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PANEL DISCUSSION TRANSCRIPT

HONORING THE LEGACIES OF JUSTICE WILLIAM J. BRENNAN, JR., AND JUSTICE THURGOOD MARSHALL

A PANEL DISCUSSION PRESENTED BY THE
INDIANAPOLIS LAWYER CHAPTER OF THE
AMERICAN CONSTITUTION SOCIETY

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PREFACE

When the Honorable Thurgood Marshall was asked in 1987 to reflect on the 200th anniversary of the U.S. Constitution, he did so not with the blind patriotism that might be expected of a man who had spent the greatest portion of his life celebrating the document's intricacies but with a "sensitive understanding of the Constitution's inherent defects."¹ The founders of our nation, after all, penned the most important stanzas of our Constitution in a world in which slavery still existed, one in which it could not have been imagined that a woman would one day sit together with an African American on our highest Bench. The "true miracle" that Justice Marshall saw fit to idolize, "was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our

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1. Thurgood Marshall, Commentary, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 5 (1987).

own making, and a life embodying much good fortune that was not."² Two years earlier, the Honorable William Brennan, Jr., had articulated precisely the judicial philosophy that gave birth to Justice Marshall's "miracle": "[T]he genius of the Constitution," said Justice Brennan, "rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."³

It is this philosophy that has guided progressive thought—both judicial and extra-judicial—through more than half a century, and one that has seen no greater standard-bearers than Justices Brennan and Marshall. The span of thirty-five years from Justice Brennan's confirmation to Justice Marshall's retirement saw nearly unimaginable strides taken in the areas of voting rights,⁴ procedural due process,⁵ equal protection,⁶ free speech,⁷ and criminal procedure.⁸ This era saw the declaration of the unconstitutionality of a prohibition on the distribution of contraceptives,⁹ the recognition of a constitutional right to abortion,¹⁰ and a four-year hiatus on executions in the United States.¹¹ It saw, above all, a revitalization in the ability of law to mirror social and political progress.

In a partial dissent written well into his tenure on the Court, Justice Marshall (joined, of course, by Justice Brennan) penned words that would encapsulate this dramatic—and unprecedented—expansion of rights. "Courts," he wrote,

do not sit or act in a social vacuum. Moral philosophers may debate whether certain inequalities are absolute wrongs, but history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a "natural" and "self-evident" ordering later comes to be seen as an

2. *Id.*

3. Byron R. White, Tribute, *Tribute to Honorable William J. Brennan, Jr.*, 100 YALE L.J. 1113, 1116 (1991).

4. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30 (1986); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

5. *See, e.g.*, *Vitek v. Jones*, 445 U.S. 480 (1980); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

6. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Craig v. Boren*, 429 U.S. 190 (1976); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Reed v. Reed*, 404 U.S. 71 (1971); *Graham v. Richardson*, 403 U.S. 365 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967).

7. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989); *Dombrowski v. Pfister*, 380 U.S. 489 (1965); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Roth v. United States*, 354 U.S. 476 (1957).

8. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79 (1986); *Terry v. Ohio*, 392 U.S. 1 (1968); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

9. *See* *Griswold v. Connecticut*, 381 U.S. 479 (1965).

10. *See* *Roe v. Wade*, 410 U.S. 113 (1973).

11. *See* *Furman v. Georgia*, 408 U.S. 238 (1972).

artificial and invidious constraint on human potential and freedom. Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests.¹²

Thus, although—in the words of Justice Brennan—the safeguards enshrined in the Bill of Rights “are deeply etched in the foundations of America’s freedoms,”¹³ these safeguards are rendered altogether meaningless if they are not valued, guarded, and occasionally expanded. Over the course of our nation’s history, few have acted as such staunch guardians as have these two giants of U.S. jurisprudence.

On February 23, 2010, the Indianapolis Lawyer Chapter of the American Constitution Society was proud to present a discussion on the legacies of Justices Brennan and Marshall and the future of the Court. We are indebted first and foremost to the Indiana Supreme Court and Chief Justice Randall T. Shepard for graciously opening its doors to this discussion and for playing the role of host. We wish to also express our gratitude to each of the panelists for their insights, their stories, and their overwhelming eagerness to participate in this discussion. We therefore thank each of our outstanding panelists for their invaluable contributions: Justice Theodore R. Boehm; Professor Geoffrey R. Stone; Professor Mark V. Tushnet; and our superb moderator, Professor Rosalie Berger Levinson, who set the table for a robust discussion. Each panelist served with distinction as a law clerk on the U.S. Supreme Court, and we owe them each an additional debt of gratitude for the roles they have played in helping to shape our constitutional jurisprudence. We would also like to thank the Indianapolis law firms of Baker & Daniels LLP and Bose McKinney & Evans LLP for their generous donations in support of this program. Finally, we wish to thank both the Indiana University—Indianapolis Law School Chapter of the American Constitution Society and the *Indiana Law Review*, for assistance in preparing and organizing this discussion and for agreeing to publish its contents, respectively.

Five years before his retirement, Justice Brennan commented that a judge should proceed with “a sparkling vision of the supremacy of the human dignity of every individual,”¹⁴ and it is with respect for this spirit in mind that we hope to do our part to honor the legacies of two of our nation’s greatest jurists.

12. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 466 (1985) (Marshall, J., joined by Brennan & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (internal citations omitted).

13. William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761, 776 (1961).

14. White, *supra* note 3, at 1116 (citing a 1985 lecture by Justice Brennan at Georgetown University).

PANEL DISCUSSION¹⁵

Date: February 23, 2010

Location: Courtroom of the Supreme Court of Indiana

PANELISTS:

Professor Rosalie Berger Levinson, Moderator, Phyllis and Richard Duesenberg Professor of Law, Valparaiso University School of Law

Professor Mark V. Tushnet, William Nelson Cromwell Professor of Law, Harvard Law School

Professor Geoffrey R. Stone, Edward H. Levi Distinguished Service Professor, University of Chicago Law School

The Honorable Theodore R. Boehm, Associate Justice, Indiana Supreme Court

PROFESSOR LEVINSON:

There has been much discussion recently about what the role of the Supreme Court should be in interpreting the Constitution. The *Heller* case,¹⁶ which gave new meaning to the Second Amendment right to bear arms, reinvigorated the battle between those who espouse an originalist interpretation with its various permutations—looking to the intent of the Framers of the Constitution, the intent of those who ratified it, or “the public meaning,”—and those who espouse the “living Constitution.” Let me quote Justice Brennan’s description: “The genius of the Constitution rests not in any static meaning it may have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and present needs.”¹⁷

It is clear that Justice Brennan, as well as Justice Marshall and Justice Warren, endorsed the living Constitution, or what Professor Michael Dorf at Cornell calls “aspirational constitutionalism”¹⁸—the notion that those who framed the original text understood that the open-ended values set forth in our Constitution would not be realized at the time of its adoption. This would be left to later generations, and the Justices who interpret the document should be guided by this understanding. Indeed, Justice Brennan referred to the Constitution as the “lodestar of our aspirations.”¹⁹

15. This transcript has been edited for clarity and brevity’s sake. The original transcript was transcribed by ClearPoint Legal, Indianapolis, Indiana.

16. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

17. REASON & PASSION: JUSTICE BRENNAN’S ENDURING INFLUENCE 18 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997).

18. Michael C. Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631 (2009).

19. Justice William J. Brennan, Jr., Associate Justice, U.S. Supreme Court, Address to the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), available at <http://www>.

