.<sup>35</sup> In his telling AEI speech, Kavanaugh positioned himself as Rehnquist’s natural successor on the Supreme Court. During that speech, Kavanaugh lamented that Rehnquist “would be the first to say that he did not achieve full success on all the issues he cared about,” before turning to a lengthy praise of Rehnquist’s “extraordinarily important” *Texas Law Review* article discussed above.<sup>36</sup>

Kavanaugh’s recent comments and writings on *Roe v. Wade* make clear the threat that he poses to women’s rights. However, his speech’s fulsome praise of Rehnquist’s approach to the law should heighten the alarm; if this philosophy were fully realized, it would invalidate 42 years of constitutional protections against sex discrimination. Kavanaugh is careful to hedge and say he does not agree with all of his hero’s dissents. However, the only decision he points to in this regard is *Morrison v. Olson*—a decision in which Rehnquist’s court upheld the constitutionality of the appointment of an independent counsel to investigate government officials.<sup>37</sup>

During his upcoming confirmation hearings, senators should press Kavanaugh to explain the depth of his agreement with Rehnquist. Specifically, they should ask him if he still agrees with Rehnquist’s early decisions, which often defended the right of states to enact laws that treated women and men differently. Senators should also ask him if he thinks sex discrimination deserves heightened protection under the 14th Amendment or if he continues to stand with his judicial hero. Even if Kavanaugh says that he disagrees with Rehnquist now, senators should challenge him on how his posi-

tion contradicts his own words from just last year, which praised not only the many dissents and opinions of Rehnquist but also his legal article that laid out his approach to the law that is in stark opposition to how women's rights have evolved under the Equal Protection Clause.

Regardless of whether Kavanaugh decides to distance himself from Rehnquist during his hearing, his record already answers many of these questions and provides few reasons to trust that he would be a reliable vote to uphold countless critical women's rights. His intense focus on Rehnquist's reasoning in "The Notion of a Living Constitution" should leave little doubt as to his approach to the law and his potential to turn back the clock on gender equality issues if they are brought before him as a Supreme Court justice. Moreover, Kavanaugh has consistently and unwaveringly embraced a vision of the law that is rooted in Rehnquist's narrow interpretation of the constitutional provisions that are essential to the recognition of women's rights.

### What a Justice Kavanaugh would mean for the legal status of women

Toward the beginning of his remarks at AEI, Kavanaugh praised Rehnquist for bringing about a "massive change in constitutional law and how we think about the Constitution."<sup>38</sup> This admiration is telling. If Judge Kavanaugh becomes Justice Kavanaugh, the Supreme Court will have the ability to unleash massive upheavals in the rights of American women.

#### *A lack of balance on the court*

Echoing Rehnquist, current Chief Justice John Roberts—then serving as an aide to President Reagan—wrote a memo opposing the Equal Rights Amendment. Roberts questioned, "whether encouraging homemakers to become lawyers contributes to the common good."<sup>39</sup> And Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch are cut from the same cloth; although Thomas and Alito might be even more extreme—the former recently authored an opinion giving political organizations the right to pose as unbiased medical centers, while the latter authored an opinion giving employers the right to deny birth control to employees.<sup>40</sup>

Former Justice Anthony Kennedy was not always a stalwart defender of women's rights on the court; he voted to uphold constitutional protections for women in some cases and opposed those protections in others. Yet, given the current composition of the Supreme Court, to replace him with Brett Kavanaugh would remove any intellectual diversity from the court's majority and make it purely a vessel for the advancement of conservative politics.

*J.E.B. v. Alabama* provides just one of many practical illustrations of how replacing Kennedy with Kavanaugh would affect women's rights. In that case, the opinion prohibiting the elimination of potential jurors on the basis of their sex was issued as a 6-3



decision. However, if *J.E.B.* were heard today with Justice Kavanaugh on the court, it would likely become a 5-4 decision to uphold the constitutionality of all-male or all-female juries in cases where it suits the interests of the accused.<sup>41</sup>

Similar outcomes could easily be imagined in other sex discrimination cases. Kavanaugh's core approach to the law is in stark opposition to heightened constitutional protections against discrimination. And with such extreme conservatives in control of the Supreme Court, women will likely face a regression in their ability to participate fully in the economy, the government, and within family structures.

### Furthering conservative legal strategy

Moreover, while it is fashionable for conservatives to point to a respect for precedent as a reason for supporters of civil rights not to oppose Kavanaugh's nomination, conservative activists are prepared to retry the same issue until they get the result they want.<sup>42</sup> The examples are numerous. Conservative activists continue to file cases that challenge settled law. Pending litigation across the country challenges the Affordable Care Act and reproductive rights, showing that conservative legal activists will continue to seek to overturn precedent in an effort to assert their political will.<sup>43</sup>

This obsessive approach to dismantling precedent has already brought rewards—rewards that would only be furthered by a Justice Kavanaugh. The final case issued in the most recent Supreme Court session demonstrates the danger in believing stock phrases on precedent. In June 2018, the court issued a blow to unions in *Janus v. American Federation of State, County, and Municipal Employees (AFSCME)*, overturning the 1977 case *Abood v. Detroit Board of Education*—which upheld the ability of public sector unions to collect fees from non-member workers who benefited from the union's collective bargaining negotiations in order to help cover related costs.<sup>44</sup> That decision ended 40 years of precedent in one swoop and should serve as a warning for what is to come. It should be noted that all five justices who voted in the majority had pledged their support to precedent during their confirmation hearings.

The continued conservative opposition to equal pay, family leave, and other vital public policies designed to further gender equality sends a clear signal. In an effort to block the progress that women have made since the 1970s, this movement will likely reopen the issue of sex discrimination under the constitution—either directly or indirectly. And if Kavanaugh takes Kennedy's place on the bench, not only will his confirmation invigorate these efforts; it will be a clear sign to conservatives that victory is within sight.

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## Conclusion

If Kavanaugh is confirmed, the rollback of women's rights under the Equal Protection Clause will likely come in waves—part of the long game Kavanaugh described a year ago at AEI. But it would happen, encouraged by conservative litigation strategy and aided by a Supreme Court majority whose ideology is hostile to women.

Conservative jurists such as Kavanaugh and Rehnquist, who oppose the recognition of vital rights under the U.S. Constitution, have long hid behind phrases such as “constitutionalist” or a “respect for precedent” in order to sound more reasonable in their approach to the law. Kavanaugh, however, is far from reasonable. By detailing his admiration for Rehnquist, he made clear his opposition to the constitutional protections that have strengthened the rights of women for decades.

Brett Kavanaugh is the next chapter in the conservative legal playbook outlined by his judicial hero back in 1976. Senators must not let him hide behind legal theory or promises to respect precedent. Blocking his appointment is imperative to safeguarding against dramatic and massive changes in constitutional law that would significantly harm women and girls across the country.

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## Endnotes

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