Justice Marshall shared this aspirational vision. Thurgood Marshall, first as an advocate for twenty-five years for the NAACP and later as a Justice, truly framed the constitutional right to racial equality—a right that most of the Framers likely never envisioned as barring de jure segregation, white primaries, or racially restricted covenants. Of course, advocate Marshall was assisted in achieving the goal of equal educational opportunity by Chief Justice Earl Warren, who penned the famous *Brown v. Board of Education*²⁰ decision, and later Justice Brennan, whose decisions helped implement the desegregation mandate.

In the same way, Justice Brennan assisted advocate Ruth Bader Ginsburg in framing the constitutional right to gender equality—again, a right that was not envisioned by the Framers, who would have been surprised to know that the Equal Protection Clause prohibited sex bias. Ruth Bader Ginsburg as advocate and Justice Brennan as author of key decisions in the 1970s, were the real framers of the constitutional right to gender equality, just as the true framers of the right to racial equality were Thurgood Marshall, as an advocate and later as Justice, as well as Earl Warren. As Professor Dorf put it, “the success of the civil rights movement in the twentieth century . . . was [really] a jurisgenerative accomplishment.”²¹ And the Justices we honor today were at the center of that movement.

Justice Marshall served on the Supreme Court from 1967 to 1991, and he began his aspirational work as an advocate back in the 1930s. Justice Brennan served on the Supreme Court for thirty-four years, from 1956 to 1990, a time spanning eight Presidencies. He authored over 1500 decisions. Rather than examining all 1500, I will just focus on some key decisions handed down when our guest speakers were clerking for their justices.

During the 1972–73 Term when Professor Tushnet and Professor Stone served as law clerks, Justice Brennan authored the plurality opinion in *Frontiero v. Richardson*,²² asserting for the first time that strict scrutiny should be the standard for judging the validity of laws that classified based on gender. He never got the fifth vote for strict scrutiny, but he clearly was instrumental in moving the Court towards recognizing, as Justice Ginsburg put it, that “our living Constitution obligates government to respect women and men as persons of equal stature and dignity.”²³

A second Brennan opinion that Term, perhaps less well known, invalidated an amendment to the Federal Food Stamp Program, which denied benefits to households with unrelated occupants.²⁴ Congress wanted to ensure that hippie communes would not receive food stamps.²⁵ Justice Brennan announced the core

teachingamericanhistory.org/library/index.asp?document=2342.

20. 347 U.S. 483 (1954).

21. Dorf, *supra* note 18, at 1648.

22. 411 U.S. 677 (1973) (plurality opinion).

23. Ruth Bader Ginsburg, *Closing Remarks for Symposium on “Justice Brennan and the Living Constitution,”* 95 CAL. L. REV. 2217, 2219 (2007).

24. U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528 (1973).

25. *Id.* at 534.

principle that the Equal Protection Clause must mean, at minimum, that, “a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”²⁶ It was this language that was invoked thirty years later by Justice Kennedy to strike down the Texas sodomy law.²⁷

During this same eventful Term, the Supreme Court handed down the extremely controversial decision in *Roe v. Wade*²⁸ on abortion, and in *San Antonio Independent School District v. Rodriguez*,²⁹ it sustained local property taxes as a means to finance public education, despite the gross disparities in educational opportunity that this produced—triggering a vigorous and poignant dissent by Justice Marshall.³⁰

Finally, when Theodore Boehm was clerking for Chief Justice Warren during the 1963-64 Term, the Chief Justice authored the opinion in *New York Times Co. v. Sullivan*,³¹ providing significant protection for the press from libel actions brought by government officials, and *Reynolds v. Sims*,³² declaring the “one person, one vote”³³ principle, which completely altered the face of democracy in this country.

Obviously, we have much to discuss this afternoon. I want to begin by briefly introducing our three extraordinarily accomplished panelists.

To my far left, Justice Theodore Boehm,³⁴ who has served on the Indiana Supreme Court since 1996. He graduated magna cum laude from Harvard, where he served as an editor of the *Harvard Law Review*, and then assumed the position as law clerk to Chief Justice Earl Warren during the 1963 Term. After that, he worked for Baker & Daniels, becoming a partner in 1970 and managing partner in 1980. He worked also for General Electric and the Eli Lilly Company. Today, he serves on numerous boards and commissions. And, Justice, we are very fortunate to have you as a member of our Supreme Court.

Geoffrey Stone³⁵ has been a member of the University of Chicago Law School’s faculty since 1973. He served both as Dean of the Law School and Provost of the University of Chicago. After law school, he clerked for Judge Skelly Wright of the District of Columbia Court of Appeals before assuming his position with Justice Brennan. He has written numerous books and articles in the area of constitutional law, and has received several national book awards. In 2006, he helped organize and participate in a symposium honoring the legacy of

26. *Id.*

27. *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (quoting *Moreno*, 413 U.S. at 534).

28. 410 U.S. 113 (1973).

29. 411 U.S. 1 (1973).

30. *Id.* at 70 (Marshall, J., dissenting).

31. 376 U.S. 254 (1964).

32. 377 U.S. 533 (1964).

33. *Id.* at 587 (Clark, J., concurring) (citing *Gray v. Sanders*, 312 U.S. 368, 381 (1963)).

34. Indiana Supreme Court Justice Biographies: Justice Theodore R. Boehm, <http://www.in.gov/judiciary/su supreme/bios/boehm.html> (last visited Mar. 11, 2010).

35. Geoffrey R. Stone/University of Chicago Law School, <http://www.law.uchicago.edu/faculty/stone-g/> (last visited Mar. 11, 2010).

Justice Brennan, sponsored by the Brennan Center for Justice, an organization founded by former law clerks to continue the wonderful work of the Justice. Among Professor Stone's many public activities, he is a member of the National Board of Directors of the American Constitution Society, our host, as well as a member of the National Advisory Council of the ACLU.

Mark Tushnet has been a law professor at Harvard Law School since 2006, following lengthy stints at the University of Wisconsin Law School and at Georgetown, where he served as Associate Dean. He clerked for Thurgood Marshall during the 1972 Term, while Professor Stone clerked for Justice Brennan. The two professors also co-author, with a few others, one of the leading constitutional law textbooks.³⁶ Professor Tushnet specializes in constitutional law and theory. He has written extensively regarding the practice of judicial review, both in this country and around the world. He has authored numerous articles and books on constitutional law, constitutional history and judicial review, and has won several book awards. One of these books, *Making Civil Rights Law*,³⁷ traces the life of Thurgood Marshall and his work before the Supreme Court from 1936 to 1961.

In short, our panelists are eminently qualified to speak on today's topic. We will begin by giving each a few minutes to make an "opening statement" about their Justice.

PROFESSOR TUSHNET:

Thank you.

I'm happy to be here and really glad that the ACS lawyer chapter here is sponsoring this event. Justice Marshall was a great storyteller. I'm not such a good storyteller, but I am going to try to tell four stories about Justice Marshall, or stories that he told. Justice Marshall's stories always had a point, and I've chosen stories that I think also have a point.

The stories all deal with Marshall when he was a lawyer. The first is this: He regularly took the subway from his office in midtown Manhattan to his apartment at the best address in Harlem. He would get out of the subway and walk along the street, greeted by the gamblers on the corner and the various, as he would put it, "low-lives," who would joke with him by asking, "What have you done for us today, Lawyer Marshall." He would talk with them, and then he would go to his apartment and entertain Duke Ellington and the other members of the Harlem elite in the evening.

The second story is about Marshall taking an application for a stay of execution in a capital case to Fred Vinson's house, and knocking on the door. Vinson comes out with his sandals on and shuffles out and invites Marshall in after Marshall says why he's there. Marshall looks around and notices he's interrupted Vinson's poker game with Harry Truman and a couple other members of the administration. And Vinson says, "Sit down, why don't you have a drink with us?"

36. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* (15th ed. 2005).

37. MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT 1936-1961* (1994).

The third story is a story Marshall told about a young lawyer—it's not clear to me that it was him, although he may have wanted to convey that sense—who was participating in the defense of an African American charged with murder in the South. The case wraps up, and the jury is sent out to deliberate. And this young, inexperienced lawyer asks the court clerk, "How long do you think it's going to take them to render a verdict?" And the court clerk says, "Twelve minutes." And the young lawyer says, "Twelve minutes? It's a very complicated case. It's a capital case. How can it take only twelve minutes?" The clerk says, "Twelve minutes from now." And the lawyer says, "Okay," and goes back and sits down. And exactly twelve minutes from that time, the jury comes back in and renders a verdict of guilty. Afterward the lawyer asked the clerk, "How did you know?" And the clerk says, "That's how long it takes to smoke a cigar."

The fourth story is my favorite. It's about a talk that Marshall gave at a tribute to a civil rights lawyer in Philadelphia named Raymond Pace Alexander.³⁸ The structure of the talk is this: He starts out as speakers do with some joking remarks, "I'm really happy to be here to be able to honor Raymond Pace Alexander, even though I had to leave the warm climate in Florida to come up here to wintery Philadelphia, where it's really cold and unpleasant." He goes on to talk about Alexander's civil rights practice, how important the work that Alexander has been doing is, and he ends with an explanation of why he had been in Florida in the warm climate. The reason was that he was investigating the assassination of an NAACP leader named Harry Moore, who had been leading a voter registration campaign in Florida. So, the joke that he starts out with turns out to have some very serious background.

Those are the four stories. Now, Justice Marshall actually never would tell you the point of his stories. You were supposed to figure them out yourself. I'm going to tell you the point of these stories.

Last summer, we heard a lot about the appropriateness of the judicial capacity for empathy. What these stories are about is the way a person like Justice Marshall developed empathy across an enormous range of human experience. One of the parts of the conversation last summer suggested that somehow the notion of empathy was limiting. But Marshall's empathy was expansive. Because he could joke with the gamblers and low-lives in Harlem and then entertain Duke Ellington, because he had defended capital defendants, and sit down and have a drink with Fred Vinson. Because he knew about the assassination of Harry Moore, he could understand why people in Philadelphia needed to care about civil rights.

Judge Jerome Frank in the 1930s wrote a book in which he described Oliver Wendell Holmes as the completely adult judge.³⁹ I don't know whether that's true of Holmes, but I'm pretty confident that it was true of Justice Marshall. He was a person who knew who he was, knew what he believed, and was not uncomfortable with any of those things. He was, as we would now say,

38. The text of the talk can be found in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 138-44 (Mark V. Tushnet ed., 2001).

39. JEROME FRANK, LAW AND THE MODERN MIND 253 (4th ed. 1935).

comfortable in his skin. But, there's a line that he would use about that skin. He would say, whenever he woke up, wherever he was in this country, he never had to look in the mirror to know what race he was. Being adult meant understanding what it was to be a black man in America, and what it was to be a white person in America, as well.

PROFESSOR STONE:

Justice Brennan was a remarkable person. Part of what made him so extraordinary was that he was filled with joy. He always had a sparkle in his eye, a kind word, and a hand on your arm when he spoke with you. He looked you squarely in the eye, was always sympathetic and supportive, and almost always generous in his evaluations of others. The three exceptions I can recall were Joseph McCarthy, Richard Nixon, and Warren Burger. Other than those three, he was always extremely generous in spirit.

Brennan was a very hard worker. He came into the office every morning before 7:30, so he could review all of the work his law clerks had left him late the night before. He met with the clerks every morning for coffee for an hour, during which time we discussed the cases on the docket, drafts of opinions we had written, or cert petitions he'd reviewed by himself. He was the only Justice who read all the cert petitions himself. We also talked about the Vietnam War, Watergate, and the Washington Redskins. Brennan was a real person. He was smart, kindhearted, thoughtful, and exuberant.

The '73 Term was difficult for Brennan. It was personally difficult because his wife was very ill during that time, but also difficult because it was a year of transition. When he arrived at the Court, during the heyday of the Warren era, he was a central figure in putting together many of the Court's momentous majority opinions. Brennan was famous for his ability to forge compromises and round up the fifth vote. He reveled in that role.

But with the appointment by President Nixon of Rehnquist, Blackmun, Powell and—who am I forgetting? Burger, yes, of course, Burger. That's Brennan speaking through me! Forget Burger, right? With that change in the makeup of the Court, Brennan's role changed. As the center of the Court shifted significantly to the right, Brennan increasingly found himself in dissent.

Although he later came to relish the role of the dissenter, he certainly wasn't yet there. At this point, he very much felt personally the defeats in the Court. These were defeats, he felt, not only for himself, but for the nation. On more than a few occasions, he came back from conference, sat down with his three law clerks, and ran through the votes at conference with tears in his eyes. He was deeply frustrated, and sometimes quite angry, that these Justices were dismantling some of the achievements of the Warren Court.

Two cases in the 1973 Term illustrate a lot about Brennan. They give a concrete sense of Brennan's efforts to recruit the often elusive "fifth vote," the meaning of Brennan's conception of the living Constitution, and the extent to which Brennan, like all justices and judges, was influenced by his own personal background and values. For Brennan, I think the central formative experience concerned his father, who was a labor organizer in New Jersey, and who suffered oppression and even police beatings in his effort to promote the cause of labor. I think this helped Brennan develop a healthy skepticism about the government's

treatment of racial and other minorities, political and religious dissenters, and other outsiders. I think this shaped his understanding of the Constitution, his role as a Justice, and his conception of a living Constitution.

So, let me briefly offer two examples. The first were the obscenity cases decided in 1973, *Miller v. California*,⁴⁰ and *Paris Adult Theatre I v. Slaton*.⁴¹ These cases represented the Court's first comprehensive attempt to revisit the issue of obscenity since 1957, when Brennan wrote the majority opinion for the Court in *Roth v. United States*,⁴² holding that obscenity is not protected by the First Amendment.

By 1973, Brennan had come to the view, as had Justices Marshall, Stewart, and Douglas, that the challenge of defining obscenity with sufficient clarity to meet First Amendment standards was simply insurmountable. They therefore concluded that there needed to be a sharper limitation on the scope of the doctrine. Brennan concluded that obscenity could not constitutionally be restricted for consenting adults.

The question was whether Brennan could get the fifth vote he needed to make this the majority view. As it turned out, Brennan decided that Justice Powell was his best prospect, and Brennan worked tirelessly on Powell for months leading up to the oral argument in the case. Powell indicated that he was open to Brennan's approach. As he thought about Brennan's arguments, Powell suggested that he was inclined in this direction.

Now, the problem was that Powell, a white Southern gentleman, had a vision of obscenity that consisted of something like *Lady Chatterley's Lover*,⁴³ or *Tom Jones*.⁴⁴ When he went into the Supreme Court's movie theater to see the very raunchy films that were actually at issue in these cases, he was shocked. As Brennan later told the story, as he and Powell walked out of the Supreme Court theater, Powell turned to Brennan and said, "You lose." And so Brennan never got his fifth vote. In the end, he wrote the lead dissenting opinion. Nonetheless, this case illustrates the efforts Brennan made to get the fifth vote, the frustration he felt when he did not succeed, and also his idea of a living Constitution.

Part of the idea of a living Constitution for Brennan was that the Court should learn with experience. One of the things Brennan learned in the obscenity context was that the doctrine didn't work very well in practice. Thus, although Brennan continued to believe, in principle, that obscenity is not protected speech, he also came to the view that it needed to be more narrowly defined and more limited in its application, in order to function well in the real world.

The second example is *Frontiero v. Richardson*,⁴⁵ which Rosalie already mentioned. In *Frontiero*, Brennan took the view that discrimination against women is in many ways analogous to discrimination against African-Americans

40. 413 U.S. 15 (1973).

41. 413 U.S. 49 (1973).

42. 354 U.S. 476 (1957).

43. D.H. LAWRENCE, *LADY'S CHATTERLEY'S LOVER* (Penguin Books 1994) (1928).

44. HENRY FIELDING, *TOM JONES* (1922).

45. 411 U.S. 677 (1973).

and is therefore presumptively unconstitutional under the Equal Protection Clause.⁴⁶ Brennan reasoned that, even though the Court had never interpreted the Equal Protection Clause in this way, society had changed so greatly over the years that our understanding of “equality” must change as well.

In this case, too, Brennan was disappointed in his hope to get a majority to embrace his view. In conference, the Justices had voted 8-1 to invalidate the law, but they had voted to do so on the ground that the law was irrational. On further reflection, Brennan decided that this was an intellectually dishonest position, because the challenged law was clearly rational under the Court’s accepted doctrine. He therefore argued instead that women constitute a “suspect class” and that discrimination against women therefore requires strict scrutiny. Justices Marshall, Douglas, and White promptly joined Brennan’s opinion. And then there was silence. Months passed. Justices Powell and Stewart, the two members of the Court most likely to join Brennan’s opinion, both argued that it was unwise for the Court to reach this issue in light of the fact that the Equal Rights Amendment was still pending. In the end, they filed separate concurring opinions,⁴⁷ arguing that the law was irrational, and Brennan never got his fifth vote.

These examples illustrate how Brennan acted out of his conception of a living Constitution, how he tried to pull together a majority opinion, and by the 1973 Term how frequently he was frustrated in his effort to do so. It was, for Justice Brennan, a trying year.

Thank you.

JUSTICE BOEHM:

Well, I was at the Court almost a decade before my two colleagues and at the height of what was then perceived to be the Warren Court. You had *Mapp v. Ohio*⁴⁸ in 1961 and *Gideon v. Wainwright*⁴⁹ in ‘62. These are still cases that I expect most lawyers recognize by case name, even those who don’t practice criminal law. And then we ended up with *Reynolds v. Sims*⁵⁰ that I’ll talk about some more later, all of which were viewed as revolutionary decisions at the time. Most of them were 5-4 decisions. Each of them set a major conflict in place between structural considerations of federalism and basic questions of human liberty, and came out in each case essentially on the side of the Equal Protection Clause⁵¹ and the Due Process Clause,⁵² trumping whatever federalism or other considerations were thought to be in play. But to speak about the Chief, as we all called him, as a human being, he, too, was a product of his history, which as I think most of you know, was essentially as a politician. He was an extremely successful governor of California. Before that he was the attorney general. He

46. U.S. CONST. amend. XIV, § 1.

47. *Frontiero*, 411 U.S. at 691 (Stewart, J., concurring); *id.* (Powell, J., concurring).

48. 367 U.S. 643 (1961).

49. 372 U.S. 335 (1963).

50. 377 U.S. 533 (1964).

51. U.S. CONST. amend. XIV, § 1.

52. U.S. CONST. amend. XIV, § 1.

was a baseball fan, a schmoozer, a politician par excellence, and a man of enormous personal charm and dignity and compassion. I don't know anybody who didn't like him.

We also had our post-Friday conferences as law clerks with our Justice. I don't know if every chamber did this, but the drill would be conferences were always on Friday at that time. And after the conference adjourned, the clerks would be called in to explain the results.

And occasionally, you'd have a case where the results surprised me. One example that sticks in my mind today is a case where we had a cert petition from the Alabama Supreme Court by a man who was the then president of the Alabama NAACP, who had been arrested by a state trooper in Alabama, and they had convicted him of—I've forgotten what—disorderly conduct or something. And I had looked at this case left, right and sideways and concluded that they had adequate state law grounds for doing everything they'd done, and there really wasn't anything we could do about this, even though it certainly looked like an abuse of power. And we come back from conference and the Chief says, "Well, we've granted cert." I said, "Well, what do you think about that?" And he said, "They can't do that." That was—and he was right. He was right. All the fancy *Harvard Law Review* analysis that I'd come up with reached the wrong result.

And that was based, in the Chief's view, on his understanding of how the world really worked. He'd been a governor for three years. He'd dealt with state legislators. He knew how they operated. More about that later. And he brought that to the Court in a way that some people might feel is somewhat lacking in today's jurisprudence where we have a bench that is largely filled with people with appellate bench credentials and histories that can get you confirmed and produces a very highly qualified bench, but also has the effect of screening out people of the broad breadth of background of the Court I dealt with. You had Tom Clark, and Earl Warren, Justice Brennan, Justice Black, of course, was a senator.

And, by the way, if you could say there was a dominant figure in the Court in that day, it would be Black. He was the one who really staked out strong positions and stiffened the backbone of the other Justices and the majority, as perceived by me. And I think history has pretty much borne that out.

But the Chief was also a great human being. And he would take us to the late, not particularly lamented Washington Senators games, and there we'd be in a box with Sergeant Shriver watching a ball game and just enjoying a ball game. The other thing he would do is, the drill was we'd all work on Saturday mornings and then go to lunch at a place called the National Lawyers' Club, which I think passed away many years ago. At least I haven't heard of it for many years. But it was on, I think, H Street in Washington, and it was just what you'd expect it to be, an all male, all lawyers luncheon club. And we'd have lunch for maybe two or three hours. And those two or three hours would be spent almost exclusively on sports and politics, hardly ever touching on a matter of law. The Chief loved to just schmooze on subjects of general interest. And he was very good at it. He was a charming guy. It was a great experience.

PROFESSOR LEVINSON:

Thanks to all of you for providing wonderful insights into the character of

these three Justices. I guess I would make one observation. Although members of the Court in the 1960s and '70s may have reflected a better cross section of experiences, we should remember that there was no woman's voice, no female Justice until a decade later. But I would like now to zero in on what each of you believes was the most significant decision that your Justice wrote or dissented from while you were clerking and/or maybe the most difficult case.

PROFESSOR TUSHNET:

For me, probably it was the dissent in the *Rodriguez* school finance case,⁵³ which I didn't work on. Another one of my co-clerks worked on it as his primary job for several months. And it was not difficult, it was disappointing because the judge thought correctly that at some level his career had been built on the notion that equality with respect to education was the foundation of equal citizenship in the United States. And here were these kids who, as he saw it, weren't being treated equally, weren't getting the kind of education that other kids were getting. The doctrinal issues were tricky, but not insurmountable.

After *Rodriguez* was handed down, another historian showed Justice Marshall a draft opinion in *Brown v. Board of Education*⁵⁴ in which Chief Justice Warren had written that education was a fundamental right in the United States. Warren revised the opinion and took out that particular phrasing. Marshall said that, if he had published that, he would have made my job in *Rodriguez* much easier. And it was disheartening to him that the majority couldn't see what he thought was so obvious, that, if there was anything that the United States should be committed to, it should be equality with respect to education.

PROFESSOR LEVINSON:

May I ask a quick follow-up question on equal educational opportunity? A year ago, in *Parents Involved*,⁵⁵ the United States Supreme Court struck down efforts by two school districts to achieve desegregation by using race as a factor in assigning students to public schools. In his opinion, Chief Justice Roberts invoked *Brown v. Board of Education* to invalidate the plans.⁵⁶ Any comments on that, Mark?

PROFESSOR TUSHNET:

Well, this is a case that was made for the phrase that, if Justice Marshall were alive today, he'd be turning over in his grave. The particular quotations that the Chief Justice used from both *Brown* and more important from the oral argument in *Brown* were accurate, and they were statements about color-blindness and the impropriety of using race as a basis for assigning kids to schools. That's what they said. I found it interesting that the quotation is from an oral argument made by Robert Carter,⁵⁷ rather than by Thurgood Marshall. Marshall said the same

53. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 73 (1973) (Marshall, J., dissenting).

54. 347 U.S. 483 (1954) (*Brown I*).

55. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

56. *Id.* at 746 (citing *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300 (1955); *Brown I*, 347 U.S. at 483).

57. *Id.* at 747 (citing Transcript of Oral Argument at 7, *Brown I*, 347 U.S. at 483 (Robert L.

things when he argued, but the Chief Justice quoted Carter rather than Marshall, I think, out of a strategic sense. It's one thing to say Robert Carter said this. It would be an insult to Thurgood Marshall to quote Marshall for this decision.

So, Marshall and Carter did say you can't use race as a basis for assigning kids to schools. There's no question about that. But they said that in the service of a larger vision about what racial equality with respect to education was. The goal was integration, not merely eliminating the use of race as a categorizing device. And they said that, as well. They said the goal is integration. There are parts of the *Parents Involved* decision that are, I think it's fair to say, disingenuous. This part isn't in particular disingenuous, it's just, again, extremely disappointing.

PROFESSOR LEVINSON:

Thank you. Let's move on to Professor Stone?

PROFESSOR STONE:

Certainly the most momentous decision the Court handed down in our Term was *Roe v. Wade*.⁵⁸ Although Brennan didn't write an opinion in *Roe*, he played a major role behind the scenes in helping Blackmun craft an opinion that would both win the Court and be more persuasive than some of the early drafts that had been circulated. So, in our chambers, we were very much involved in *Roe*. The outcome in *Roe* was fairly clear from early on, but the way the opinion would be written, how broad or narrow the decision would be, was very much in doubt.

For Brennan, *Roe* was an interesting challenge. As the Court's only Catholic Justice, he clearly felt a personal tension between his religious and moral beliefs about abortion, on the one hand, and his responsibilities as a Justice in interpreting the Constitution, on the other. Although Brennan did not often discuss this with the clerks, we did get a sense of how important it was to him not to allow his religious beliefs affect his position. But at the same time, he also wanted to make sure that his desire *not* to be affected by his religious beliefs did not lead him to a legal judgment that was not a sound one. It was impressive to watch the way he worked this through.

The Justices understood, of course, that *Roe* was an important, difficult, and controversial decision that would have a substantial effect on society. They also knew that the decision would have a certain degree of short-term political fallout, but I don't think anyone within the Court—Justices or law clerks—had the faintest idea that we'd be today still talking about *Roe v. Wade* as a fundamental factor in American politics thirty-seven years later. I don't think any of the Justices would have predicted that.

The first inkling we got of the depth of the reaction to *Roe* was from the mail response to the decision. The Court was inundated with mail, mostly critical. The boxes were piled up from floor to ceiling in the hallways of the Supreme Court. The Court had never seen anything quite like this. The only people who really were interested in going through all this mail were some of the law clerks who had gone on job interviews and were waiting for their reimbursement checks.

Carter, Dec. 9, 1952)).

58. 410 U.S. 113 (1973).

They were the ones who were still there at two in the morning elbow deep in the boxes trying to find their money.

The two Justices who received the most mail were Blackmun and Brennan, Blackmun because he authored the opinion, Brennan because he was Catholic. Most of the letters were from children in parochial schools. They were usually form-letters accusing the Justices of murdering babies. The tone of many of the letters was pretty brutal. Brennan and Blackmun had very different responses to the mail. Brennan's approach was not to read it. He felt such correspondence was not relevant to his role as a Justice, so for the most part he just put it aside.

Blackmun, on the other hand, seemed fascinated by these letters. There was a moment when I saw Blackmun, which I thought was very poignant. Over time I've come to believe, perhaps unrealistically, that that moment was pivotal in Blackmun's evolution as a Justice and as a person. It was late at night, maybe one or two in the morning, and I was still in the Court working on something or other. I was dealing with a case with one of Blackmun's law clerks. I went to Blackmun's chambers to see if the clerk was still around. Everyone was gone, except Blackmun. All the lights were out in Blackmun's chambers, except for a small green reading light on Blackmun's desk. He was sitting there, almost in the dark, with his glasses down around his nose and a big pile of these letters on his desk. He was reading them, one by one. I remember just standing there silently, watching him, and it struck me as so moving that he was allowing himself to feel the pain of being the target of such animosity, condemnation, and disapproval.

What I came to believe over time is that it was this experience that changed Blackmun as a person and that led him to be someone who, like Marshall, Brennan, and Warren, began to think about the outsiders in society, about what it felt like to be a dissenter, to be the one who is despised. I think that experience initiated an important transition in Blackmun's understanding of his responsibilities as a Justice, and ultimately changed the way he fulfilled his judicial responsibilities. I believe this capacity for empathy—to use an overused term these days—made him a better Justice.

PROFESSOR LEVINSON:

Thank you.

As a side note, Professor Stone, I recall that you wrote a piece after the very controversial *Gonzales*⁵⁹ decision sustaining the federal “partial birth abortion” statute, in which you noted that all five of the Catholics on the Court were in the majority, whereas the four non-Catholics joined in the dissent.⁶⁰ It was important to Justice Brennan to keep his religious beliefs separate from his legal opinions. Professor Stone, isn't it fair to say more broadly that Justice Brennan was a separationist when it came to the Establishment Clause,⁶¹ while he also authored *Sherbert v. Verner*,⁶² in which he advocated a very protective interpretation of the

59. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

60. Posting of Geoffrey Stone to The Faculty Blog, http://uchicagolawtypepad.com/faculty/2007/04/our_faithbased_.html (Apr. 20, 2007, 15:01).

61. U.S. CONST. amend. XIV, § 1.

62. 374 U.S. 398 (1963).

rights of religious minorities under the Free Exercise Clause.⁶³

PROFESSOR STONE:

Right. Brennan had strong views about religious freedom. I think “separationist” is the right way to put it. He believed deeply in the separation of church and state. He also believed deeply in the protection of religious minorities, as he believed in the protection of any minority group. He therefore championed the view that laws that had disparate effects on minority religions must be considered very carefully and merited serious scrutiny.

Now, let me say a word about the piece I wrote about *Gonzalez*.⁶⁴ Six years before *Gonzalez*, the Court, in a 5-4 decision, struck down a Nebraska statute prohibiting partial birth abortions, because the law did not have an exception for the life or the health of the mother.⁶⁵ In *Gonzalez*, the Court considered a federal law prohibiting partial birth abortions that also did not include an exception for the life or the health of the mother. But this time, the Court, in a 5-4 decision, upheld the law.⁶⁶ In my view, the opinion in *Gonzalez* was completely disingenuous in its effort to distinguish the earlier decision. The only real change, as far as I was concerned, was that Justice O’Connor had been replaced by Justice Alito.⁶⁷ O’Connor had been the fifth vote in the first case.⁶⁸ Alito was the fifth vote for the opposite result in *Gonzalez*.⁶⁹

In the op-ed you’ve referred to,⁷⁰ I asked, what is it about this issue that would drive these Justices to feel such a powerful need to produce so disingenuous an opinion? Why couldn’t they just either follow the clearly controlling precedent or, if need be, be honest about it and take up the challenge of directly overruling it (which I didn’t think it could justify in any principled way)?

I noticed that all five Justices in the majority in *Gonzalez* were Catholic. That led me to write the piece, wondering whether the religion of the Justices had affected their conduct. As I’ve already noted, I do believe that Justices are affected by their personal experiences and values, and this is true of conservative Justices as well as of liberals. So I posed the question whether these Justices might have been unwilling to follow the precedent because they so despised the idea of partial birth abortion that they just could not “morally” bring themselves to do so. I contrasted this scenario with how I had seen Justice Brennan struggle with this challenge in *Roe*.⁷¹

This piece received much more attention on the Internet than I had

63. U.S. CONST. amend. I.

64. *Gonzales*, 550 U.S. at 124.

65. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

66. *Gonzales*, 550 U.S. at 168.

67. Adam Liptak, *O’Connor Casts a Long Shadow on the Nominee*, N.Y. TIMES, Jan. 12, 2006, at A1.

68. *Carhart*, 530 U.S. at 918-19.

69. *Gonzales*, 550 U.S. at 130.

70. See Posting of Geoffrey Stone, *supra* note 60.

71. *Id.*

expected,⁷² but the most interesting response was from Justice Scalia. He had been my colleague on the faculty at the University of Chicago in the 1970s, and we were friends. A student came to me about six months after this piece was published, and said, “Did you know that Justice Scalia said that he would not set foot in the University of Chicago Law School again as long as you’re on the faculty?” I said, “Not possible. That’s ridiculous.”

Then about six months ago Joan Biskupic, a very fine reporter and author, called me to say she was writing a biography of Scalia⁷³ and wanted to discuss his reaction to my piece on *Gonzalez*. She said that during one of her interviews of Scalia, she’d asked him about my piece, and he had jumped up from his chair and exclaimed, among other things, “I’m never going to set foot in the University of Chicago Law School again as long as Stone is on the faculty.” In effect, he accused me of being bigoted against Catholics, although that missed my point entirely. To get the full account of this incident, you should read Biskupic’s book, *An American Original*,⁷⁴ which is actually quite good. The point is simply that these issues touch nerves.

JUSTICE BOEHM:

Well, the answer to the most important decision in my Term is easy. The Chief himself thought that *Reynolds v. Sims*⁷⁵ was not only the most important decision of the 1963 Term,⁷⁶ but the most important decision of his tenure on the Court, including *Brown v. Board of Education*⁷⁷ and all the other decisions. Often when I make that comment I get a lot of raised eyebrows, particularly from younger audiences that have never heard of *Reynolds v. Sims*. Many people seem to think that there is a one person, one vote clause in the Constitution somewhere. Not so.

Reynolds v. Sims was a decision involving the apportionment of the Alabama state legislature, which was severely mal-apportioned.⁷⁸ Let me describe the situation in Indiana since this is largely a Hoosier audience. In Indiana, the 1960 election when John Kennedy was elected president, was conducted on legislative and congressional maps that were based on the 1920 census.⁷⁹ There had been no reapportionment for forty years. And a culture of “let’s continue to protect our own backsides” had dominated the legislature to the point where reapportionment was a subject that was really largely off the table within the legislature.

In the meantime, beginning from 1920 to 1960, as you might expect, there

72. Posting of Geoffrey Stone to The Faculty Blog, http://uchicagolaw.typepad.com/faculty/2007/04/faith_based_jus.html (Apr. 25, 2007, 9:09).

73. JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* (2009).

74. *Id.* at 202-05.

75. 377 U.S. 533 (1964).

76. The case was argued November 13, 1963 and decided June 15, 1964. *Id.*

77. 347 U.S. 483 (1954) (*Brown I*).

78. *Reynolds*, 377 U.S. at 537-38.

79. Howard D. Hamilton et al., *Legislature Reapportionment in Indiana: Some Observations and a Suggestion*, 35 NOTRE DAME L. REV. 368 (1959-60).

had been dramatic shifts in the population centers of this state. At that time, Indiana had eleven congressional districts. The district in the southeastern quadrant of the state, that is one of the least populated and in many configurations came to be represented for many years by Lee Hamilton, had a population of roughly one fifth that of Marion County, which was also a congressional district. So, you had a five to one disparity in the numbers of people who were electing one congressman.

The same phenomenon existed in the state legislatures. It's more complicated to explain it because the districts were smaller. But basically, you had massive malapportionment of the state legislature in relationship to the population as it then sat. *Reynolds v. Sims* invoked the Equal Protection Clause⁸⁰ to hold that you can't do that. You have to essentially have one person, one vote in both houses of the legislature.

Now, this was highly controversial. As Professor Levinson noted, it restructured American democracy. What it did was shift the center of gravity of the state legislatures in many parts of the country, and certainly Indiana, essentially from rural and small town districts to the suburbs. It didn't so much shift it to the cities themselves, because they already were significant forces. But the suburban areas—to take Marion County that most people in this room are familiar with, at the time *Reynolds v. Sims* was decided, Indianapolis and the metropolitan area was all inside Marion County. The surrounding counties, the ones that those of us who live here call the “donut counties” around Marion County, were essentially rural and farm areas. As you know, Hamilton County to the north of Indianapolis is now the fifth most populated county in the state. The one person, one vote requirement didn't effect a shift of power from Democrats to Republicans or vice versa. But what it did is shift representation from small town and rural interests to suburban areas, and created a legislature that then proceeded over the ensuing several decades to be much more responsive to concerns like consumerism and environmentalism.

A lot of the relatively modest progressive movements that evolved through the '70s and '80s simply could not have happened at the state level without *Reynolds v. Sims* mandating that the legislatures fix this imbalance, which the fox in charge of that henhouse had no interest in fixing itself. And the effect of that was not just to enable a broad range of basically progressive movements to become implemented at the state level, it was also to revive federalism. It made the states more responsive in dealing with a lot of the problems that had, through the New Deal in successive years, because of a default by the state in dealing with them, been forced onto the federal agenda. And the result is of enormous historic consequence, I think. And the Chief was absolutely right. It cut across the board and affected virtually every aspect of American life.

I would like to comment on a case that didn't get decided—in a very peculiar way. The case that we thought that was going to be the biggest case of the 1963 Term was *Bell v. Maryland*.⁸¹ Now, how many of you know *Bell v. Maryland*?

80. U.S. CONST. amend. XIV, § 1.

81. 378 U.S. 226 (1964).

No?

Bell v. Maryland came to us as a sit-in case from Maryland.⁸² It was a classic case of an African American that had been rejected admittance to a lunch counter. This had happened all over the country, and Mr. Bell brought his claim purely under the Fourteenth Amendment.⁸³ His claim was that the Fourteenth Amendment is self-effectuating, and prohibits discrimination in public facilities without need of any implementing legislation by Congress. That claim wended its way through the Maryland state courts and the Maryland Court of Appeals said, no, there's no such federal claim. Cert comes up to the U.S. Supreme Court and the case arrives about the same time I do in August of 1963.

This case, if decided in favor of the plaintiffs, would have been a judicial enactment of the Civil Rights Act of 1964, in effect. It would have been a declaration that the Constitution in and of itself, without any need of congressional action, prohibits discrimination on the basis of race in public facilities. And there's nothing in the case that would have restricted its application. It would have been *Brown* against the *Board*, not just for schools but for everything. You can imagine what a monumental decision this was.

Well, the case grinds forward, and on November 22, 1963, a date ingrained in the memory of most people my age, President Kennedy was killed. Lyndon Johnson becomes president, and over the course of the next several months, Johnson gets the Civil Rights Act through the Congress of the United States. The Maryland General Assembly then responds with a public accommodations law of its own in Maryland. And the case that is thought to become this historic, ultimate high water of—to use the term of opponents—an activist court, is decided on the basis that, well, Maryland might have changed its mind in light of this intervening legislation, so we're going to send the case back to Maryland to see whether, in the light of either the federal act or the state act, they want to change their minds on this prosecution. And as far as I know, that issue has never been resolved to this day, whether the Fourteenth Amendment would have achieved the same result without it. It would have been a yet unprecedented view of the state action requirement. There were all these arguments for state action. We license corporations. We provide police protection to them. There were a whole bunch of arguments as to what was sufficient.

PROFESSOR LEVINSON:

No. No, if anything the Court has generally narrowed the reach of the Fourteenth Amendment.

Justice Boehm, you were talking about *Reynolds v. Sims*,⁸⁴ which facilitated real democracy. It reminded me of campaign finance reform and the Court's recent decision that invalidated longstanding limits on corporate spending⁸⁵ and overturned Justice Marshall's opinion in the *Austin* case,⁸⁶ in which he decried the

82. *Id.* at 227.

83. *Id.* at 228 (citing U.S. CONST. amend. 14, § 1).

84. 377 U.S. 533 (1964).

85. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

86. *Id.* at 913 (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990)).

corrosive effect of corporate wealth on elections.⁸⁷ Because we don't have a lot of time left, it might be interesting to talk more broadly about judicial activism, as well as the current debate about the politicization of the Supreme Court. When all three of you clerked, the same complaints about the politicization of the Court were heard—just in the other direction. How, if at all, was the liberal Warren Court different?

PROFESSOR STONE:

I think there is a lot of similarity, at least in a superficial sense, between liberal activism and conservative activism. But I'd make two points about this issue. First, there is the problem of defining what we mean by a "conservative" justice. When Richard Nixon appointed Burger, Rehnquist, Blackmun, and Powell, they were thought of as conservative justices. But their understanding of conservatism meant that they believed in judicial restraint. They were appointed to resist the activism of the Warren Court. The conservative argument at the time was that activism is bad, passivism is good. The conservative Justice was thus one who would invalidate laws only in extraordinary circumstances, where the finding of unconstitutionality was clear. This was the prevailing conception of a conservative Justice throughout the era of the Burger Court. It is interesting, by the way, that despite that understanding, three of the four Nixon appointees voted in the majority in *Roe v. Wade*.⁸⁸ Without their support, the decision would have come out the other way.

Basically, though, judicial restraint was the catchword of judicial conservatism at that time. In American politics today, that remains the public conception of a conservative Justice. A conservative Justice "calls balls and strikes," and does not exercise any kind of activist judicial review. That is an entirely inaccurate description of the current conservatives on the Supreme Court, however. In decisions like *Heller*,⁸⁹ the Second Amendment case; *Citizens United*,⁹⁰ the corporate campaign finance case; and in the Court's affirmative action, commercial advertising, and federalism decisions, the Court's "conservative" Justices have been extremely activist. In all of those cases, and many more, Justices like Roberts, Kennedy, Scalia, Thomas, and Alito have been anything but restrained. They have used the power of judicial review every bit as actively as the Warren Court, but for different reasons. In short, we have seen a dramatic change in the meaning of judicial conservatism.

Unfortunately, the nature and magnitude of this change has not been understood by the public, which still clings to the idea that conservative Justices "apply the law" rather than "invent the law." Because of this, one of the most serious challenges for the American Constitution Society is to explain to the public that the conservative Justices are not neutral or passive in their interpretation of the Constitution, but are aggressively ideological.

The second point I'd like to make concerns the nature of judicial activism.

87. *Austin*, 494 U.S. at 660.

88. 410 U.S. 113 (1973).

89. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

90. 130 S. Ct. at 876.

Justices Brennan, Marshall, Warren, and the other Justices of that era who were labeled activists had a fundamental vision of when it was appropriate for the Court to be muscular in its exercise of judicial activism. Basically, they thought judicial activism was warranted in two situations. First, they believed they had a special responsibility to protect the rights of religious dissenters, racial minorities, political dissidents, persons accused of crime, and others whose interests are likely to be inadequately protected in the majoritarian political process. Second, they believed the Court has a special responsibility to make sure that the channels of the political system itself are open and well functioning, as illustrated by such decision as *Reynolds v. Sims*⁹¹ and *New York Times Co. v. Sullivan*.⁹² Almost all of their most controversial decisions fell into one or both of those categories.

That is, in my view, a sensible and principled understanding of the proper role of the judiciary in our constitutional system. But if you try to make sense of the activism of today's conservative Justices, it's very difficult to come up with any kind of principled or coherent theory that would explain their activist judicial review. On what theory does the Supreme Court get activist on such issues as the rights of gun owners, the rights of corporations, the rights of commercial advertisers, the right of the Boy Scouts to exclude gay scoutmasters, and the rights of those who oppose affirmative action? As far as I can tell, there is no principled theory of judicial review or of the role of courts that explains this pattern of decisions. They just seem to correspond to the ideological predispositions of political conservatives. That, I think, is a serious problem with the current Court, and it is a profound difference between Warren Court-era judicial activism and Roberts Court-era judicial activism.

JUSTICE BOEHM:

One comment on keeping the channels of our political system working properly, which I take to mean making sure there aren't structural obstacles to the proper working of government. Just on a personal count, when I was still a private lawyer, I was lead lawyer for the plaintiffs in a case called *Bandemer* against *Davis*.⁹³ I think it became *Davis* against *Bandemer*⁹⁴ in the Supreme Court, which was the first case that got to the Supreme Court challenging gerrymandering as an equal protection violation. And it ended up in a 4-3-2 decision where Justice White wrote the four Justice plurality opinion. The Indiana General Assembly map in question was obviously a gerrymandered map. It included a mix of multi-member districts and single member districts—and districts that were drawn in a way that couldn't possibly be explained on any basis other than it was designed to elect a Republican legislature. But Justice White was joined by both Brennan and Marshall in the proposition that, whatever was going on in Indiana in the 1980 map, it wasn't bad enough according to the

91. 377 U.S. 533 (1964).

92. 376 U.S. 253 (1964).

93. 478 U.S. 109 (1986).

94. *Id.* at 113 (White, J., plurality opinion).

plurality opinion.⁹⁵

PROFESSOR LEVINSON:

And we've never figured out what's bad enough, right?

JUSTICE BOEHM:

Nobody's ever come up with anything that is bad enough. There's been a subsequent Pennsylvania case that wasn't bad enough,⁹⁶ and so the level to which Blackmun and Justices Brennan and Marshall were willing to go to open up those channels obviously had limits—although one way to look at that decision is you weren't going to get a five-Justice majority anyway, so go along with Justice White's opinion. I don't know what was in their brains.

PROFESSOR TUSHNET:

I have, I think, just two comments. I would emphasize something that Geoff said in passing, which is that there is an account of *when* the Roberts Court is activist. The account says, it's activist by reading the Republican platform. If we could get that idea across, that would be pretty effective, because I don't think people think that the Constitution is the Republican platform.

The other thing is this. It would be really nice if the next nominee for the Supreme Court got up and said,

Damn right, I'm going to be an activist. If the Constitution says the statute is unconstitutional, I'm going to find it unconstitutional. And if it doesn't say it's unconstitutional, I'm not going to find it unconstitutional. That's just what Roberts and Alito do. I'm not going to do anything different.

People associated with the liberal or progressive side have been scared away from the word activism when the phenomenon of activism has shifted to the other side of the spectrum. I never know quite whether this is exactly appropriate, but there's a U2 performance of the song "Helter Skelter."⁹⁷ They open up with Bono saying, "Charlie Manson took this away from us, we're going to take it back." I think that's what we ought to do about activism. We ought to take it back.

PROFESSOR LEVINSON:

I think that's an important observation. Statistically, the Rehnquist Court, for example, overturned more acts of Congress than all previous Supreme Courts combined.⁹⁸ This concept of activism is certainly a two-way street.

We are running short on time, so would each of you like to sum up what you think was the greatest contribution of your Justice? We will then have a little time for comments and questions from the audience.

PROFESSOR TUSHNET:

Well, for me, it's *Brown v. Board of Education*.⁹⁹ That was his opinion, as

95. *Id.* at 143.

96. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

97. U2, HELTER SKELTER (Island 1988) (cover of THE BEATTLES, HELTER SKELTER (Apple Records (1968))).

98. THE CONSTITUTION IN 2020, at 39 (Jack M. Balkin & Reva B. Siegel, eds. 2009).

99. 347 U.S. 483 (1954).

far as I'm concerned.

PROFESSOR LEVINSON:

And his work to make that happen. That's true.

PROFESSOR STONE:

For Brennan, I think it was the First Amendment. Brennan became a vocal champion of the First Amendment during his tenure on the Court and he was an extremely important and influential thinker about the meaning of free speech. That is probably his greatest achievement. He transformed the way we think about the freedom of speech and press.

JUSTICE BOEHM:

All of the above. The Chief was able to get a majority together and sometimes even a unanimous Court on extremely controversial subjects. To try and pull one of them out, just try and consider what America would be like without some of these keystones.

DINO POLLOCK:

We're going to take the last five, six minutes or so to take your questions. If you would, please stand up or raise your hand, we'll recognize you and then you can address your question to either the entire panel or one particular panelist.

UNKNOWN SPEAKER:

This is to Justice Boehm. Did Earl Warren ever discuss the internment of Japanese during World War II, during your time?

JUSTICE BOEHM:

Not with me. I don't—I never heard him address the subject.

UNKNOWN SPEAKER:

Justice Scalia once said that no other Justice was as powerful as Justice Brennan because the Constitution was this pliable thing, the notion of which was such that he could say, oh does it mean one hundred percent, does it mean fifty percent, what does it mean, where as I, Justice Scalia, see a document and I make decisions based on that. My second question is that based on his view that if you look at the language as it was understood by objective person at that time, which in 1791 meant sabers and muskets, do you feel like the *Heller* decision betrayed what he purports to be as his perspective?

PROFESSOR STONE:

Well, the danger in a kind of open-ended and aspirational conception of the Constitution is that it can be an unbounded premise on which to interpret the often very ambiguous words of the Constitution. That is a potential problem. We need some constraint to give a sense of structure, direction, and legitimacy to constitutional interpretation.

It is certainly possible, however, to identify the values that are the central aspirations of those provisions and that can be analyzed in an appropriate, constrained, and logical manner. But the challenge is certainly a real one.

With respect to Scalia, I'm not a great fan of his version of originalism. First of all, though, I should emphasize that I think the idea of an aspirational, living constitutionalism is originalist. That methodology attempts to implement an originalist meaning, but with the recognition that, in adopting phrases like,

“Congress shall make no law abridging the freedom of speech,”¹⁰⁰ or “no state shall deny any person the equal protection of the laws,”¹⁰¹ or inflict upon any person “cruel or unusual punishments,”¹⁰² the Framers were not enacting a specific code with a clearly defined meaning. Rather, they understood full well that they were adopting provisions that were vague, open-ended, and would have to gain meaning over time.

On the other hand, the form of originalism that seeks to fix the meaning of these provisions in terms of what the Framers specifically intended or expected is largely a ruse. For one thing, the Framers themselves never intended the Constitution to be construed in this way, so the basic premise of this sort of originalism is inherently contrary to originalism. But beyond that, lawyers are not particularly good historians and, in any event, we often know very little about what the Framers themselves actually intended or expected. As a consequence, when purporting to undertake this sort of inquiry, “originalists” typically go through the following thought process: “Well, what did the Framers intend? Well, the Framers were reasonable people. I’m a reasonable person. So, the Framers must have intended what I would have intended had I been there at the time.” So, conservative “originalists” hold affirmative action unconstitutional, they hold that the Boy Scouts have a First Amendment right to exclude gay scoutmasters, they hold the regulation of guns unconstitutional, they hold that corporations have First Amendment rights, and so on. None of that is in any credible way an “originalist” understanding of the Constitution. Rather, such decisions simply illustrate how “originalist” Justices smuggle their own values into the Constitution by conveniently attributed them to the Framers, who (for all we know) never held them.

MR. POLLOCK:

Yes. Justice Sullivan?¹⁰³

JUSTICE SULLIVAN:

Let me just say that Professor Tushnet’s provocative comment that we should recapture the term activism, isn’t it true that a century ago the activists were the conservatives? And so, the call for recapturing seems to have a very sound basis in history after all the *Lochner*¹⁰⁴ Court was criticized for activism, right?

PROFESSOR TUSHNET:

Certainly. Another way of putting the point about recapturing the term “activism” is that, what we on my side of the political spectrum need to do is remove the term activism from the vocabulary because it doesn’t tell us anything. There are conservative activists and there are liberal activists. If you’re a liberal, you want liberal activism and you don’t want conservative activism. But it’s not activism that’s at stake. It’s the aspirations of the Constitution. There are

100. U.S. CONST. amend. I.

101. U.S. CONST. amend XIV, § 1.

102. U.S. CONST. amend. VIII.

103. Indiana Supreme Court Associate Justice Frank Sullivan.

104. *Lochner v. New York*, 198 U.S. 45 (1905).

conservative visions of an aspirational Constitution, too. That's a discussion we could have. But having a discussion about whether somebody's an activist or not is just not productive.

MR. POLLOCK:

Thank you so much for coming out and we appreciate your time.

